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4th Circuit

No. 08-1037

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

PIRATE INVESTOR, LLC and FRANK PORTER STANSBERRY,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland

FINAL BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

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Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland

FINAL BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

PRELIMINARY STATEMENT

The district court found that defendants-appellants Frank Porter Stansberry and Pirate Investor, LLC ("Pirate") intentionally deceived more than one thousand people by, first, sending them an e-mail falsely claiming to have "insider information" from an unnamed public company's senior executive that a major corporate event would occur on a specified date and, then, selling them the

identity of the company for $1,000 so that they could "double [their] money" by buying and selling shares of the company's stock. The district court correctly concluded that appellants' fraud was "in connection with" trading in that stock because the scheme depended on inducing investors to pay appellants for a stock tip that—having spent $1,000 for it—investors were almost certain to follow.

Every argument to the contrary made by appellants and/or *amici* rests on the same set of flawed assumptions. They contend that the district court erred in treating Stansberry and Pirate like any other defendants charged with violating Section 10(b), because appellants' false representations were made by an investment newsletter "Author" and "Publisher" dispensing "pure speech" advice that was disconnected from specific purchases or sales of securities. Those assumptions, and the arguments they undergird, have no merit for the following reasons.

First, this case is not about the relationship between a "publisher" a "reader." As the district court recognized, although Stansberry and Pirate are in the business of publishing investment newsletters, the fraud in this case was not accomplished in the ordinary course of the publisher-reader relationship. Indeed, the fraudulent e-mail solicitation at issue here—sent out under an assumed name—expressly stated that it was from someone who "do[es]n't even write a

newsletter." Instead, it stressed the "one-shot," no-continuing-relationship nature of the purported "insider tip" investors were paying for. It said, in essence: You pay me $1,000; I identify the stock; you buy it and double your money; and you never hear from me again. The only relevance of Stansberry and Pirate's connection to publishing is that it gave them access to groups of subscriber e-mail addresses through which they were able to carry out their fraud.

Second, the false statements at issue here are nothing like the kind of "pure speech" or "disinterested commentary" that courts have deemed worthy of heightened protection. Appellants and *amici* repeatedly describe the false statements at issue as generic "speech about stocks," "writings about investments," "newsletters," and "mere predictions or mistaken statements." In fact, they were precisely the sort of one-shot fraudulent tips, timed to specific market events, that are treated no differently under the law than any other false statement that induces reasonable investors to buy or sell a corporation's securities.

Third, appellants' fraud did not involve the sale of information wholly detached from specific purchases or sales of securities. To the contrary, the possibility of trading in the securities of USEC—the "company" whose name Stansberry and Pirate disclosed in exchange for a $1,000 payment—was an *essential* component of their fraud: The "information" they proposed to sell for

$1,000—USEC's identity—had such value because USEC was a publicly traded company whose shares could be purchased by the prospective investors appellants targeted. It defies common sense to believe that reasonable investors would have paid Stansberry and Pirate $1,000 for USEC's identity unless, having been induced by appellants' false statements, they had decided to purchase shares in whatever company appellants would identify in exchange for that money.

Appellants and the *amici* seek to distance themselves from the facts of this case and litigate a different case that is not before the Court. Their arguments are based to a large extent on the claim that applying Section 10(b) to appellants could allow the Commission to bring actions against other persons that would raise First Amendment concerns. Thus, they do not claim that the Constitution protects appellants' right to lie to investors—nor could they, given the well established body of law prohibiting fraud. Instead, they urge that the antifraud provisions of the Exchange Act should be read in an artificially narrow manner to avoid chilling ordinary expressions of financial opinion, such as media business reports. There is a huge difference, however, between selling a fraudulent stock tip to investors, as appellants did, and reporting on or opining about financial matters, which was not the basis of the judgment against them. Appellants and the *amici* have not identified any case in which the Commission has charged a violation of Section

10(b) based on an innocent but erroneous misstatement in a bona fide financial publication; the time to consider the Constitutional implications of such an action would be if one were ever brought. In the meantime, it is unnecessary to distort the securities laws, or to allow appellants' deceit to go unremedied, in order to protect ordinary business reporting that is entirely distinguishable from the one-time fraudulent tip that is the subject of this case.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to Sections 21(e) and 27 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78u(e) & 78aa. Under 28 U.S.C. § 1291, this Court has jurisdiction of this appeal, filed on November 29, 2007, from the final judgment entered by the district court on October 3, 2007.

COUNTERSTATEMENT OF ISSUES

1. Whether appellants' fraud was "in connection with" the purchase or sale of securities, because it was virtually certain that investors—who were fraudulently induced by appellants to pay $1,000 for the identity of a specific publicly traded company—would purchase stock in that company.

2. Whether, by restricting claims under Section 10(b) to false statements of fact, made with deceptive intent, in connection with the purchase or sale of securities, Congress and the Supreme Court have established standards that *both*

protect investors and the securities markets *and* provide "breathing room" for protected speech—a balance that would be improperly upset by imposing the "actual malice" and heightened proof standards of *New York Times v. Sullivan* governing defamation claims against public figures.

3. Whether the evidence supports the district court's findings that Stansberry and Pirate made materially false statements and did so with scienter.

4. Whether the injunction limiting appellants' "speech" is consistent with the First Amendment because it restricts only unprotected fraudulent speech, and the presumption against the constitutionality of prior restraints does not apply to injunctions against the repetition of conduct that has been found to be illegal.

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

This appeal follows a bench trial in which the district court found that Stansberry and Pirate violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. The court imposed an injunction against future violations of Section 10(b) and Rule 10b-5, ordered disgorgement of the defendants' profits from their fraud, and imposed civil penalties.

B. Facts

1. The USEC-Tenex uranium pricing agreement

USEC, Inc. is the world's largest provider of uranium enrichment services. It is the executive agent of the United States government under a 1993 disarmament pact (referred to as "Megatons to Megawatts"), pursuant to which the United States purchases uranium from Russia for conversion to fuel for nuclear power plants. 1JA 119, ¶¶ 9-10; 1JA 148; 1JA 247-48, 348-49.[1] Under the 1993 agreement, USEC and its Russian counterpart, OAO Techsnabexport ("Tenex"), periodically renegotiate the price of the uranium, and those new pricing agreements are subject to government approval. 1JA 119, ¶ 11; 1JA 148; 1JA 350-52. At the end of 2001, an interim pricing agreement expired, and USEC and Tenex negotiated a new agreement, which they finalized in February 2002. 1JA 119, ¶ 12; 1JA 148; 1JA 356. As of May 2, 2002, however, the United States had not announced its approval of the new pricing agreement. 1JA 119, ¶ 13; 1JA 148-49; 1JA 353.

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[1] "#JA" refers to the deferred Joint Appendix (by volume number) filed by appellants on July 14, 2008; "Br." refers to appellants' opening brief; "Am.Br." refers to the brief *amici curiae* submitted in support of reversing the judgment.

2. USEC investor relations personnel did not tell Stansberry that the approval of the new pricing agreement would be announced on May 22, 2002.

On May 2, 2002, Stansberry, the editor of two investment newsletters published by Pirate, had a conference call with Steven Wingfield, the director of investor relations for USEC, and Mary Angeles Major-Sosias, USEC's newly hired manager of investor relations, who took detailed notes of their conversation. 1JA 276-78; 2JA 522-25; 1JA 149; 7JA 3212. During that call, neither Wingfield nor Major-Sosias provided Stansberry with any inside information, and, in particular, they did not tell Stansberry that the new USEC pricing agreement would receive government approval on May 22 or to watch USEC stock on that date. 1JA 279-83; 2JA 522-27; 7JA 3212; 1JA 149.

3. Stansberry, under an assumed name, drafted and distributed the Super Insider Tip Email, falsely claiming to have "insider information" about the approval on May 22, 2002 of an agreement highly favorable to an unnamed company and offering to disclose the identity of the company for $1,000.

After the conference call with Wingfield and Major-Sosias, Stansberry, using the pseudonym "Jay McDaniel," drafted the "Super Insider Tip Email" ("Tip Email") in which Stansberry falsely claimed to have "insider information" about an unnamed company (USEC), purportedly obtained from "a senior executive inside the company . . . definitely in a position to know" about a major

international agreement the announcement of which would cause the company's stock to soar. 7JA 2972, 2975; 1JA 149-50. The Tip Email also stated that, because of the insider information, McDaniel was able to tell investors that they should buy the company's stock on May 21st and sell it on May 23rd. 7JA 2974, 2977; 1JA 150. The Tip Email offered to sell, for $1,000, a "Special Report" that would identify the company so that investors could buy and sell the company's stock as instructed and "make a killing" on a "low-risk stock" thanks to McDaniel's access to the company insider. 7JA 2974, 2977-78; 1JA 150.

The Tip Email stressed the one-time nature of the offer and emphasized that it was not linked to any newsletter subscription. 7JA 2977 ("I'm not asking you to subscribe to my newsletter in exchange for this information. (I don't even write a newsletter). . . . I'm not going to bother you with subsequent emails or follow-up phone calls. Nope. This is a simple, one-shot deal.").

Beginning on May 13, 2002, Stansberry had the Tip Email sent to approximately 800,000 e-mail addresses, drawn from lists of subscribers to newsletters published by Pirate and Pirate's parent corporation, Agora, Inc., and to one list of subscribers to a newsletter not affiliated with Agora. 1 JA 120-22, ¶¶ 22-24, 30-38; 1JA 150-51.

