# 08-2899-cv(L)

08-3016-cv (XAP)

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United States Court of Appeals
for the Second Circuit

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CSX CORPORATION,
*Plaintiff/Appellant/Cross-Appellee,*

MICHAEL WARD,
*Third-Party Defendant,*

v.

THE CHILDREN'S INVESTMENT FUND MANAGEMENT (UK) LLP,
THE CHILDREN'S INVESTMENT FUND MANAGEMENT (CAYMAN) LTD.,
THE CHILDREN'S INVESTMENT MASTER FUND,
3G CAPITAL PARTNERS LTD., 3G CAPITAL PARTNERS, L.P., 3G FUND, L.P.,
CHRISTOPHER HOHN, SNEHAL AMIN, and
ALEXANDRE BEHRING A/K/A ALEXANDRE BEHRING COSTA,
*Defendants/Appellees/Cross-Appellants.*

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**On Appeal from the United States District Court
for the Southern District of New York**

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**BRIEF OF WASHINGTON LEGAL FOUNDATION,
NATIONAL ASSOCIATION OF MANUFACTURERS,
AND BUSINESS ROUNDTABLE AS *AMICI CURIAE*
IN SUPPORT OF PLAINTIFF/APPELLANT**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, the Washington Legal Foundation (WLF) states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. The National Association of Manufacturers (NAM) and the Business Roundtable state that they are corporations organized under § 501(c)(6) of the Internal Revenue Code. WLF, NAM, and the Business Roundtable have no parent corporations, nor do they have any stock owned by a publicly held company.

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## BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF/APPELLANT, URGING REVERSAL

## IDENTITY AND INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF has litigated in support of corporate shareholders, opposing abusive securities class-action litigation that imposes substantial costs on both the American economy and the shareholders who invest in our Nation's publicly traded corporations. *See, e.g., Stoneridge Investment Partners, LLC v. Scientific Atlanta, Inc.*, 128 S. Ct. 761 (2008). Through its Investor Protection Program, WLF has petitioned the Securities and Exchange Commission to crack down on manipulative trading schemes such as "naked" short selling of securities, an activity that often causes substantial harm to shareholders.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America’s economic future and living standards. Many of the NAM's members are publicly traded corporations and it thus supports efforts to ensure that contests for corporate control are conducted in a manner that provides shareholders with timely and accurate information about the intentions of all contestants.

Business Roundtable is an association of chief executive officers of leading U.S. companies with $4.5 trillion in annual revenues and nearly 10 million employees. Business Roundtable has long been a strong supporter of corporate governance reforms, including Sarbanes Oxley, the enhanced listing standards of the exchanges, additional disclosures on executive compensation, and majority voting for directors. Business Roundtable is committed to promoting the accountability and responsiveness of boards, enhancing transparency so investors can make informed decisions, and facilitating communications and understanding between companies and their shareholders.

The district court declined to provide meaningful relief in this case, despite finding that the Defendants-Appellees engaged in deliberate and egregious violations of the Williams Act. *Amici* are concerned that if the district court decision is allowed to stand, groups seeking to exercise control over American corporations will have little or no incentive to abide by the Act. In *amici*'s view, it cannot be the law that those who deliberately violate the Act's disclosure provisions should be allowed to retain the benefits of their misconduct – to the detriment of the shareholders that the Act was intended to protect.

*Amici* address the issue of appropriate relief only. They do not address Defendants-Appellees' contention that the district court erred in finding that they violated the Williams Act.

## STATEMENT OF THE CASE

This case arises in connection with an ongoing effort by Defendants-Appellees to gain effective control of Plaintiff-Appellant CSX Corporation, one of the largest railroads in the United States.[1] TCI began investing in CSX in October 2006, while 3G began purchasing CSX common stock in February 2007. By mid-February 2007, TCI had amassed TRSs ("total return swaps") referencing 13.6% of CSX common stock, while 3G owned 8.3 million shares of CSX common stock, or 1.9% of shares outstanding. By mid-April, the combined holdings of TCI and 3G – including both TRSs and actual shares – represented more than 19% of CSX's

[1] Defendants-Appellees associated with The Children's Investment Fund Management (UK) LLP are referred to herein as "TCI." Defendants-Appellees associated with 3G Capital Partners Ltd. are referred to herein as "3G."

market value.[2] Those holdings remained relatively constant for the remainder of 2007.

