08-2899-cv(L)

08-3016-cv(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CSX CORPORATION,

Plaintiff-Appellant-Cross-Appellee,

MICHAEL WARD,

Third-Party-Defendant,

—against—

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

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (KAPLAN, J.)
CIVIL ACTION NO. 08-CV-2764 (LAK)

BRIEF OF *AMICUS CURIAE* MANAGED FUNDS ASSOCIATION IN SUPPORT OF NEITHER PARTY

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July 18, 2008

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the corporate amicus curiae hereby states as follows:

Amicus Curiae Managed Funds Association is a 501(c)(6) corporation incorporated in the State of Illinois. Managed Funds Association has no parent corporation, and no publicly held corporation holds 10% or more of its voting rights or stock.

/s/ Martin Klotz

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STATEMENT OF INTEREST

Managed Funds Association ("MFA") is a membership organization representing the global alternative investment industry. Its more than 1700 professional members represent hedge funds, funds of funds, and managed futures funds that collectively manage a substantial portion of the approximately $2 trillion presently invested in alternative investment strategies. MFA members routinely enter into total return swap agreements ("TRSs") for a wide range of legitimate investment purposes. They have a significant interest in understanding and complying with the legal rules governing the use of TRSs.

MFA endorses the views of amici International Swaps and Derivatives Association, Inc., and Securities Industry and Financial Markets Association, which have submitted a joint amicus brief on this appeal.

All market participants, including MFA's members, need clear rules relating to TRSs. The opinion below makes a number of broad statements, principally in dicta, about the applicability of Section 13(d) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §78m(d), and rules promulgated thereunder, to transactions involving TRSs that are contrary to longstanding interpretations by the Securities and Exchange Commission (the "SEC") of its own rule, Exchange Act Rule 13d-3, 17 C.F.R. §240.13d-3, as well as the widespread current industry understanding of the law. These novel and

incorrect legal propositions, unless rejected by this Court, would effect a significant change in the state of the law that in many respects would create confusion, uncertainty, and other undesirable consequences.

This Court's resolution of the appeal before it should reaffirm the clear principles of law that are reflected in the plain language of the statute and its implementing regulations, that the SEC has endorsed, and that the industry has followed for many years prior to this case. These clear principles include:

(1) that a TRS, standing alone, does not make the long party a "beneficial owner" of the referenced shares;

(2) that investing through a TRS, rather than through a purchase of shares, so as not to trigger a Section 13(d) reporting obligation does not, without more, constitute a "plan or scheme to evade" a reporting requirement;

(3) that in order to form a "group," investors must reach an agreement to coordinate investing activity, not merely engage in information-sharing or similar activity common to separate investors.

The decision below rested in substantial part on detailed findings of fact. MFA takes no position concerning either these findings or the proper outcome of this appeal, and none of its members has a direct interest in this case. MFA asks only that this Court reaffirm the principles identified above, reject any contrary implications suggested by the district court's opinion and, regardless of the decision it reaches, base its decision on a clear, narrow, and objective basis that

does not create legal uncertainty for the vast majority of parties to standard TRS agreements.[1]

ARGUMENT

I

AN ECONOMIC INTEREST HELD IN THE FORM OF A STANDARD CASH-SETTLED TOTAL RETURN SWAP DOES NOT CONFER BENEFICIAL OWNERSHIP FOR PURPOSES OF EXCHANGE ACT SECTION 13(d)

The court below declined to reach the issue of whether defendant TCI, as the long party in a number of TRSs referencing more than five percent of the securities of plaintiff CSX, could be found to be a "beneficial owner" of CSX securities under Exchange Act Rule 13d-3(a), 17 C.F.R. §240.13d-3(a), and hence subject to the reporting requirements of Exchange Act Section 13(d) and Exchange Act Rule 13d-1, 17 C.F.R. §240.13d-1. Nonetheless, the court devoted sixteen pages of dicta to the beneficial ownership issue and opined that "there are substantial reasons for concluding that TCI is the beneficial owner of the CSX shares held as hedges by its counter-parties." JA5620.[2] This assertion, while clearly dictum and while resting at least in part on the unique facts of the case, would be both bad law and bad policy if adopted as a general rule. This Court should reject it and make clear that the long party to a TRS is the "beneficial

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1 All parties have consented to MFA's filing of this amicus brief

2 Citations beginning with JA reference documents in the Joint Appendix.

owner" of the referenced shares only to the extent it is also party to other agreements beyond the TRS itself that confer beneficial ownership on it.