4. More than a thousand investors bought the Special Report, which identified USEC as the "company" referred to in the Tip Email.

Between May 14 and 18, 2002, Pirate sold 1,217 copies of the Special Report, which identified USEC as the "company" referred to in the Tip Email, for $1,000 each. 1JA 122, ¶ 39; 1JA 151. The report was captioned "DOUBLE YOUR MONEY ON THE UPCOMING ARMS AGREEMENT: BUY USEC (NYSE: USU, $6.50)." 7JA 3109. Repeating the essential promise of the Tip Email, the Special Report explained that investors could rely on information from a company insider to buy USEC stock prior to the announcement of government approval of the new pricing deal between USEC and its Russian counterpart:

> The uncertainty about when this deal would be approved has led to [USEC's] stock trading in limbo—and at very cheap prices—since early 2000 when [uranium unit] prices fell. A USEC senior executive has assured me that the new Russian agreement will be approved prior to the upcoming Bush-Putin summit. In fact, he said *"watch the stock on May 22nd."*

7JA 3111 (emphasis in original).

No one at Pirate verified the "facts" Stansberry included in the Tip Email or Special Report. Stansberry had complete control over the content of those materials. 1JA 171; 2JA 959-61.

The gross receipts from the sales of the Special Report were $1,217,000, of which $215,000 was refunded to 215 investors. 1JA 123, ¶¶ 40-42; 1JA 151.

After sharing revenues with the other newsletters through whose databases the Special Report was also sold (1JA 121-22, ¶¶ 27, 30-35), Pirate paid Stansberry a commission of $200,400 on the sales of the Special Report. 1JA 150-51.

5. There was no announcement on May 22, 2002 of the approval of the new pricing agreement.

No announcement of the pricing agreement between USEC and Tenex was made on May 22, 2002. 1JA123, ¶ 45; 1JA 151-52. It was not until June 19, 2002, that the U.S. State Department and USEC announced that the new pricing agreement had been approved. 1JA 124, ¶ 48; 1JA 152; 1JA 359-60.

6. The trading volume and price of USEC stock spiked between the date that the Tip Email was distributed and May 22, 2002.

In the five months before Stansberry sent out the Tip Email, trading volume in USEC common stock averaged approximately 189,000 shares a day at prices ranging from $5.78 to $7.52 a share. 9JA 4176-78; 1JA 152. From May 14 to May 23, 2002, trading volume in USEC averaged 3.3 million shares a day with a closing price ranging from $7.85 a share on May 14 to a high of $9.98 a share on May 20, 2002. 9JA 4176; 1JA 152, 165-66. When no announcement of government approval of the USEC-Tenex agreement occurred on May 22, 2002, the stock price fell from $9.54 to $8.20 a share. 9JA 4176; 1JA 152, 166.

C. District Court Proceedings

The Commission filed a complaint against Stansberry, Pirate, and Pirate's parent corporation, Agora, charging them with violating Section 10(b) and Rule 10b-5. 1JA 15-25. Following a six-day trial, the district court issued a 49-page Memorandum of Decision, setting forth its findings of fact and conclusions of law and holding that the Commission had proven its claims against Stansberry and Pirate but not against Agora.[2] 1JA 147-95.

1. Although the Commission was required to prove the elements of its claims only by a preponderance of the evidence, the district court found that it had done so by clear and convincing evidence.

The district court rejected appellants' argument that the Commission was required to prove by clear and convincing evidence that the statements at issue were false. The court concluded that, unlike in the cases cited by Stansberry and Pirate, the relevant statements in the Tip Email and Special Report were commercial speech and, therefore, it would not be appropriate to require the Commission to prove the elements of its case by more than a preponderance of the evidence. 1JA 154 (citing cases). Nonetheless, the court found that the

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[2] Finding that the Commission had not proven that Agora was accountable for the false statements at issue in the case, the district court concluded that Agora was not liable for the securities fraud committed by Stansberry and Pirate. 1JA 160-62.

Commission had established by clear and convincing evidence every element of its claims against Pirate and Stansberry. 1JA 154-55.

2. The district court found that Stansberry and Pirate violated Section 10(b) and Rule 10b-5.

Turning to the elements of the fraud claims, the district court found, first, that, although the Tip Email and Special Report contained "numerous statements that were untrue" (1JA 156), the representation that "a senior executive of a company (identified in the Special Report as USEC) had told the author of the May 22 date on which the contract would be approved" was both false and "definitely actionable." 1JA 156-57. The court also found that Stansberry, as the acknowledged author of the Tip Email and Special Report, and Pirate, through which the solicitation was distributed and the report was sold, made the actionable false statements. 1JA 160.

The court rejected as "not . . . credible" Stansberry's testimony that, during the May 2, 2002 conference call, Wingfield provided him with information that there would be an announcement of approval of the USEC pricing agreement on May 22, 2002 (or any other particular date) and told him to "watch the stock on May 22." 1JA 159. Instead, the court credited the testimony of both Wingfield and Major-Sosias (which the court found consistent with Major-Sosias's contemporaneous notes) that Wingfield provided no such information to

Stansberry. 1JA 159. The district court found "preposterous" Stansberry's testimony that "Wingfield became angry during the May 2, 2002 conference call when Stansberry indicated that he was not going to write about USEC in his newsletter and acted upon his anger by providing inside information." 1JA 159-60, n. 9.

Addressing materiality, the district court found it "self-evident" (1JA 163) that a reasonable investor would "consider the [purported insider information] important in deciding whether to buy or sell" USEC stock. 1JA 162 (citing *Ottman v. Hanger Orthopedic Group*, 353 F.3d 338, 343 (4th Cir. 2003)). The court also found that the materiality of the false information was supported by the trial testimony of USEC investors about the significance of that information to their investment decisions (1JA 163-64) and by market data relating to trading in USEC shares at the time Stansberry and Pirate made the false statements. 1JA 166.

The district court found that Stansberry acted with scienter because he "did not have, indeed, could not possibly have had a belief that the information he provided in the [Tip Email] and Special Report was correct in all material respects." 1JA 170. To the contrary, the court found both that "Stansberry knew full well that Wingfield had not told him that the pricing agreement would be

announced on May 22 . . . [and that] Stansberry intentionally made false statements about the company (USEC) to induce the recipients of the [Tip Email] to pay $1,000 for the Special Report that completed the intentionally false statements." 1JA 170. The court also concluded that Stanberry's scienter should be imputed to Pirate (which he effectively controlled). 1JA 170. Alternatively, the court found that Pirate acted with reckless disregard of the truth or falsity of the information in the Tip Email and Special Report. 1JA 170-72.

Applying the settled law that a fraudulent action is "in connection with" the sale of a security "when someone utilizes a device 'that would cause reasonable investors to rely thereon' and 'so relying, cause them to purchase or sell a corporation's securities' " (1JA 172, quoting *In re Carter-Wallace Securities Litigation*, 150 F.3d 153, 156 (2d Cir. 1998)), the district court found that the false statements at issue were made in connection with the purchase or sale of USEC securities: "The very essence of the fraudulent scheme was to induce its victims to purchase USEC stock prior to May 22, 2002 and, of course, to pay some $1,000 for the privilege of being misled to believe that there was a particular plausible specific reason to do so." 1JA 174. The district court rejected the assertion that the defendants had done nothing more than offer "commentary or predictions" about USEC stock. *Id.* The court also found no merit in the argument that a

defendant can be held liable under Rule 10b-5 only if the defendant acts in breach of a fiduciary duty. *Id.*.

3. The district court found no merit in the various defenses to liability asserted by Stansberry and Pirate.

The district court rejected the argument that the Commission was required to prove that appellants made the false statements at issue with "actual malice"— the standard for proving libel of a public official by a newspaper announced in *New York Times v. Sullivan*, 376 U.S. 254 (1964). The court found that standard inapplicable, both because the speech at issue in this case is commercial speech and, "[m]ost importantly," because " 'the First Amendment does not shield fraud.' " 1JA 177-78 (quoting *Illinois v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003)).

The district court also concluded that, even assuming the existence of a "disinterested publisher defense" to liability for securities fraud covered by Section 10(b) and Rule 10b-5—for which there is no authority beyond a single, unreviewed 1986 district court decision—it would not apply to the fraudulent conduct of Stansberry and Pirate in this case because "publishing a newsletter of 'general and regular' circulation does not include the issuance of 'bulletins from time to time on the advisability of buying and selling stocks . . . .' " 1JA 181-82 (quoting *Lowe v. SEC*, 472 U.S. 181, 206 (1985) (internal quotations omitted)).

4. The district court imposed remedies for the defendants' violations.

The district court imposed an injunction against future violations based on its finding that there was "a 'reasonable and substantial likelihood' that [Stansberry and Pirate] will violate securities laws in the future." 1JA 190. The court also held Stansberry and Pirate jointly and severally liable to disgorge the amount by which they were unjustly enriched, plus prejudgment interest. 1JA 191-93. Finally, the court imposed a third-tier civil penalty of $120,000 each on Stansberry and Pirate. 1JA 194.