On December 10, 2007, TCI and 3G first filed a Schedule 13D with the Securities and Exchange Commission (SEC) regarding their CSX holdings. The filing disclosed that they had entered into an agreement (along with three other individuals) to coordinate their activities with respect to CSX stock and to conduct a proxy solicitation. It also disclosed that those entering into the agreement (the "Group") owned 8.3% of CSX shares outstanding, and that they owned TRSs that gave them economic exposure to an additional 11.8% of CSX's shares. In January 2008, the Group provided notice that it intended to nominate individuals to serve on CSX's board of directors, and to present a proposal that would amend the CSX bylaws to grant shareholders holding at least 15% of all shares outstanding the ability to call a special meeting of shareholders. CSX management nominated its own slate of directors, urged shareholders not to support any of the Group's five nominees, and supported a competing proposal for amending the CSX bylaws.

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[2] Although TCI's economic exposure to CSX remained relatively constant throughout the period, in April 2007 TCI shifted its position by unwinding some of its TRSs and purchasing CSX stock. By the middle of the month, TCI owned about 4% of CSX shares outstanding. The district court determined that TCI shifted its position because it anticipated a proxy fight – actual shares possess voting rights, and thus they are of more certain utility than TRSs in a proxy fight.

The CSX annual meeting of shareholders, at which these issues were addressed, took place on June 25, 2008. The final results of the shareholder votes will be announced in the coming weeks.

CSX filed suit against TCI and 3G on March 17, 2008. CSX alleged, *inter alia*, that TCI and 3G had violated § 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d),[3] by failing to disclose in a timely manner their significant positions in CSX and by failing to disclose in a timely manner the formation of a group. TCI and 3G filed a counterclaim alleging, *inter alia*, that CSX violated § 14(a) of the Exchange Act, 15 U.S.C. § 78n(a), because its proxy statement was materially false and misleading.

In its June 11, 2008 Opinion, the district court agreed with CSX that TCI and 3G had violated § 13(d). The court declined to decide whether TCI, by virtue of its extensive CRS holdings, should be deemed under Rule 13(d)-3(a) to be the beneficial owner of the CSX shares held as hedges by its short counterparties. Slip Op. 64.[4] The court instead held that TCI should be deemed to be the beneficial

[3] Section 13(d) was added to the Exchange Act in 1968 as § 2 of the Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968).

[4] The banks with which TCI entered into TRSs were not interested in taking a short position on CSX stock. Accordingly, they regularly bought shares of CSX common stock in amounts equal to their short exposure created by the TRSs they entered into with TCI. In late 2007, TCI moved most of its TRSs to

owner under Rule 13(d)-3(b) because, the court found, "TCI created and used the TRSs with the purpose and effect of preventing the vesting of beneficial ownership in TCI as part of a plan or scheme to evade the reporting requirements of Section 13(d)." *Id.* at 72. The court also held that no later than February 13, 2007, TCI and 3G formed a group for purposes of holding CSX shares, and thus should be deemed a "person" under § 13(d). *Id.* at 72-77.

Based on those findings, the court determined that TCI and 3G had violated § 13(d) by failing to report their greater-than-5% CSX holdings in February 2007, and instead waiting until December 2007 to file a Schedule 13D.[5] The court determined that during the period that TCI and 3G remained in violation of § 13(d), their holdings in CSX increased by 6.4% of the total CSX shares

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Deutsche Bank. In response, Deutsche Bank increased its hedge position in CSX; by December 2007, it owned 36.7 million shares of CSX, or 9.1% of all common stock outstanding.