A standard TRS does not confer on the long party any rights that satisfy the Rule 13d-3(a) definition of a beneficial owner. In particular, a standard TRS does not confer on the long party either "[v]oting power," "the power to vote, or to direct the voting, of such security," or "[i]nvestment power," "the power to dispose, or direct the disposition of, such security." 17 C.F.R §240.13d-3(a). All that a standard TRS gives the long party is an economic interest in the market performance of the referenced security, including any dividends or other distributions associated with it.

Such an economic interest, standing alone, is not sufficient to create beneficial ownership for purposes of Rule 13d-3. When the SEC first began formulating permanent rules under Section 13(d), it explicitly invited public comment on whether a definition of "beneficial owner" should include "a person who has the right to receive economic benefits from securities." SEC Release No. 34-11003 (Sept. 9, 1974), 39 Fed. Reg. 33835. Initially, the SEC answered this question in the affirmative, proposing a definition of "beneficial owner" that included any person "who has or shares the power to direct the receipt of dividends or proceeds from the sale of the securities." But when the final rules were adopted, the "most significant modification" of the rules as originally proposed was the

elimination of economic interest as a basis for finding beneficial ownership. Exchange Act Release No. 34-13291 (Feb. 24, 1977), 42 Fed. Reg. 12344. As the Commission later explained:

> The possible [e]ffect on control is the aspect of beneficial ownership of greatest interest to issuers and investors. Accordingly, the traditional economic interest in securities, i.e., the right to receive dividends and the right to receive proceeds upon sale, have not been included as criteria for defining beneficial ownership.

Filing and Disclosure Requirements Relating to Beneficial Ownership, Exchange Act Release No. 34-14693 (April 21, 1978), 14 SEC Docket 888.

Because Section 13(d) concerns possible changes in corporate control, the SEC concluded that economic interest is irrelevant and that the only relevant indicia of ownership are the power to vote and the power to dispose of the security. Schedule 13D, 17 C.F.R. §240.13d-101, requires disclosure of swap agreements among a variety of other agreements, but only by a party that is already required to file on Schedule 13D.[3] Significantly, Special Instruction C to Schedule 13D makes it clear that a limited partnership filing of Schedule 13D does not have to disclose the identity of its passive limited partners, no matter how large their interests.[4]

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[3] Item 6 of Schedule 13D provides that a person who is independently required to file on Schedule 13D must include in its report a disclosure of, inter alia, any agreements it has reached with respect to the security in question, but it does not require any disclosure of such agreements, including TRSs, unless the person is already required to file on Schedule 13D.

[4] Special Instruction C to Schedule 13D provides, in pertinent part: "If the [13D] statement is filed by a . . . limited partnership . . . the information called for . . . shall be given with

This exemplifies the fact that the disclosure obligation relates to actual voting and dispositive power, not economic incidents of ownership that do not include voting or dispositive power.

The Commodities Futures Modernization Act of 2000 ("CFMA") also argues against a rule that would make the long party to a TRS an "owner" of the referenced security. Pub. L. 106-554, § 1(a)(5), 114 Stat. 2763, 2763A-365 (codified as amended in scattered sections of 7, 11, 15, 16 U.S.C.). Under the CFMA, a standard TRS is not a "security," and, with narrow exceptions not relevant here, is generally outside the scope of the SEC's rule-making authority.

True to this history, the SEC Staff, invited by the district court to comment on the question of whether a long party to a TRS is a beneficial owner of shares, concluded unequivocally that it is not:

> As a general matter, economic or business incentives, in contrast to some contract, arrangement, understanding or relationship concerning voting power or investment power between the parties to an equity swap, are not sufficient to create beneficial ownership under Rule 13d-3 . . . . The more reasonable interpretation of the terms 'voting power' and 'investment power' as used in the Rule, which are based on the concept of the actual authority to vote or dispose or the authority 'to direct' the voting or disposition, is that they are not satisfied merely by the presence of economic incentives.

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respect to: . . .(ii) each partner who is denominated as a general partner or who functions as a general partner of such limited partnership and . . . each person controlling such partner . . . ."

JA5549.

MFA believes that the overwhelming majority of its members and, indeed, of market participants generally, share the SEC Staff's interpretation of the definition of "beneficial owner" in Rule 13d-3 and have acted in reliance on this shared understanding for many years. See JA5471; JA1404, 1413, 1460. The dicta of the court, however, are contrary to the Staff's correct statement of the law, and this creates an undesirable uncertainty about the law. However it decides the specific case before it, the Court should eliminate this uncertainty by declaring that the SEC Staff's statement of the law is entirely correct, consistent with well-established law on the issue of beneficial ownership, and applicable in the case of a standard TRS unaccompanied by any unusual side agreements or understandings.