STANDARD OF REVIEW

In an appeal from a judgment following a bench trial, this Court reviews the district court's findings of fact for clear error and its legal conclusions *de novo*. *Wilson v. Phoenix Speciality Mfg. Co.*, 513 F.3d 378, 384 (4th Cir. 2008), citing *Roanoke Cement Co. v. Falk Corp.*, 413 F.3d 431, 433 (4th Cir. 2005). Under the clearly erroneous standard, the Court "may only set aside . . . a finding when [it is] left with the definite and firm conviction that a mistake has been made, and [the Court] may not do so simply because [it] might have found to the contrary." *Nelson-Salabes v. Morningside Development*, 284 F.3d 505, 512 (4th Cir. 2002).

SUMMARY OF ARGUMENT

1. Appellants' fraud was "in connection with" the purchase or sale of securities because it was virtually certain that the investors who were fraudulently induced by appellants' false statements to spend $1,000 to learn the identity of USEC would buy stock in that company before May 22 in accordance with the instructions appellants provided. The direct connection between appellants' fraud and securities transactions easily satisfies the "in connection with" tests established by relevant precedent.

2. The Supreme Court has held that the elements of a civil claim under Section 10(b) and Rule 10b-5 include a scienter requirement and must be proven by a preponderance of the evidence, rejecting the argument that a higher clear-and-convincing standard like that advocated by appellants and *amici* should apply. The First Amendment does not require any departure from that governing precedent in this case. Appellants' fraud did not involve bona fide publications regularly issued by a publisher. It involved speech that is fraudulent, distributed as part of a one-time purported "insider tip" to induce investors to pay for the identity of company in which they were almost certain to invest. This is speech that courts have uniformly recognized is not entitled to special treatment under the First Amendment.

3. The evidence amply supports the district court's findings that Stansberry and Pirate made materially false statements and did so with scienter. Appellants contrary arguments (and those of *amici*) misstate the representations that are at issue and ignore evidence of materiality and deceptive intent.

4. The injunction does not improperly restrict appellants' First Amendment rights. It restricts only fraudulent speech, which is not protected. Nor is the injunction an impermissible prior restraint. Courts have held that the presumption against the constitutionality of prior restraints does not apply to injunctions against the repetition of conduct that has been found to be illegal.

ARGUMENT

I. THE FALSE STATEMENTS MADE BY PIRATE AND STANBERRY WERE IN CONNECTION WITH THE PURCHASE OF USEC SECURITIES.

There is no merit to Pirate and Stansberry's argument (Br. 17-36) that the district court's judgment is inconsistent with cases applying the "in connection with" requirement of Section 10(b) and Rule 10b-5.

A. The District Court Properly Applied the "In Connection With" Analysis of *SEC v. Texas Gulf Sulphur*.

In concluding that the Commission proved the "in connection with" element, the district court applied the longstanding rule that a false or misleading statement is in connection with the purchase or sale of a security when it is of a

sort " 'that would cause reasonable investors to rely thereon' " and " 'so relying, cause them to purchase or sell a corporation's securities.' " *Carter-Wallace*, 150 F.3d at 156 (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 860 (2d Cir. 1968) (en banc)); *see also Texas Gulf*, 401 F.2d at 862 ("Rule 10b-5 is violated whenever assertions are made, as here, in a manner reasonably calculated to influence the investing public . . . if such assertions are false or misleading or are so incomplete as to mislead").

The district court correctly concluded that, under the foregoing authorities, fraudulent statements in the Tip Email and Special Report were made "in connection with" transactions in USEC securities. Indeed, it was not merely "reasonably expected" that the investors who spent $1,000 to learn the identity of USEC would buy stock in that company before May 22 in accordance with the instructions Stansberry and Pirate provided—it was a virtual *certainty.* As the district court recognized, unless investors intended to buy shares after they learned USEC's identity, it is extraordinarily unlikely that they would spend $1,000 for that information, which appellants told them they could use to "double their money" *by trading in USEC stock. See* 1JA 174. [3]

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[3] Appellants misleadingly assert that "the allegation" in the Commission's complaint is that "the defendants' allegedly false statements 'induce[d] investors to pay [them] . . . for <u>subscriptions</u> . . . .' " Br. 2 (emphasis appellants'); *see also*
(continued...)

Stansberry and Pirate argue (Br. 22-26) that the district court erred in relying on an "in connection with" analysis taken from cases applying *Texas Gulf*, 401 F.2d 833, because that analysis applies only to defendants who are trading in the securities at issue or have fiduciary duties. In support of this argument, appellants merely identify a number of Section 10(b) cases in which the defendants were traders or fiduciaries and then erroneously suggest that those cases stand for the proposition that the "in connection with" element can be met *only* if the defendant trades or is a fiduciary of some sort. Such a requirement not only lacks any basis in Section 10(b)'s text and history, but also would undermine that statute's remedial purpose. Not surprisingly, as discussed below, neither *Texas Gulf* nor any of the other cases on which appellants rely (nor any other case) imposes such a requirement.

The portion of *Texas Gulf* on which the district court relied addressed whether a misleading press release issued by Texas Gulf could be "in connection with" subsequent trading in Texas Gulf securities even though neither Texas Gulf

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[3](...continued)
Br. 20 (same). In fact, the complaint alleged that appellants' false statements induced investors to pay them "for subscriptions *or purported inside information*." 1JA 42 (¶ 16) (emphasis supplied). The district court found that appellants' false statements about purported inside information induced investors to pay for the identity of USEC to use in purchasing USEC securities. 1JA 174. The district court did not find appellants liable based on the sale of subscriptions.

nor corporate insiders were contemporaneously trading in those securities. 401 F.2d at 858-62.[4] In concluding that such a "contemporaneous trading" requirement would be inconsistent with the purposes of Section 10(b), the *Texas Gulf* court observed that "[t]he dominant congressional purposes underlying the . . . Exchange Act . . . were to promote free and open public securities markets and to protect the investing public from suffering inequities in trading, *including*, specifically, inequities that follow from trading that has been stimulated by the publication of false or misleading corporate information releases." 401 F.2d at 858 (emphasis supplied). Critically, although it was addressing a misleading corporate press release, *Texas Gulf* did not state (or even imply), as appellants argue (Br. 23-24), that Section 10(b) applies *only* to false statements by corporations or by "other types of fiduciaries in the securities market."

To the contrary, *Texas Gulf*'s analysis is inconsistent with such a limiting gloss. In rejecting the suggestion that a "trading by the defendant" limitation be read into "in connection with," the court emphasized that, "from its very inception, Section 10(b) . . . ha[s] always been acknowledged as [a] catchall[]" and that, "[a]lthough several . . . witnesses objected to the breadth of the proposed

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[4] Another part of *Texas Gulf* addressed insider trading violations. 401 F.2d at 847-57.

prohibition . . . , the section as enacted did not in any way limit the broad scope of the 'in connection with' phrase." 401 F.2d at 859 (citations omitted).

Courts have reaffirmed the continuing vitality of *Texas Gulf*'s "in connection with" analysis. For example, in *McGann v. Ernst & Young*, 102 F.3d 390 (9th Cir. 1996), the court held that Section 10(b)'s "in connection with" requirement was broad enough to reach false and misleading statements made by an independent accounting firm in a report included in a company's annual Form 10-K filed with the Commission—even though the firm had not traded in the company's securities. *McGann* rejected the argument that *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994), had overturned *Texas Gulf*'s holding that "in connection with" does not limit the reach of Section 10(b) to defendants who trade in the securities at issue. Instead, *McGann* found that *Texas Gulf* had correctly concluded that an "implied trading" requirement would be inconsistent with the statute's text, structure, and legislative history—and that nothing in *Central Bank* is to the contrary. 102 F.3d at 396. *See also, e.g., Semerenko v. Cendant Corp.*, 223 F.3d 165, 175-77 (3d Cir. 2000) (applying *Texas Gulf*-type approach to "in connection with" where the "alleged fraud involves the public dissemination of false and misleading information") (citing cases).[5]

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[5] Although the Supreme Court has not expressly adopted the *Texas Gulf* "in
(continued...)

The reasons that *Texas Gulf* and *McGann* identified for refusing to read Section 10(b)'s "in connection with" requirement as limited to trading defendants apply with equal force to the "trading or fiduciary duty" requirement that appellants argue should be engrafted onto that provision. The plain language of Section 10(b) states that it applies to "any person"—not "any person who has fiduciary duties or trades"—and, although "deceptive" and "in connection with" obviously have a limiting effect, nothing in that language or elsewhere in the statute or in Rule 10b-5 requires the limitation appellants urge. *See McGann*, 102 F.3d at 394; *see also* ARNOLD S. JACOBS, DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAWS DATABASE Part III, Ch. 12.VII.B, § 12:113 (updated June 2008) ("Rule [10b-5] prohibits 'any person' from misrepresenting. . . . One who misrepresents can be liable regardless of who he is or what it is.") (collecting cases; internal citations omitted).