[5] The conclusion that TCI and 3G violated § 13(d) followed naturally once the district court determined that TCI and 3G had formed a group, even had it not also found that TCI should be deemed the beneficial owner of CSX shares held by its short counterparties. Beginning in April 2007 and at all times thereafter, TCI and 3G together have held well more than 5% of the CSX common stock outstanding. Quite apart from their TRS holdings, TCI and 3G were required by the Williams Act – once they had formed a group – to report combined holdings exceeding 5% of CSX stock. The group passed that threshold in April 2007, yet TCI and 3G did not file a Schedule 13D until eight months later.

outstanding.[6] The court held that the violations had not been inadvertent but rather that TCI and 3G had hatched a "scheme to evade the reporting requirements of Section 13(d)" and thereby "conceal[] precisely what Section 13(d) was intended to force into the open." *Id.* at 69.

That scheme did not end once TCI and 3G filed their initial Schedule 13D in December 2007. Rather, the district court found, TCI and 3G officials provided false testimony throughout the district court proceedings in an effort to conceal that they had been working jointly – from February 2007 forward – to gain effective control of CSX.[7]

The district court nonetheless denied CSX meaningful relief. It issued a permanent injunction against further § 13(d) disclosure violations by TCI and 3G. But it denied CSX's request that it bar TCI and 3G from voting the 6.4% of CSX shares they acquired during the period (February to December 2007) that they were

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[6] Slip Op. 115. CSX has calculated the increase as constituting 6.61% of CSX shares outstanding as of April 2008. CSX Br. 27 n.23.

[7] CSX's opening brief (at 35-39) thoroughly summarizes the numerous instances in which the district court found that TCI and 3G officials testified falsely. Accordingly, *amici* will not repeat those findings here. Suffice to say that, in light of those findings, *amici* are unmoved by Defendants-Appellees' assertions that the district court's group-formation holding creates intolerable uncertainty regarding the § 13(d) reporting obligations of businesses acting in good faith. Businesses acting in good faith do not repeatedly provide false testimony to federal courts.

in violation of § 13(d) reporting requirements. The court determined that such injunctive relief was impermissible in light of the Supreme Court's decision in *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975), and this Court's decision in *Treadway Companies, Inc. v Care Corp.*, 638 F.2d 357 (2d Cir. 1980). The district court determined that *Rondeau* and *Treadway* require those seeking injunctive relief under the Williams Act to demonstrate that they would be irreparably harmed in the absence of an injunction, and that CSX could not demonstrate irreparable injury of the type contemplated by those two decisions. Slip Op. at 105-111. The district judge added, however, that if he had deemed himself free to enjoin TCI and 3G from voting the 6.4% of CSX shares they acquired after February 2007, he would have exercised his discretion to do so. *Id.* at 115.

## SUMMARY OF ARGUMENT

The district court determined that TCI and 3G intentionally and flagrantly violated the Williams Act over an extended period of time, in order to gain an advantage in their efforts to exercise control over CSX. That wrongdoing facilitated a substantial change in the composition of CSX's shareholder base, to the detriment of those CSX shareholders who may not share TCI's and 3G's vision for the company. The court nonetheless declined to adopt a meaningful remedy for the wrongdoing, concluding that it was barred from doing so under federal securities law and traditional equitable principles.

The district court erred with respect to the scope of its remedial powers. The Supreme Court has repeatedly held that the federal courts possess broad powers to redress violations of the securities laws. Those powers include the granting of equitable relief where appropriate to deter wrongdoing and to protect the group for whose benefit the Williams Act was adopted: the shareholders of publicly held companies. Entitlement to an injunction is, of course, conditioned on a showing that shareholders meet the traditional prerequisites for equitable relief, including a showing that they would suffer irreparable harm in the absence of an injunction. But the district court adopted an inappropriately restrictive view of what constitutes harm flowing from Williams Act violations. Such harm encompasses far more than deprivation of information about the intentions and the scope of holdings of those waging fights for control of a corporation; it encompasses any injury to a shareholder arising from a Williams Act violation, and it should be deemed "irreparable" if it cannot readily be compensated by an award of money damages.

As a result of TCI's and 3G's § 13(d) violations, they obtained a significant position in CSX, a position that increased by 6.4% of CSX shares outstanding during the February-to-December 2007 violation period. They very likely could not have obtained their position in CSX for the same price had they disclosed their true holdings and intentions in February 2007, because any such disclosure would have driven up the price of CSX stock. Indeed, TCI and 3G officials candidly admitted that avoiding a price run-up was a principal reason for keeping the wraps on their activities. In other words, had they complied with the law, their voting position within CSX would have been smaller and the positions of other CSX shareholders would have been more significant. Their ability to prevail in any proxy contest would then have depended on their ability to garner a greater degree of support among their fellow shareholders than is currently necessary.