A rule that left open the possibility that a long party to a standard TRS should be deemed the beneficial owner of all or some of the referenced shares would create many difficult compliance issues. In this case, the district court concluded, TCI had a reasonably precise and accurate understanding of what shares its counterparties held. But in another case, the TRS party's understanding of its counterparty's position might be much less precise or accurate, either because the counterparty's economic incentives were different, or because hedging practices had evolved, or for some other reason. What would it be required to report on its Schedule 13D, 17 C.F.R. §240.13d-101, in those circumstances? How

should it be expected to amend its filings if it is uncertain to what extent, if any, its counterparty continues to hold the referenced stock and if it has no legal right to compel its counterparty to provide it with this information?

Moreover, treating a long party to a TRS as a beneficial owner will lead to widespread duplicative filings, with both the TRS investor and, potentially, the counterparty subject to filing requirements. This duplication could well confuse and misinform the market, especially because the counterparty, to the extent it owns the referenced shares, is likely to make a short-form filing on Schedule 13G, 17 C.F.R. § 240.13d-102, which would not distinguish between owned shares and investments held through a TRS. As a result, the market will be unable to determine easily what interests are held by what parties and to eliminate double-counting. Similar problems would occur in quarterly holdings reports filed on Form 13F.

The suggestion that a party to a TRS should be deemed a beneficial owner of shares actually held by its counterparty as a hedge assumes a uniformity of present practice — namely, that the counterparty always or almost always acquires actual shares precisely or almost precisely equal to the shares referenced in the TRS. That is by no means typical, even if it in fact occurred in this case. See JA5476-5477. More importantly, even if a uniform practice existed today, it would be unlikely to continue to exist for long into the future, so that a reporting

requirement based on this assumed uniformity would quickly become outdated and simply generate uncertainty. See JA5481-5484.

There is a further problem with adopting a judicial definition of "beneficial owner" that includes long parties to standard TRSs. Many other legal and contractual obligations are linked to the Rule 13d-3 definition of "beneficial owner," and a result-oriented judicial change in this definition for purposes of Section 13(d) would have unforeseen and unpredictable consequences in these other areas. For example, filing requirements imposed by Sections 13(f) and 13(g), 15 U.S.C. §§ 78m(f), 78m(g), as well as the application of the reporting and short-swing recovery provisions in Exchange Act Section 16(a) and (b), 15 U.S.C. §78p(a), (b), are tied to Section 13(d) concepts of beneficial ownership.[5] Any expansion of the scope of Section 13(d) beneficial ownership would expand these provisions as well.

Similarly, a wide variety of federal and state statutes and regulations, corporate governance provisions, and private contractual arrangements incorporate

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[5] Section 13(f) and the rules thereunder require certain investment managers to file quarterly reports of their holdings of publicly traded equity securities. Section 13(g) and Rules 13d-1(b) and (c), 17 C.F.R. § 240.13d-1(b), (c), permit regulated investment intermediaries, and persons who own less than 20% of an issuer's voting securities without a view to affecting control of the issuer, to file the shorter Form 13G, 17 C.F.R. §240.13d-102, instead of Schedule 13D. Section 16(a), 15 U.S.C § 78p(a), provides for reporting of equity securities positions and changes in positions by the issuer's officers, directors, and 10% shareholders; Section 16(b), 15 U.S.C. § 78p(b), permits the issuer to recover "short swing" profits by such insiders if they buy and sell, or sell and buy, the issuer's equity securities within six months.

concepts of beneficial ownership that are similar to, and often expressly derived from, Section 13(d).[6] The adoption of a novel and broad definition of beneficial ownership that sweeps up participants in the vast TRS market could have unintended and undesirable consequences far beyond this case.

In summary, the district court's unnecessary conclusion that "substantial reasons" would support a finding that the long party to a TRS should be deemed the "beneficial owner" of shares held by its counterparty as a hedge is wrong as a matter of law. It is also ill-advised as a matter of policy, and contrary to the settled understanding — endorsed by the SEC Staff — of who is a beneficial owner for purposes of the reporting requirements of Section 13(d). Because this dictum will create confusion and uncertainty if not corrected, this Court should disavow it and reaffirm the settled definition of beneficial owner.