Further, the structure of the Exchange Act and related securities laws demonstrates that if Congress had intended to limit the scope of Section 10(b) to defendants who were trading or had fiduciary duties, it knew how to do so. *See,*

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[5](...continued)
connection with" formulation, it quoted that language with apparent approval in a case addressing the materiality of misrepresentations made to the investing public. *See Basic v. Levinson*, 485 U.S. 224, 235 n. 13 (1988) (quoting *Texas Gulf*, 401 F.2d at 862).

e.g., Section 12(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77l(a)(2) (imposing liability on any person who "offers or sells a security" by the use of untrue statement); Section 15(c)(1)(A) of the Exchange Act, 15 U.S.C. § 78o(c)(1)(A) ("No broker or dealer shall . . . effect any transaction in, or . . . induce or attempt to induce the purchase or sale of, any security" by the use of fraud); Section 14(b)(1) of the Exchange Act, 15 U.S.C. § 78n(b)(1) (making it unlawful for any "entity that exercises fiduciary powers" to act in contravention of certain rules governing proxies); Section 36 of the Investment Company Act, 15 U.S.C. § 80a-35 (authorizing injunctive actions against certain persons who engage in "any act or practice constituting a breach of fiduciary duty involving personal misconduct in respect of any registered investment company").

Finally, appellants' suggestion that only defendants who trade or are fiduciaries can be liable is also inconsistent with what the legislative history shows to have been Congress's goals when it passed the Exchange Act. *See Basic*, 485 U.S. at 230 (citing legislative history and cases); *see also McGann*, 102 F.3d at 396 ("Congress's goals are better served by giving the 'in connection with' language of § 10(b) its natural meaning and imposing liability on all whose false assertions are reasonably calculated to influence the investing public."). As *Texas Gulf* explained, Congress was aware that "in connection with" was a broad

standard, but nonetheless enacted it as drafted, having been told that this breadth was necessary so that the Commission would have the flexibility necessary to address newly conceived fraudulent devices. 401 F.2d at 859-60 (citing and quoting legislative history); *see also SEC v. Rana Research*, 8 F.3d 1358, 1362 (9th Cir. 1993) (applying *Texas Gulf* where a financial consultant issued a press release containing false statements about a corporate takeover target—even though the consultant was neither a fiduciary nor a trader in the stock of the purported target or acquirer—and noting that the meaning of "in connection with" in "SEC actions remains as broad and flexible as is necessary to accomplish the statute's purpose of protecting investors") (citing cases).

Amici argue that a requirement that a defendant trade to be liable under Section 10(b)—rejected in all of the cases discussed above—is supported by the statement in *United States v. O'Hagan*, 521 U.S. 642 (1997), that the " 'in connection with' requirement [is] met when [a] defendant 'uses the information to purchase or sell securities.' " Am.Br. 23 (quoting *O'Hagan*). That accurately describes a case, like *O'Hagan*, where the defendant is charged with violating Section 10(b) by misappropriating information that is used in securities trading in breach of a duty to the source of that information. But nothing in *O'Hagan* supports the view that trading by a defendant is a prerequisite to *all* liability under

Section 10(b). Even appellants concede, in discussing *Texas Gulf* (Br. 23), that a corporation can be liable for false or misleading press releases in the absence of trading by the corporation or its insiders.

The other cases on which Stansberry and Pirate rely (Br. 25-26) likewise fail to establish that the *Texas Gulf* "in connection with" analysis is inapplicable to their fraud. In *Carter-Wallace*, the Second Circuit did not hold, as appellants assert (Br. 25), that a company's false statements about its product could be "in connection with" a securities transaction *because* the statements were made by "an issuer (with fiduciary duties to investors)." Rather, consistent with the authorities the district court applied here, the *Carter-Wallace* court held that the statements at issue could satisfy the "in connection with" requirement if the evidence showed that the statements "were used by market professionals in evaluating the stock of the company." 150 F.3d at 156-57.

Likewise, the D.C. Circuit's determination in *SEC v. Savoy Indus.*, 587 F.2d 1149, 1171 (D.C. Cir. 1978), that the "in connection with" element was established by the filing of a Schedule 13D was not based on the defendant filer's having been "the buyer of the stock" (Br. 25). To the contrary, the D.C. Circuit stated that "this requirement is satisfied whenever it may reasonably be expected that a publicly disseminated document will cause reasonable investors to buy or

sell securities in reliance thereon, *regardless of the motive or existence of contemporaneous transactions by or on behalf of the violator.*" 587 F.2d at 1171 (emphasis supplied).

In *United Int'l Holdings v. Wharf (Holdings)*, 210 F.3d 1207 (10th Cir. 2000), *aff'd*, 532 U.S. 588 (2001), the court did not hold that the false statements at issue were made "in connection with" the purchase or sale of a security because they occurred as part of a "sale of a security between the parties" involved. Br. 25. Instead, the court held that the "in connection with" requirement was met because "the misrepresentations were made to influence [the investor's] investment decision." 210 F.3d at 1221.

The court in *In re Cascade Int'l Securities Litigation*, 894 F. Supp. 437 (S.D. Fla. 1995), did not state, as appellants suggest (Br. 25), that the "in connection with" requirement is satisfied only where a defendant has a duty to disclose a client's false statements. Rather, the court explained that, under controlling law, "the 'in connection with' requirement . . . can be met when a plaintiff alleges that the statement or lack of statement made by the defendant affected the price of the stock, therefore being in connection with the sale or purchase of the security." 894 F. Supp. at 444. This is fully consistent with the district court's decision here.

In *SEC v. Terry's Tips*, 409 F. Supp. 2d 526 (D. Vt. 2006), the court rejected, on a motion to dismiss, the same argument appellants make here: that the alleged fraudulent statements of an online financial adviser could not have been made "in connection with" the purchase or sale of securities because the adviser "sell[s] information, not securities" (*id.* at 533). The court in *Terry's Tips* did not hold that the "in connection with" requirement could be satisfied because the defendant supplied "personalized investment advice." Br. 26. That part of the court's opinion had to do with liability under the Advisers Act, not the Exchange Act. In the relevant portion of *Terry's Tips* (409 F. Supp. 2d at 533), the court applied exactly the same standard as the district court did here.

Finally, neither of the cases from this Court cited by appellants supports their view that *Texas Gulf* applies "only where a defendant either deal[s] in securities or breache[s] a fiduciary duty." Br. 26. Although *Phillips v. LCI Int'l*, 190 F.3d 609 (4th Cir. 1999), and *SEC v. Datronics Engineers*, 490 F.2d 250 (4th Cir. 1973), both involved misleading statements by corporate officials, those opinions nowhere stated that *Texas Gulf*—or Section 10(b)—was limited to such defendants.

B. O'Hagan and Zandford Offer No Basis for Overturning the District Court's Judgment.

Stansberry and Pirate also erroneously argue (Br. 18-20, 22) that the district court improperly failed to apply the "in connection with" analysis of *O'Hagan*, which, they assert, requires " 'fraudulent scheme[s] in which the securities transactions and breaches of fiduciary duty coincide.' " Br. 22 (quoting *SEC v. Zandford*, 535 U.S. 813, 825 (2002)) (emphasis appellants'); *see also* Br. 23 (" '[T]he fiduciary's fraud is consummated . . . when, without disclosure to his principal, he uses the information to purchase or sell securities' ") (quoting *O'Hagan*, 521 U.S. at 656) (emphasis appellants').

To the extent appellants are arguing that *O'Hagan* and *Zandford* impose a fiduciary duty requirement, they confuse two concepts: fraud committed by silence in breach of a fiduciary duty of disclosure (addressed by *O'Hagan* and related cases) and fraud committed by misrepresentations made to investors (addressed in the portion of *Texas Gulf* on which the district court relied). Either type of fraud is actionable under Section 10(b). *See, e.g.*, *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999) (violation requires proof of *either* "a material misrepresentation *or* a material omission as to which [the defendant] had a duty to speak") (emphasis added). But only fraud through silence requires a breach of fiduciary or other duty. *See* ARNOLD S. JACOBS, DISCLOSURE AND REMEDIES

UNDER THE SECURITIES LAWS DATABASE, § 12:113 ("While some duty must be owed by the defendant to the plaintiff in complete *silence* cases, under the duty theory, liability for *misrepresentations* flows absent a fiduciary or other duty between the plaintiff and the defendant.") (emphasis supplied). This is an affirmative misrepresentation case, and appellants' liability for their fraudulent statements is not based on any failure to disclose but on their having intentionally made false statements to induce investors to pay them for information that those investors would purchase in order to trade in USEC securities.

For the same reason, appellants are wrong that the Commission's argument "demands" the imposition of "a new 'general duty' " of disclosure on publishers (Br. 28) (quoting *Chiarella v. United States*, 445 U.S. 222, 233 (1980)), or that it rests on the "duty to speak the full truth" rejected by the court in *SEC v. Wall Street Publishing Institute*, 664 F. Supp. 554, 556 (D.D.C. 1986) ("*Wall Street Publishing II*"), *rev'd on other grounds*, 851 F.2d 365 (D.C. Cir. 1988). This case has nothing to do with a duty of disclosure.

There is likewise no merit to an argument that, under *O'Hagan* and *Zandford*, appellants' false statements were not "in connection with" trading in USEC securities because their victims traded only after appellants deceived them into paying for USEC's identity. *See* Br. 19-20. This, too, ignores obvious

differences between fraud through silence in breach of a duty of disclosure and fraud committed by misrepresentation. In *O'Hagan*, the insider trading defendant was charged with violating Section 10(b) by trading on material non-public information in breach of a duty of disclosure to the source of that information. Because O'Hagan could have made the required disclosure at any point prior to trading, his fraud necessarily could be consummated only at the moment that he traded. *See O'Hagan*, 521 U.S. at 654 (" 'To satisfy the requirement of the [Exchange] Act that there be no deception, there would only have to be disclosure.' ") (quoting Transcript of Oral Argument at 12). The same is true of the broker defendant in *Zandford,* who defrauded his clients by trading in their accounts without disclosing that he intended to misappropriate the proceeds of those trades. 535 U.S. at 820-21.