CSX shareholders have now had an opportunity to read the Group's Schedule 13D and its proxy statement. But even assuming the accuracy of those materials, shareholders in June 2008 arguably were faced with the prospect of being forced to take sides in a proxy contest for which they lacked adequate information. Particularly in light of TCI's and 3G's "ballot-stuffing" activities (*i.e.*, changing the composition of the shareholder base by illegally purchasing CSX shares), there are some grounds for asserting that the proxy contest could not be conducted fairly and thus that the district court should have enjoined it from taking place. More importantly, any shareholder who does not share TCI's and 3G's vision for the company has undoubtedly been harmed by their egregious violations of the federal securities laws:  that shareholder's ability to influence TCI's and 3G's efforts has been reduced by their illegal acquisition of CSX shares and concomitant increased voting power.  That harm cannot be compensated by money damages.  Under those circumstances, an entirely appropriate equitable remedy – and one that the district court would have granted had it believed itself empowered to do so – is an injunction prohibiting TCI and 3G from voting their illegally obtained shares at the June 25, 2008 shareholders' meeting.  Such an injunction would not require the courts to take sides in the on-going fight for control of CSX; the control issue would be decided by a majority vote of all legally obtained CSX shares.  But if a majority of those shareholders decide to back the existing board and management, TCI and 3G should not be permitted to thwart the majority will by voting shares that they obtained only as a result of their flagrant violations of federal securities laws.

The district court based its restrictive view of its equitable powers on a misreading of the *Rondeau* and *Treadway* decisions.  *Rondeau* made clear that the normal prerequisites for obtaining equitable relief – including a showing of irreparable harm – apply to Williams Act plaintiffs, but it never mandated the restrictive definition of irreparable harm adopted by the district court.  *Treadway* is similar.  While it determined that the interests of the shareholders in *that* case were fully satisfied once the challenger had corrected arguably misleading Schedule 13D filings and the shareholders had had an opportunity to digest the new information, *Treadway* did *not* hold that the provision of accurate information eliminates the threat of irreparable harm to shareholders in *all* cases.

*Amici* urge the Court to take note of the increasing frequency with which hedge funds have been mounting challenges to the incumbent boards and management of publicly traded companies.  In some instances, those challenges may serve the best interests of shareholders by leading to improved management. But the Court should bear in mind that most hedge fund managers have relatively short-term investment horizons; they are looking to maximize a stock's price over the short term and then to move on to other investment opportunities.  Such interests often conflict with those of shareholders who seek to stay invested in a corporation for the long haul and are focused on long-term, sustained growth. Federal courts must be provided the tools necessary to ensure that hedge funds are not permitted to employ schemes prohibited under the federal securities laws as a means of gaining an unfair advantage over shareholders who do not share their investment goals.

## ARGUMENT

### I. STERILIZATION IS AN APPROPRIATE REMEDY WHERE, AS HERE, TCI'S AND 3G'S ILLEGAL CONDUCT HAS DISADVANTAGED CSX'S LONG-TERM SHAREHOLDERS

Federal courts possess broad powers to redress violations of the securities laws. Indeed, they bear a "duty . . . to be alert to provide such remedies as are necessary to make effective the congressional purpose" of the securities laws and to "adjust their remedies so as to grant the necessary relief." *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). The Supreme Court has "not hesitated to recognize the power of federal courts to fashion private remedies for securities laws violations" when "necessary for the protection of investors" – provided only that the plaintiff carries his "burden of establishing the traditional prerequisites of relief." *Rondeau*, 422 U.S. at 63.