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[6] For example, the term "beneficial ownership" in the conversion regulations of the Federal Home Loan Bank Board is intended to have the same meaning as in Section 13(d). 41 Fed. Reg. 50415 (November 16, 1976). The Federal Deposit Insurance Corporation relies on the Section 13(d) definition of beneficial ownership for purposes of the Depository Institution Management Interlocks Act, 12 U.S.C. § 3201-08, and related rules. 1982 FDIC Interp. Ltr. LEXIS 22 (Dec. 30, 1982). Concepts of beneficial ownership are integral to the definition of "control" in the Bank Holding Company Act of 1956, 12 U.S.C. § 1841(a)(2)(A), to the definition of "affiliate" in the Investment Company Act of 1940, 15 U.S.C. § 80a-2, and to the definition of "control" in many state insurance regulatory statutes. E.g., N.Y. Ins. Law § 1501 (Consol. 2008). Shareholder rights plans frequently are tied to the concept of Section 13(d) beneficial ownership. See Moran v. Household Int'l, Inc., 490 A.2d 1059, 1080 (Del. Ch. 1985); Hu & Black, Equity and Debt Decoupling and Equity Voting II: Importance and Extensions, 156 U. Pa. L. Rev. 625, 726 (2008) ("The definition of ownership used in most [shareholder rights plans] is borrowed from Exchange Act section 13(d).") The Massachusetts anti-takeover statute expressly refers to the Section 13(d) standard of beneficial ownership. Mass. Gen. Laws Ann. ch. 149, § 183 (2008).

II

A PARTY TO A TOTAL RETURN SWAP SHOULD NOT BE DEEMED TO BE ENGAGED IN A "PLAN OR SCHEME TO EVADE" BASED SOLELY ON AN INTENT TO INVEST WITHOUT TRIGGERING A SECTION 13(d) REPORTING REQUIREMENT

After declining to decide whether TCI was a beneficial owner of CSX shares as defined by Exchange Act Rule 13d-3(a), the district court nonetheless concluded that TCI should be "deemed" a beneficial owner under Rule 13d-3(b) because it entered into TRSs, instead of purchasing shares outright, as part of a "plan or scheme to evade the reporting requirements of section 13(d). . . . ." A general rule making the long party to a TRS subject to Rule 13d-3(b) whenever one of its purposes, or even its sole or dominant purpose, is to invest without triggering a Section 13(d) reporting requirement would misread Rule 13d-3(b) and would be contrary both to the SEC Staff's announced view and to the general industry understanding of the law. As the SEC Staff declared in its amicus letter, "the long party's underlying motive for entering into the swap transaction generally is not a basis for determining whether there is a 'plan or scheme to evade.'" JA5550. This Court should endorse the SEC Staff's position. It should clearly specify that the long party to a TRS holder will be "deemed" a beneficial owner under Rule 13d-3(b) only if it enters into additional agreements with its counterparty relating to the indicia of beneficial ownership identified in Rule 13d-3(a) — the voting or disposition of shares of the referenced security.

In reaching its conclusion that TCI should be "deemed" the beneficial owner of the CSX shares referenced in its TRSs, the district court relied principally on what it perceived to be TCI's motive of avoiding Section 13(d) disclosure by using TRSs rather than outright purchases of CSX stock. Starting with the proposition that "[t]he purpose of Section 13(d) is to alert shareholders of 'every large, rapid aggregation or accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control,'" JA5631 (citing GAF Corp. v. Milstein, 453 F.2d 709, 717 (2d Cir. 1971)), the district court concluded that Rule 13d-3(b) was designed to require disclosure "where there is accumulation of securities by any means with a potential shift of corporate control, but no beneficial ownership." It then apparently concluded that TCI fit this standard because it caused someone else — its TRS counterparties — to accumulate securities at a time when it contemplated a possible shift in corporate control, and structured its trading in a manner designed to avoid reporting these facts.

The problem with this reasoning is that the parties who accumulated the securities — the TRS counterparties — had no intentions whatsoever with respect to any potential shift in corporate control, while the party whose intentions may have included a possible shift in corporate control — TCI — had no beneficial ownership and no ability to acquire beneficial ownership based on the

TRSs alone. TCI's filing obligations under Section 13(d) are thus made to turn entirely on its subjective motives at the time it entered into the TRSs.[7]

The SEC Staff, in its response to the district court's invitation for comment, correctly rejected the district court's emphasis on motive:

> [T]he long party's underlying motive for entering into the swap transaction generally is not a basis for determining whether there is, 'a plan or scheme to evade.' . . .
>
> [T]aking steps with the motive of avoiding reporting and disclosure generally is not a violation of Section 13(d) unless the steps create a false appearance.