By contrast, in cases like *Texas Gulf* and this case, in which a defendant makes affirmative misrepresentations to potential buyers or sellers of a particular security, those misrepresentations necessarily are made in advance of any trading connected with the false statements. That does not mean, however, that those false statements are not "in connection with" or do not "coincide with" the securities trading. Instead, recent cases have recognized that if, in satisfaction of the *Texas Gulf* "in connection with" test, the facts surrounding the making of the false

statement indicate that it would induce a reasonable investor to buy or sell a security, the false statement "coincides with" trades in the security within the meaning of *Zandford*. *See, e.g.*, *SEC v. Merrill Scott and Associates*, 505 F. Supp. 2d 1193, 1213-14 (D. Utah 2007) (finding both *Texas Gulf* and *Zandford* satisfied where "[t]here was a direct and intended link between the [fraudulent device] and the purchase and sale of securities"); *Terry's Tips*, 409 F. Supp. 2d at 533 (finding both *Carter-Wallace* and *Zandford* satisfied based on the Commission's having "alleged facts that if proven could show that the Defendants provided false or misleading information to their auto-trading subscribers upon which reasonable investors would rely in the purchase or sale of securities").

Contrary to appellants' argument (Br. 19), *O'Hagan*'s explanation of why the "in connection with" requirement is not met where a person embezzles money from a bank and then uses that money to purchase securities supports the conclusion that appellants' fraud was in connection with trading in USEC securities. As the Court explained, unlike the confidential corporate acquisition information O'Hagan misappropriated, fraudulently obtained money "can buy, if not anything, then at least many things; its misappropriation may thus be viewed as sufficiently detached from a subsequent securities transaction that § 10(b)'s 'in connection with' requirement would not be met." 521 U.S. at 656-57. In contrast,

material non-public information about a merger "[ordinarily] derives its value . . . from its utility in securities trading." *Id.* at 657. Contrary to appellants' argument, therefore, it was not because the hypothetical embezzlement did not "require[] or depend[] upon the purchase or sale of a stock" (Br. 18, emphasis appellants') that the Court found it failed to meet the "in connection with" requirement. Instead, it was because the money obtained through embezzlement is not viewed as ordinarily deriving its value from—and thus would not have an obvious immediate relationship with—a subsequent purchase of securities.

Here, Stansberry and Pirate fraudulently induced investors to pay them $1,000 for information that was being sold for the stated purpose of enabling those investors to purchase and sell securities. Although appellants argue (Br. 19-20) that their fraud was "complete" when the investors paid the money, this ignores the fact that the "information" those investors purchased had value to them principally (if not only) because it would allow them to buy shares in USEC. A reasonable investor, having spent $1,000 for the identity of the company touted in appellants' fraudulent solicitation, would almost certainly invest in USEC—as Stansberry and Pirate had urged. Unlike the hypothetical in *O'Hagan*, in which nothing about a scheme to embezzle money from a bank *inherently* suggested that it would lead to the purchase of securities, the purchase of shares in USEC by the

investors deceived by Stansberry and Pirate was virtually certain to occur because of the way appellants' fraudulent scheme was structured: the potential profit to a purchaser from the information appellants were selling could be unlocked, as a realistic matter, only by trading in USEC stock.

Similarly, in *R&W Technical Services v. CFTC*, 205 F.3d 165 (5th Cir. 2000), the Fifth Circuit held, in an analogous context governed by the Commodity Exchange Act, that software sellers (who did not trade or have fiduciary duties) made false representations "in connection with" futures transactions by misrepresenting the performance of commodities trading programs they sold, because the software's only purpose was to serve "as a means of selecting commodity futures contracts." *Id.* at 172-73; *see also CFTC v. Vartuli*, 228 F.3d 94, 101 (2d Cir. 2000) (same).

C. The Direct Connection Between Appellants' Fraud and Trading by Investors Distinguishes This Case From Those in Which Courts Have Found Misconduct Beyond the Reach of Section 10(b).

The cases that appellants identify as having rejected "the SEC's theory of § 10(b) liability" (Br. 29) do not support their argument. In *Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341, 1353 (S.D.N.Y. 1977), the court rejected a private claim under Section 10(b) and Rule 10b-5 because—unlike in this case—there was no "evidence that defendants published with the intent to

manipulate stock prices, *or to defraud potential investors*, or aid and abet those so engaged." (Emphasis supplied). In so holding, the court specifically distinguished the purported fraud in that case—which the court concluded was merely a repackaging of a state-law libel claim in which the insurance company alleged that it was harmed by an article questioning the merits of its proposed public offering—from situations (like this case) "where a publisher uses his First Amendment rights intentionally to effect a fraud or manipulation for his own financial gain . . . ." *Id.*

In *Hart v. Internet Wire*, 50 Fed. Appx. 464, 465 (2d Cir. 2002), the court rejected the argument that private plaintiffs had stated a claim against publishers "by reporting on and distributing over the Internet a phony corporate news release . . . *perpetrated by an independent hoaxer*." (Emphasis supplied). The Court found that, unlike in this case, "plaintiffs ha[d] not sufficiently alleged that *[the publisher] made knowingly false statements* . . . ." *Id.* at 466 (emphasis supplied).

Appellants and *amici* also erroneously contend (Br. 2-3, 21-22, 34-35; Am.Br. 24-26) that the recent decision in *Stoneridge Investment Partners v. Scientific-Atlanta*, 128 S. Ct. 761 (2008), supports their argument that the district court's judgment reflects an unjustified expansion of the reach of Section 10(b). In *Stoneridge*, the Supreme Court concluded that equipment vendors who entered

into sham transactions with a cable TV operator (Charter) that allowed Charter to improperly inflate its reported operating revenues and cash flow could not be liable in a private Section 10(b) action. The Court reasoned that the plaintiffs could not demonstrate, as required in private actions, that they relied on the defendant vendors' statements and conduct because the defendants "had no duty to disclose" the financial improprieties to investors nor were "their deceptive acts . . . communicated to the public." 128 S. Ct. at 769.

Appellants' reliance on *Stoneridge* is misplaced for two reasons. First, as stated, that decision was based on the plaintiffs' inability to establish an element in their private action under Section 10(b)—reliance—that does not exist in claims under Section 10(b) brought by the Commission. Although the Court noted that the "reliance" and "in connection with" elements are related and sometimes overlap, it stated that it was not evaluating the "in connection with" requirement of Section 10(b). 128 S. Ct. at 770.

Second, even if *Stoneridge* could be viewed as having identified a "demarcation" or "line" between fraud that is sufficiently connected with securities trading to be actionable under Section 10(b) and that which is not (Br. 21), appellants' direct fraudulent solicitation of investors falls well within the scope of actionable misconduct. The reason for the *Stoneridge* Court's conclusion

that the defendant vendors were beyond the reach of Section 10(b) was that "[i]t was Charter, not respondents, that misled its auditor and filed fraudulent financial statements; nothing respondents did made it necessary or inevitable for Charter to record the transactions as it did." 128 S. Ct. at 770; *see also Regents of Univ. Cal. v. Credit Suisse First Boston*, 482 F.3d 372, 384-86 (5th Cir. 2007), *cert. denied*, 128 S.Ct. 1120 (2008) (holding that banks that entered into partnerships and transactions that allowed Enron Corporation to take liabilities off of its books temporarily and to book revenue from the transactions when it was actually incurring debt could not be liable to investors under Section 10(b) and Rule 10b-5 because they neither owed any duty of disclosure to Enron's shareholders ***nor*** made any "public and material misrepresentations"). That is not true here, where Stansberry and Pirate *themselves* directly made the false statements that induced investors to pay them $1,000 to obtain USEC's identity, information that a reasonable investor would be almost certain to use to trade in USEC's securities.

D. Even If Appellants Could Qualify As "Disinterested Publishers" Under the Advisers Act, It Would Not Affect Their Liability Under Section 10(b) of the Exchange Act.

Appellants and *amici* also argue that the Supreme Court's decision in *Lowe* and the district court opinion in *Wall Street Publishing II* purporting to apply *Lowe* support the broad exemption of publishers of disinterested investment

advice from Section 10(b) (Br. 33-34) or "the securities laws" as a whole (*e.g.*, Am.Br. 18). Those arguments fail for three reasons.

First, *Lowe* addressed Advisers Act Section 202(a)(11)(D)'s exception of certain publishers from regulation as investment advisers; it did not address or involve Section 10(b) of the Exchange Act or constitutional concerns with applying that provision. The statement by *amici* that "[u]nder *Lowe, securities laws* may not reach financial news and commentary by disinterested publishers" (Am.Br. 6 (emphasis supplied), *see also* Am.Br. 18, 31-32) is simply incorrect. Indeed, the portion of *Lowe* that *amici* quote makes clear that the Court was discussing only the legislative history of the Advisers Act and, in that context, observed only that "Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the press through the *licensing* of nonpersonalized publishing activities." 472 U.S. at 204 (emphasis supplied). In fact, the majority in *Lowe* assumed that, notwithstanding a publisher's exception from registration under the Advisers Act, the Commission would be able to use Exchange Act Section 10(b) and Rule 10b-5 to respond to fraudulent conduct by such a publisher. *See id.* at 209 n. 56. Thus, to the extent *Lowe* addressed the issue, it cannot be read to support appellants' contention that "[a] similar bright line under § 10(b) is necessary for all the same reasons" (Br. 33) that

disinterested *bona fide* publishers are excepted by Section 202(a)(11)(D) of the Advisers Act.