CSX has met that burden here. As the district court found, it demonstrated that TCI and 3G intentionally and flagrantly violated the Williams Act over an extended period of time, in order to gain an advantage in their efforts to exercise control over CSX. It demonstrated that the misconduct enabled them quietly to gain control over a substantial percentage of CSX common stock at a price that would have been unattainable if they had complied with the Williams Act, and that such illegal purchases have strengthened their position to the detriment of those

CSX shareholders who do not share TCI's and 3G's vision for the company. Finally, CSX demonstrated that those shareholders will suffer irreparable harm unless the courts grant injunctive relief to deprive TCI and 3G of their ill-gotten voting power and to deter future misconduct. Accordingly, nothing in either the securities laws or traditional equity principles supports the district court's conclusion that it was precluded from granting CSX an injunction barring TCI and 3G from voting the 6.4% of CSX stock they acquired in violation of the Williams Act.

### A. The Williams Act Was Intended To Protect the Interests of Shareholders of Companies Subject to Fights Over Control

The Williams Act, adopted in 1968, added § 13(d) to the Exchange Act. It imposes reporting requirements on anyone purchasing more than 5% of the common stock of a publicly traded company. Within 10 days of becoming "directly or indirectly the beneficial owner" of the stock, the purchaser must, *inter alia*, file a statement with the SEC listing such information as the number of shares purchased and the purpose for which they were purchased. 15 U.S.C. § 78m(d)(1); 17 C.F.R. § 240.13d-101.

The Williams Act was adopted in response to the increasing number of hostile tender offers being made in the 1960s. Congress made clear it was acting to protect the interests of shareholders of targeted companies, not to aid entrenched management in warding off potentially beneficial takeover bids. For example, in testimony supporting the legislation, SEC Chairman Manual Cohen stated:

> But the principal point is that [the SEC is] not concerned with assisting either side. We are concerned with the investor who today is just a pawn in a form of industrial warfare. . . . The investor is lost somewhere in the shuffle. This is our concern and our only concern.

Hearings on S. 510, Senate Committee on Banking and Commerce, Subcommittee on Securities, 90th Cong., 1st Sess., 178 ("Senate Hearings") (quoted in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 27-28 (1977)).

The Williams Act's principal means of protecting shareholders was to require anyone purchasing large chunks of a corporation's stock to provide shareholders with "adequate information regarding the qualifications and intentions" of the purchaser, thereby enabling shareholders to make a more fully informed response to any tender offer. *Rondeau*, 422 U.S. at 58. But Congress never suggested that the only type of shareholder injury with which it was concerned was the absence of important information, or that any injury to a shareholder could be fully remedied by supplying him with all previously withheld information. To the contrary, the Supreme Court has stated repeatedly that the purpose of the Williams Act was to protect shareholders from *any* injury arising from fights over corporate control, not simply to keep shareholders well informed. *See, e.g.*, *Chris-Craft Industries*, 430 U.S. at 28 ("The legislative history thus shows that Congress was intent upon regulating takeover bidders, theretofore operating covertly, in order to protect the shareholders of targeted companies."); *id.* at 29 ("The two major protagonists the bidder and the defending management do not need any additional protection, in our opinion. . . . Rather, the investor who is the subject of these entreaties of both major protagonists is the one who needs a more effective champion.") (quoting testimony of Prof. Hayes, Senate Hearings at 57); *id.* (purpose of Williams Act was "the protection of investors").

Accordingly, the district court erred in suggesting that the only type of injury – irreparable or otherwise – that the Williams Act was designed to guard against was inadequate shareholder knowledge. Slip Op. at 107. Rather, the Act was designed to protect shareholders from *any* injury that could arise due to failure of large shareholders to disclose the fact of, and the purposes for, their stock acquisitions. *See also ICN Pharmaceuticals, Inc. v. Viratek, Inc.*, 2 F.3d 484, 490 (2d Cir. 1993) (federal securities laws regulating contests for corporate control are intended not only to require "full disclosure" but also to ensure a "level playing field" for all participants). Maintaining a level playing field requires that shareholders be afforded redress for any and all injuries incurred as a result of violations of the Williams Act's requirements. Maintaining a level playing field also requires that courts be empowered to deprive Williams Act scofflaws of the fruits of their illegal conduct; otherwise, they will not be deterred from continuing to flout the Williams Act whenever it suits their purposes to do so.