JA5549.

The district court concluded that TCI in fact created a "false appearance" and, therefore, fell within the exception identified by the SEC Staff to the general rule that motive is irrelevant. In the district court's view, TCI created "the false appearance that there is no large accumulation of securities that might

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[7] The district court also appears to have been under the misimpression that Section 13(d) was meant to uncover the intent to influence the management or control of a registered company by any shareholder, no matter what the size of its actual beneficial ownership, through a proxy contest or otherwise. However, Congress made quite clear in adopting the Williams Act that proxy contests were already regulated by the proxy rules, which have been consistently updated to keep pace with industry practice, and that the purpose of Section 13(d) was to regulate potential tender offers. Section 13(d) is concerned only with shareholders who can influence management through the size of their beneficial ownership stake: "an ownership of substantially less than five percent would generally have little influence on control of an issuer." Report of the Securities and Exchange Commission on Beneficial Ownership Reporting Requirements Pursuant to Section 13(h) of the Securities Exchange Act of 1934, Exchange Act Release No. 33-6268 (Dec. 4, 1980), 1980 Fed. Sec. L. Rep. (CCH) ¶ 82,616 at 83,319.

have a potential for shifting corporate control." JA5629. But this does not seem to be the kind of "false appearance" the SEC Staff had in mind. The accumulation of securities by TCI's counterparties did not, by itself, have any potential for shifting corporate control, and TCI, the party that may have had an interest in a change in corporate control, was not engaged, merely by virtue of entering into various TRSs, in any accumulation of securities.

The district court's view would appear to hold that there always is a false appearance if the long party to a TRS does not count the shares its counterparty may (or may not) have purchased to hedge its TRS position and treat its long TRS position as the legal equivalent of owning the underlying shares. This mistaken and overboard interpretation of Rule 13d-3(b) leads to the conclusion that the district court declined to reach directly in its discussion of Rule 13d-3(a): that a long party to a TRS is a beneficial owner of the referenced shares.

This result is wrong as a matter of law and likely to create undesirable uncertainty about reporting obligations under Section 13(d). Participants in the TRS market are generally aware of Section 13(d) reporting requirements and at present generally follow the accepted understanding that a party to a TRS does not acquire beneficial ownership of the referenced shares for Section 13(d) purposes. The belief that TRS interests are not required to be reported under Section 13(d) is thus generally part of the mix of information available to a party when it considers

the form of its investment and could always, particularly after the fact, be considered a "motive" for using a TRS rather than a purchase of shares. If a motive to avoid disclosure suffices to bring a TRS holder under the alternative reporting requirements of Rule 13d-3(b), then all TRS holders will be at risk of being found, in hindsight or otherwise, to be de facto beneficial owners, and treating all TRSs as the equivalent of share purchases for Section 13(d) purposes will be the only safe and prudent course to follow. Such a result would be unprecedented and improper.

Investors often have legitimate and unobjectionable reasons for wanting to invest without triggering a Section 13(d) filing obligation. A Section 13(d) filing is likely to cause an increase in a company's share price, thus increasing an investor's cost of additional investment. Having made a Section 13(d) filing, an investor is obliged to amend it as required. Subsequent disclosure of a reduced position may cause a company's share price to decline, impairing the value of the investor's remaining investment. Unnecessary disclosures thus impose economic costs on investors, and this may reduce incentives to identify undervalued companies and to work to improve their performance. All shareholders are harmed by this unnecessary interference with normal market incentives. See JA5486-5487.

Any finding that a long party to a TRS is engaged in a "plan or scheme to evade" the reporting requirements of Section 13(d) should not turn on the bare TRS agreement itself or on the motives or intentions of the party investing through a TRS. Rather, it should require additional agreements between the parties to the TRS that convey one or more of the Rule 13d-3(a) indicia of beneficial ownership — voting power and power to dispose of the referenced securities.

The SEC gave an example of such an agreement when it adopted Rule 13d-3(b). In the SEC's example, a beneficial owner of shares divests itself of ownership by giving a short-term irrevocable voting proxy to a third party. The proxy expires by its terms prior to a key corporate event. Although not literally the beneficial owner of the shares after it has irrevocably, but temporarily, granted voting rights to a third party, the original acquirer of the shares is nonetheless "deemed" a beneficial owner under Rule 13d-3(b). Adoption of Beneficial Ownership Requirements, Exchange Act Release No. 34-13291 (Feb. 24, 1977), 42 Fed. Reg. 12344, 12347.