Second, the portion of *Wall Street Publishing II* that *amici* cite in support of their argument for a "disinterested publisher exception" (Am.Br. 32) is erroneous. In an earlier decision in the same case, which involved an investment magazine that (among other things) misrepresented its articles as the product of objective research, the court found that, under settled case law applying Section 10(b), the defendant's "false and/or misleading statements . . . [were] clearly made in connection with the purchase and sale of securities" because those statements " 'touch' securities transactions" in the sense that "[t]he information disseminated . . . may be expected to 'cause reasonable investors to buy or sell securities in reliance thereon.' " *SEC v. Wall Street Publishing Institute*, 591 F. Supp. 1070, 1088 (D.D.C. 1984) ("*Wall Street Publishing I*") (quoting *Superintendent of Ins. v. Banker's Life & Casualty Co.*, 404 U.S. 6, 12 (1972); *Savoy*, 587 F.2d at 1171). *Wall Street Publishing I* also held that the defendant publisher was an investment adviser, required to register under the Advisers Act, and that it had violated Section 206 of the Advisers Act, 15 U.S.C. § 80b-6, and Section 17(b) of the Securities Act of 1933, 15 U.S.C. § 77q(b). 591 F. Supp. at 1081-87, 1088-89.

After the Supreme Court decided *Lowe*, the D.C. Circuit vacated the district court's decision in *Wall Street Publishing I* and remanded for further proceedings consistent with *Lowe*. On remand, purporting to follow *Lowe*, the court held, in relevant part, that because the defendant published "a bona fide publication with a general and regular circulation and [was] excepted from the Investment Advisers Act," its false and misleading statements could not have been "in connection with" the purchase or sale of securities as required for liability under Section 10(b). *Wall Street Publishing II*, 664 F. Supp. at 555-56. [6]

Significantly, however, nothing in *Wall Street Publishing II* or in *Lowe* explains why a defendant's status under the Advisers Act has any bearing on whether its false statements are made "in connection with" the purchase or sale of securities for purposes of fraud prohibited by the Exchange Act. *Wall Street*

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6 *Wall Street Publishing II* also held that, although the prior ruling in *Wall Street Publishing I* that the defendant publisher had violated Securities Act Section 17(b) was unaffected by *Lowe*, the Supreme Court's teaching on "bona fide publishers" meant that an injunction against future violations of Section 17(b) could no longer be imposed because it would constitute an unconstitutional prior restraint. 664 F. Supp. at 556. The Commission appealed this last ruling, which the D.C. Circuit reversed, 851 F.2d at 370 ("Orders that are carefully focused, address a continuing course of speech, and are imposed after an opportunity for full merits consideration are not properly analyzed as prior restraints"), but did not appeal the ruling in *Wall Street Publishing II* on the Section 10(b) claim. Therefore, as the district court here recognized (1JA 180), the D.C. Circuit did not address the *Wall Street Publishing II* ruling on which *amici* rely (*see* AmBr. 31-32).

Publishing II offered no rationale for the summary conclusion that by qualifying for an exception from regulation under the Advisers Act a publisher gains immunity from liability for fraud covered by the Exchange Act. In the 22 years since *Wall Street Publishing II* was issued, no other court has adopted and applied that opinion's erroneous conclusion that there is a "disinterested publisher" defense to liability under Section 10(b). [7]

Third, even if there were some rationale for importing the disinterested publisher exception from the Advisers Act into the Exchange Act, it would not assist Stansberry and Pirate in this case. *Lowe* explained that the publisher's exception applied only where the publication was *both* "bona fide" and "of regular and general circulation." Neither requirement is met here. The Court found the publications at issue in *Lowe* to be "bona fide" or "genuine" because, among other things, there was "no suggestion that they contained any false or misleading

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[7] *Lubin v. Agora*, 882 A.2d 833 (Md. 2005), cited *Wall Street Publishing II* in the context of reciting Agora's argument about why the state securities regulator had no basis for issuing administrative subpoenas in connection with an investigation of the Tip EMail and Special Report at issue here. *Id.* at 842, n. 7. The *Lubin* court did not address the "in connection with" requirement of Section 10(b) at all, let alone explain or endorse *Wall Street Publishing II*'s unique (and incorrect) view of the link between that requirement and whether a defendant is subject to regulation under the Advisers Act. Nor, contrary to appellants' suggestion, did the *Lubin* court state broadly that "this case requires heightened standards." Br. 37. It addressed only the distinct First Amendment interests of *subscribers and customers* in anonymity. *See* 882 A.2d at 846.

information, or that they were designed to tout any security in which petitioners had an interest." 472 U.S. at 208-09. In this case, the Tip Email and Special Report contained false and misleading statements and, as discussed above at pages 15, 20 and 34-35, were structured to induce investors to pay $1,000 for the purpose of obtaining the identity of a company in which they almost certainly would invest. These are clearly not the sort of "publication" that *Lowe* described as "bona fide."

Further, as the district court found, because the Tip Email and Special Report were not "offered to the general public on a regular schedule" (1JA 181), they were not publications "of regular and general circulation" 1JA 182. *Lowe* explained that to meet this requirement a publication must be " 'regular' in the sense important to the securities market," *i.e.*, it must not "have been timed to specific market activity, or to events affecting or having the ability to affect the securities industry." 472 U.S. at 209. The Tip Email was a one-time offer to sell the identity of a single stock that investors were instructed to buy in connection with a critical market event—hardly "regular" publications within the meaning of *Lowe*. Indeed, in contrast to their current litigation position (Br. 32) and that of *amici* (Am.Br. 32-36), appellants' contemporaneous characterization of the fraudulent e-mail solicitation and report not only conceded their one-time nature,

but used the *absence* of any continuing subscription or future periodic contact as part of the sales pitch:

> I'm going to make this very easy for you. I'm not asking you to subscribe to my newsletter in exchange for this information. (I don't even write a newsletter). I'm not asking you to follow a trading system. (I don't have one.) I'm not going to bother you with subsequent emails or follow-up phone calls. Nope. This is a simple, one-shot deal. . . . With the deal I'm offering you today, all you have to do is buy one stock.

7JA 2977; *see also* 2JA 966-67 (acknowledgment by Pirate's group publisher that this was "a one shot sale"); 2JA 571 (testimony from former Agora consultant that this was a unique "one-time promotion").

Presumably unaware of the foregoing evidence, *amici* argue that the Tip Email and Special Report are not the sort of "special deals" or additional "alerts" that fail the test for bona fide "general and regular" publications but, instead, are simply " 'off-cycle' updates" critical to "the contemporary age of Internet publications . . . ." Am.Br. 34. That position does not square with the evidence or the holdings in *Lowe* discussed above. The identity of USEC as a good investment was not issued as an "off-cycle update" to regular subscribers of Pirate's investment newsletters or to subscribers of the other publications whose e-mail lists were used to solicit purchasers of the Special Report. *See* 7JA 2972-3105. Instead, the Tip Email clearly portrayed itself as offering a "special" "one-

time" deal available only to those willing to spend an *additional* $1,000 for the identity of the stock about which appellants falsely claimed to have inside information. It is the character of the Tip Email and Special Report that is relevant, not the fact that appellants distributed those materials through e-mail lists of subscribers to newsletters published by Pirate and other Agora subsidiaries. *See Lowe*, 472 U.S. at 208.

Thus, the district court correctly concluded that even if a "disinterested publisher" defense were available in a Section 10(b) case for bona fide publications of regular and general circulation, the "one-shot deal" Stansberry and Pirate offered to victims of their fraud would not qualify. 1JA 181-83.

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In sum, the district court's finding that appellants' fraud was "in connection with" the purchase or sale of USEC securities is supported by compelling evidence of the essential link between appellants' fraud and trading in USEC securities. Their fraud was possible only because their victims could—and were virtually certain to—buy USEC securities as instructed in the fraudulent e-mail solicitation and "report." That direct connection falls well within any "in connection with" formulation followed by the Supreme Court and the courts of appeals.

II. THE *NEW YORK TIMES V. SULLIVAN* STANDARD FOR PROVING DEFAMATION OF A PUBLIC FIGURE DOES NOT APPLY TO THE COMMISSION'S CLAIMS UNDER SECTION 10(b) AND RULE 10b-5.

Appellants and *amici* argue (*e.g.*, Br. 37-39; Am.Br. 7-10, 26-28) that, in establishing its case under Section 10(b) and Rule 10b-5, the Commission should be held to the *New York Times v. Sullivan* standards for proving defamation of public figures—clear and convincing evidence that the defendant published the false statement with "actual malice" (*i.e.*, knowledge of falsity or reckless disregard of truth)—and that this Court should engage in the searching, independent review of findings of "actual malice" described in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (*e.g.*, Br. 39). However, they do not dispute the standards generally applicable to claims under Section 10(b) and Rule 10b-5. Thus, in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976), and *Aaron v. SEC*, 446 U.S. 680, 691 (1980), the Supreme Court held that persons who act with "scienter" (an intent to deceive, manipulate or defraud) violate Section 10(b) and Rule 10b-5. And, in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-91 (1983), the Court held that the elements of a civil claim under Section 10(b) and Rule 10b-5 (as pertinent here, that the defendant made (1) a false statement (2) of material fact (3) with scienter (4) in connection with the purchase or sale of securities) need only be established by a preponderance of the evidence

—and not the higher clear and convincing standard of proof the defendants had advocated. Finally, it is well-established that, in cases under Section 10(b) and Rule 10b-5, courts apply the traditional rules of appellate review, including affording deference to the findings of the trier of fact. *See, e.g.*, *Miller v. Asensio & Co.*, 364 F.3d 223, 233-35 (4th Cir. 2004) (applying deferential review to jury's findings in Section 10(b) claims). Notwithstanding appellants' and *amici*'s arguments, these decisions, taken together, provide abundant breathing space for speech protected by the First Amendment.

As the Supreme Court has repeatedly made clear, actions may be brought against those who have committed fraud without raising First Amendment concerns. *See, e.g., Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637-38 (1980) (*citing, e.g., Schneider v. New Jersey*, 308 U.S. 147, 164 (1939)). Thus, despite the obvious fact that actions brought under Section 10(b) and Rule 10b-5, like common-law actions for deceit, federal mail fraud prosecutions, or fraud actions under the commodities laws, more often than not will involve speech and occasionally speech by members of the financial press, such actions do not run afoul of the First Amendment. *See, e.g., Commodity Trend Service v. CFTC*, 233 F.3d 981, 993 (7th Cir. 2000). This is so because there is no independent constitutional value to fraudulent speech. *See, e.g., Gertz v. Robert*

Welch, 418 U.S. 323, 340 (1974); *see also Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) ("[f]alse statements of fact are particularly valueless").

Moreover, the fear that enforcement actions under the antifraud provisions could have a "chilling" effect on bona fide—if sometimes erroneous—financial news and commentary is misplaced. Unlike state defamation laws that operated to capture erroneous statements honestly made, *New York Times*, 376 U.S. at 278, liability under Section 10(b) and Rule 10b-5 is imposed, as pertinent here, only for factual statements a claimant proves are false and made with scienter. Further, those false factual statements must be "in connection with" the purchase or sale of securities; Section 10(b) does not reach "pure speech" disconnected from the harm to investors or the markets Congress enacted that provision to prevent. Perhaps for this reason, appellants and *amici* cite no cases, and we are aware of none, that would engraft *New York Times* standards—such as a heightened standard of proof —onto any Section 10(b) claim, let alone a claim, such as this, that involves false commercial speech. [8] *Cf., e.g., Commodity Trend Service*, 233 F.3d at 993-94;

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[8] Contrary to *amici*'s argument (Am.Br. 14), the Tip Email is not a "newsletter," but clearly an offer to sell a piece of information—the identity of USEC—for $1,000. The entire purpose of the Tip Email was to invite a commercial transaction—the essence of commercial speech. *See Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562 (1980) (recognizing, for purposes of First Amendment analyses, the "commonsense distinction" between speech proposing a commercial transaction

(continued...)

Litton Systems v. AT&T, 700 F.2d 785, 813-14 (2d Cir. 1983) (applying *Herman & MacLean* in refusing to apply clear-and-convincing standard in antitrust case despite asserted chilling effect on speech under preponderance standard).

The cases cited by appellants and *amici* in which "actual malice" standards have been held to apply involve situations—only marginally different from that involved in *New York Times*—in which the interest in avoiding harm to reputation is balanced against the risk of chilling protected speech [9] or situations in which

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[8](...continued)
and other varieties of speech). Further, although *amici* suggest that *Lubin* stated that "the same publications" at issue here did not only propose a commercial transaction (Am.Br. 14), they fail to note that the statement they quote was addressing *only* the Special Report, not the Tip Email. *See* 882 A.2d at 848.

[9] Thus, two of the cited cases involve torts, closely related to libel or defamation, which seek to vindicate damage to reputation, such as the tort of corporate defamation or product disparagement, *see, e.g., Bose Corp. v. Consumers Union*, 508 F. Supp. 1249, 1270-72 (D. Mass. 1981), *rev'd on other grounds*, 692 F.3d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984), and false light privacy claims. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571-73 (1977) (describing *Time, Inc. v. Hill*, 385 U.S. 374 (1967)). Other cited cases involve state tort claims predicated on defamatory speech or claims that otherwise seek to end-run the *New York Times* requirements by, for example, seeking defamation-type damages under the guise of non-reputational tort or contract claims, *see, e.g., Food Lion v. Capital Cities/ABC*, 194 F.3d 505, 522-23 (4th Cir. 1999) (discussing *Hustler*, 485 U.S. 46); *Compuware Corp. v. Moody's Investors Services*, 499 F.3d 520, 529-33 (6th Cir. 2007); *see also* Am.Br. 10, n.1.

private parties seek to bring claims against financial press for negligent misrepresentation. [10]

The scienter requirement of Section 10(b), like the actual malice requirement imposed in the cases cited by appellants and *amici*, ensures that freedom of expression is not endangered by claims that otherwise could embrace false statements made in good faith. But, in cases under Section 10(b), imposing the heightened review and proof standards of *New York Times* would sacrifice the congressional interest in protecting investors while providing only negligible (if any) additional breathing space for protected speech. [11] There is, therefore, no reason to depart from the balance the Supreme Court has struck in determining the standards and elements applicable to Section 10(b) claims.

Nor, contrary to the suggestion of appellants and *amici*, does appellants' status as "Author" and "Publisher" itself warrant heightened scrutiny. It is "well-established . . . that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its

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[10] *E.g.*, *First Equity Corp. v. Standard & Poor's Corp.*, 690 F. Supp. 256, 258-59 (S.D.N.Y. 1988), *aff'd on other grounds*, 869 F.2d 175 (2d Cir. 1989); *Gutter v. Dow Jones*, 490 N.E.2d 898, 901-02 (Ohio 1986).

[11] In any event, as the district correctly held, the Commission established all elements of its claims by clear-and-convincing evidence, *see supra*, pp. 12-16, and *infra*, pp. 51-59, and the district court's factual findings would easily withstand independent review under *Bose*.

ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991). Instead, because the press "has no special privilege to invade the rights and liberties of others . . . enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.*; *see also Veilleux v. NBC*, 206 F.3d 92, 126-29 (1st Cir. 2000).

III. THE EVIDENCE SUPPORTS THE DISTRICT COURT'S FINDINGS THAT APPELLANTS MADE MATERIALLY FALSE STATEMENTS WITH SCIENTER.

The district court's findings that Stansberry intentionally made materially false statements in the Tip Email and Special Report about having received "insider information" about the USEC-Tenex pricing agreement (1JA 170) and that Pirate acted with at least reckless disregard as to the truth of those statements (1JA 170-71) are amply supported by the evidentiary record.

A. The False Statements on Which Appellants' Liability Rests Were Material.

Under governing law, a false or misleading statement is "material" for purposes of Section 10(b) and Rule 10b-5 if there is " 'a substantial likelihood that a reasonable purchaser or seller of a security (1) would consider the fact important in deciding whether to buy or sell the security or (2) would have viewed the total mix of information made available to be significantly altered by disclosure of the

fact.' " *Ottman*, 353 F.3d at 343 (quoting *Longman v. Food Lion*, 197 F.3d 675, 682-83 (4th Cir. 1999) (citing, *e.g.*, *Basic*, 485 U.S. at 231-32)). As the district court concluded, the evidence supports a finding of materiality under either alternative formulation.

Appellants and *amici* inaccurately describe the false statements at issue as: "a mistaken *prediction* that a stock 'should' rise" (Am.Br. 4) (emphasis in original); "news or commentary [that] . . . turn[s] out to be mistaken" (Am.Br.15); "financial news reports that turn out to be mistaken" (Am.Br. 22 n. 5); "boil[ing] down to whether a USEC official told the Author to 'watch the stock' the day before a superpower summit opened" (Br. 2); and "the Author's prediction USEC's stock would double in price." (Br. 46). In fact, as the district court explained, the false statements at the heart of this case are not some predictions about USEC's stock price going up that simply "turn out" to be "mistaken." Instead, the "actionable falsity" was a lie about a past event: "that 'Jay McDaniel' *had been told* by a USEC executive that government approval of the pricing agreement would be announced on May 22, 2002." 1JA 163 (emphasis supplied). This statement falls well outside the kind of subjective, forward-looking statements that this Court has held can qualify as non-actionable "opinion." *See*

Raab v. General Physics Corp., 4 F.3d 286, 290 (4th Cir. 1993); *Biospherics v. Forbes*, 151 F.3d 180, 184 (4th Cir. 1998).[12]

The district court correctly concluded that it is "self-evident" that a reasonable investor would have considered the specific factual information at issue here important in deciding whether to buy or sell USEC stock: "The essence of the false information is not only that the highly beneficial pricing agreement would be announced on May 22, 2002, and that the date had been communicated by a senior USEC executive, but also that the market in general does not know what purchasers of the Special Report will learn for their $1,000." 1JA 163 (emphasis in original). Neither appellants nor *amici* explain why such specific information from a highly placed inside source would *not* have been "important" to a reasonable investor's decision to buy or sell USEC stock as required by this Court's precedent. Nor do they even attempt to counter the testimony offered by purchasers of the Special Report and then USEC stock about the importance they attached to the false statements *because* those statements supposedly came from a senior company executive and gave a date certain on which the critical new agreement would be announced. 1JA 163-64; 2JA 704; 2JA 733. Indeed, it is

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[12] Thus, there is likewise no merit to the arguments (Br. 46-47; Am.Br. 19-22) that appellants' liability is based on "opinion" protected by the First Amendment. *See supra*, p. 48.

simply implausible that 1,200 investors would have paid $1,000 for the identity of USEC unless the false statements in the Tip Email were important to their decision to buy that stock.