We do not address whether, in this case, TCI was party to agreements relating to the powers of beneficial ownership such that it was properly deemed a beneficial owner of CSX shares under Rule 13d-3(b). Should the Court find that it was, however, it should articulate a clear, narrow and objective basis for this finding

that does not create legal uncertainty for the vast majority of parties to standard TRS agreements.

III

GROUP ACTIVITY REQUIRES AN AGREEMENT, NOT MERELY INFORMATION SHARING OR PARALLEL INVESTMENT BEHAVIOR

A finding that a group exists under Section 13(d)(3), requiring members of the group to be treated as a single person for filing purposes, is necessarily highly fact-specific. Any ruling on the group issue by this Court should make clear that shareholders are free to share views about a company without fear of being deemed a group for Section 13(d) reporting purposes, so long as they do not "act together for the purpose of acquiring, holding, voting or disposing of equity securities," Exchange Act Rule 13d-5(b)(1), 17 C.F.R. § 240.13d-5(b)(1).

"Section 13(d) allows individuals broad freedom to discuss the possibilities of future agreements without filing under securities law." Pantry Pride, Inc. v. Rooney, 598 F. Supp. 891, 900 (S.D.N.Y. 1984). The statute is "carefully drawn to permit parties seeking to acquire large amounts of shares in a public company to obtain information with relative freedom, to discuss preliminarily the possibility of entering into agreements and to operate with relative freedom until they get to the point where they do in fact decide to make arrangements which they must record under the securities laws." Lane Bryant, Inc. v. Hotleigh Corp., No. 80 Civ. 1617, 1980 WL 1412, at *1 (S.D.N.Y. June 9, 1980).

Here, the district court looked with apparent disfavor on the practice by TCI personnel of beginning conversations with other CSX shareholders or potential shareholders with a formulaic recitation that the parties to the conversation were not a group. JA5562, 5634. To be sure, such recitations should not be dispositive. At the same time, many investors employ internal policies and procedures that are intended to emphasize the seriousness of entering into agreements with other investors to prevent individual, unauthorized employees from entering into agreements with other investors, and to remind parties who share information but have not reached agreements that they are completely free to pursue their own perceived interests. These policies and procedures include reminding participants in calls and meetings that the parties do not intend to reach an agreement that would constitute them a group, policies against sharing written information with other investors, see JA5634, or policies requiring senior executive approval of any decision to reach an agreement with a third party investor. Such practices are perfectly healthy and desirable and should not, without more, be taken as evidence of a purpose to conceal an agreement to coordinate investment plans.

Similarly, the district court appeared to place great emphasis on the history of communications about CSX between TCI and 3G, and the fact that one or both parties often engaged in trading activity with respect to CSX following such communications. Such patterns of information-sharing and trading following

information-sharing are commonplace among investors. They should not be viewed with suspicion by themselves, and if the parties to such communications later reach an agreement, that later agreement should not, without more, be read retroactively into the earlier commonplace communications. The district court's judgment by hindsight in effect misconstrues what may be an evolving process and thus may find group status before it is justified.

We offer no opinion whether or not a group was in fact formed in this case. Any affirmance of the district court's finding of a group in this case, however, should underscore that the finding rests on the existence of an agreement, and that information-sharing and even parallel activity based on common interests, but without agreement, does not create a group.

CONCLUSION

Regardless of the result it reaches on the facts of this case, this Court should adopt three clear rules: (1) a TRS, standing alone, does not confer beneficial ownership; (2) Rule 13d-3(b) requires an agreement that conveys one or more of the Rule 13d-3(a) indicia of ownership and does not apply based solely on a party's motive; and (3) group activity requires an agreement to act together for the purpose of acquiring, holding, voting or disposing of equity securities, not merely information-sharing or parallel investment activity based on common interests. The MFA takes no position on the result that should follow from an application of these rules in this case.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B). The text of this brief was prepared in Times New Roman 14 point font, and according to Microsoft Word's word count feature, consists of 5213 words, excluding its certificates of compliance and service.

/s/ Martin Klotz
Martin Klotz

ANTI-VIRUS CERTIFICATION

Case Name: CSX Corporation v. The Children's Investment Fund

Docket Number: 08-2899-cv(L)

I, Samantha Collins, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 7/18/2008) and found to be VIRUS FREE.

/s/ Samantha Collins
Samantha Collins
Record Press, Inc.

Dated: July 18, 2008