In arguing that those false statements did not alter "the total mix of information" available to investors, appellants list a number of USEC statements and media reports in the Spring of 2002 which stated only that USEC was "hopeful" that the approval of the new pricing agreement would occur in the "near future" or would "come soon" (Br. 9, 11, 42). [13] Critically, however, as even appellants' expert witness conceded (3JA 1075, 1080), *only* appellants' Tip Email and Special Report stated that a senior USEC executive had confirmed that the approval announcement was tied to the upcoming summit and that the announcement would be made on May 22. There is a significant difference between hopes and speculations about a possible announcement at some point in the near future and the purported statement by an insider "in a position to know" that it has been decided that the announcement will occur on a specific date. *See SEC v. Mayhew*, 121 F.3d 44, 50-52 (2d Cir. 1997) (distinguishing between generally available information about a possible merger and information that was

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[13] Statements in internal memoranda not released to the public (Br. 10 (Wingfield memo); Br. 7, 45 (Bank of America memo)) cannot have affected the "mix of information" available to investors.

material because it came from an insider in a position to confirm that merger negotiations were serious and actual); *see also* 3JA 1081 (testimony of appellants' expert that USEC "management's opinion that there was a tie [between approval and the summit is] . . . quite a bit different from speculation in the market that there was a tie"). Tellingly, it was the qualitative difference in the purported reliability and precision of their information about the timing of the pricing agreement announcement that appellants used as a principal selling point in their solicitation. 7JA 2972 ("And, best of all, because of my source—a senior company executive—I can even tell you EXACTLY WHEN the deal will be finalized and announced to the public."); 7JA 2974 (noting less specific "rumors that have been reported in the mainstream press").

Ignoring all of the circumstances showing materiality, appellants argue (Br. 41-46) that the district court's finding cannot be sustained because it is contrary to the testimony of their witness that the movement in the price of USEC stock between the time of the fraudulent email solicitation and report and May 22 could not definitively be attributed to appellants' fraudulent statements. But this was only one piece of evidence bearing on materiality, and the district court provided a reasonable explanation for its contrary reading of the market movement in the relevant period. 1JA 165-66.

More importantly, as appellants obliquely acknowledge (Br. 45), the same witness *conceded* that appellants' false statement that a USEC senior executive had tied the approval of the pricing agreement to the May 2002 summit would have been material to a reasonable investor. 3JA 1071, 1073, 1075. (He disagreed that the specific false date for the announcement, May 22, added anything more to the mix of information. 2JA 1015.) Appellants attempt to avoid this adverse testimony by asserting that even if that information was material, it was "accurate," because the approval of the new pricing agreement was announced "[j]ust weeks after the summit concluded" (Br. 45), and thus was *in fact* "tied to" the summit. This is obviously erroneous. Appellants' statements were false not because the approval of the pricing agreement failed to occur on May 22 or in connection with the summit, but because appellants lied about having been told *by a "senior company executive"* that the approval would be announced then. 7JA 2972; 7JA 3111. Even if the announcement of the approval weeks after the summit somehow could be seen as "tied to" that summit (Br. 45)—which is, at best, implausible—that would in no way alter the falsity of the statements at issue.

Appellants cite no authority—and we are aware of none—for their argument (Br. 40-41) that their false statements in the Tip Email and Special Report cannot have been material because USEC did not issue a press release correcting those

statements. Whether or not USEC's "no comment" policy (*see* 1JA 337-39; 2JA 530-31) was in full compliance with the requirements of NYSE Rule 202.03 (Br. 40-41), USEC's adherence to the policy does not alter the fact that appellants made materially false statements.

B. Stansberry and Pirate Acted with Scienter.

Appellants and *amici* incorrectly assert that there is inadequate evidence to support the finding that Stansbury acted with scienter because the district court "confused proof of falsity with proof of fault" (Br. 48) and "the sole evidence of intention was the mere falsity of the statement itself" (Am.Br. 4). Instead, based on the in-court testimony of Stansberry, Wingfield, and Major-Sosias as well as contemporaneous documentary evidence, the district court found not simply that Stansberry's representations about his conversation with Wingfield were "mistaken" (Am.Br. 4) or "misconceptions" (Br. 49, *see* Br. 51), but that Wingfield had not stated that approval of the pricing agreement would occur on May 22 (or any other time), that Stansberry knew it, and that Stansberry affirmatively *lied* about what Wingfield told him. 1JA 159, 170. The court further found that, in an effort to back up that lie, Stansberry fabricated a "preposterous" story about Wingfield disclosing non-public material information because he was

angry that Stansberry would not write about USEC. 1JA 159-60 n.9; *see* 2JA 635-42.

Those findings, informed by the district court's credibility determinations, are reviewed for clear error—and appellants have identified no reason for second-guessing them. *See Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4th Cir. 1979) (resolution of intent issues "depends so much" on witness credibility) (citations omitted). The court's findings fully support the conclusion that Stansberry acted with scienter because "Stansberry knew full well that Wingfield had not told him that the pricing agreement would be announced on May 22 . . . [and] . . . intentionally made false statements about the company (USEC) to induce the recipients of the Super Insider Solicitation to pay $1,000 for the Special Report that completed the intentionally false statements." 1JA 170.

With regard to the scienter of Pirate, appellants wholly ignore the district court's finding that, given Stanberry's control of Pirate in connection with the issuance of the fraudulent e-mail solicitation and report, Stansberry's scienter is imputed to Pirate. 1JA 170. Stansberry drafted the Tip Email and Special Report; no one else at Pirate fact-checked those materials. 2JA 960-62, 967; 2JA 567-71. Moreover, when asked if he considered himself "to be the person ultimately responsible for the Pirate publications that go out," Stansberry responded:

"There's no doubt about it, I run the show." 2JA 589; *see also* 2JA 770 ("[N]ot only am I the boss [of that] business, but I wrote this."). In these circumstances, Stansberry's mental state is properly attributed to Pirate. *See, e.g.*, *Makor Issues & Rights, Ltd. v. Tellabs*, 513 F.3d 702, 708 (7th Cir. 2008) (corporate scienter is established by "looking to the state of mind of the individual corporate official . . . who make[s] or issue[s] the statement" and a "corporation is liable for statements by employees who have apparent authority to make them").

The same facts also support the district court's alternative finding that Pirate acted with reckless disregard of the truth or falsity of the statements in the email solicitation and report. As the court found, that recklessness was shown by Pirate's complete surrender of control to Stansberry, notwithstanding the red flags (visible to other Pirate employees) raised by Stansberry's "claiming to have inside information from a USEC senior executive and . . . telling customers to buy and sell on specific days." 1JA 172. Such reckless indifference establishes scienter under controlling law. *See Ottman*, 353 F.3d at 343-44.

IV. THE INJUNCTION ENTERED BY THE DISTRICT COURT IS NOT A PRIOR RESTRAINT PROHIBITED BY THE FIRST AMENDMENT.

There is no merit to the argument (Br. 55-57) that the injunction entered by the district court improperly chills and restrains appellants' future speech. Because the injunction prohibits only fraudulent speech, which is not protected by

the First Amendment, it is not an impermissible prior restraint. *See, e.g.*, *United States v. Raymond*, 228 F.3d 804, 815-16 (7th Cir. 2000) (holding that an individual may be enjoined from engaging in unprotected speech and that "[i]t is permissible for the government to prevent the dissemination of false or misleading commercial speech") (internal citations omitted); *United States v. Bell*, 414 F.3d 474, 481 (3d Cir. 2005) ("[T]he general principle of First Amendment law that prior restraints, as opposed to criminal penalization, bear a heavier presumption against their constitutional validity . . . does not apply to restrictions on unprotected speech, including false or unlawful commercial speech."); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697-99 (1978) (rejecting the argument that an antitrust injunction, entered as a remedy for violations by a professional association, was an unconstitutional prior restraint on the association's speech because it barred the association from "adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical").

As the district court properly concluded (1JA 203-04), because the injunction tracks the language of Section 10(b) and Rule 10b-5, and, therefore, the only speech prohibited is fraudulent speech in connection with the purchase or

sale of securities, the injunction does not bar Pirate or Stansberry from any activity protected by the First Amendment. *See supra*, pages 47-48.

CONCLUSION

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

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July 2008

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Fourth Circuit Rule 32(b), that the foregoing FINAL BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE is proportionately spaced, has a typeface of 14 points or more, and contains 13,775 words.

s/ Michael A. Conley

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July 24, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on July 24, 2008, I electronically filed the foregoing FINAL BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE, with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on July 24, 2008, I have mailed the foregoing document by First-Class Mail, postage prepaid, to the foregoing counsel and to the following non-CM/ECF participants:

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