### B. Sterilizing the CSX Shares Illegally Obtained by TCI and 3G Is an Appropriate Means of Leveling the Playing Field and Ensuring that Shareholders Are Not Irreparably Harmed by TCI's and 3G's Misconduct

There is little dispute that their disregard of § 13(d) disclosure requirements allowed TCI and 3G to acquire CSX stock at a significantly reduced price. As the district court found:

> TCI admitted that one of its motivations in avoiding disclosure was to avoid paying a higher price for the shares of CSX, which would have been the product of front-running that it expected would occur if its interest in CSX were disclosed to the market generally. Indeed, TCI acquired only approximately 4.5 percent in physical CSX shares to remain safely below the 5 percent reporting requirement until it was ready to disclose its position.

Slip Op. 66. *See also* CSX Br. 4-5. Had TCI and 3G filed their required Schedule 13D in February 2007, CSX's share price would have risen, and the Group would likely have paid considerably more for the 6.4% of CSX common stock that it purchased in the ensuing 10 months (if, indeed, it would have been able to make those purchases at all) before finally filing its Schedule 13D in December 2007.

By failing to grant any effective relief to CSX, the district court has permitted TCI and 3G to keep their ill-gotten gains – enhanced voting power – to the detriment of CSX shareholders who do not share their corporate goals.

Any time a court considers granting injunctive relief against a corporate challenger, it should be careful to avoid relief that unfairly tilts the playing field in the direction of the incumbent management. Granting such relief has the potential to block attractive tender offers or proxy solicitations and thereby harm the shareholders for whose benefit the injunctive relief ostensibly is being granted. But the relief sought here – sterilization of the 6.4% of CSX shares illegally obtained by TCI and 3G in the February-to-December 2007 period – will not result in an unfairly tilted playing field.[8] It would permit the proxy fight to be determined by holders of 93.6% of the CSX shares outstanding, a total that includes many shares owned by TCI and 3G. It would prevent TCI and 3G from reaping the benefits of their flagrant violations of the Williams Act.[9]

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[8] The danger here actually runs in the other direction. Unless the injunctive relief requested by CSX is granted, the playing field will remain tilted in favor of TCI and 3G, whose illegal conduct has rendered a fair election virtually impossible in the absence of judicial intervention.

[9] Indeed, the large number of shares accumulated by TCI and 3G – both legally and illegally – means that, if all their shares are counted, they can prevail in a proxy fight by attracting the votes of only a small minority of all other shareholders. For example, an analysis conducted by the Group's proxy solicitor

Most important, the relief sought by CSX is necessary to prevent irreparable harm to the many CSX shareholders who do not share TCI's and 3G's vision for the company. The ability of such shareholders to contest TCI's and 3G's efforts has been reduced by the latter's illegal acquisition of CSX shares. An injunction prohibiting TCI and 3G from voting their illegally obtained shares at the June 25, 2008 shareholders' meeting would not require the courts to take sides in the on-going fight for control of CSX: the control issue would still be decided by a majority vote of all legally obtained CSX shares. But if a majority of those shareholders decides to back existing management, TCI and 3G should not be permitted to thwart the majority will by voting shares that they obtained in connection with their flagrant violations of federal securities laws.

The First Circuit has explicitly endorsed the propriety of injunctive relief that goes beyond merely directing the corporate challenger to comply with disclosure requirements and to correct prior misleading disclosures. *San Francisco Real Estate Investors v. Real Estate Investment Trust of America,* 701 F.2d 1000 (1st Cir. 1983). Indeed, the First Circuit endorsed the propriety of such relief at the

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concluded that if the TRS counterparties voted with the Group (a highly likely assumption, given that the counterparties, particularly Deutsche Bank, had such strong financial incentives to support TCI), TCI would need the support of only 16.2% of the shares of CSX's institutional investors in order to prevail. *See* CSX Br. at 40.

specific request of the SEC, which filed an *amicus curiae* brief in the case. The court said:

> [T]he SEC in its amicus brief suggests that there are occasions when "[a]bsent a remedy beyond ordering corrective disclosure, a person will have little incentive to comply with the statute." It argues that in determining whether more than corrective disclosure is called for, we should, while taking care not to tip the balance between offeror and target sought to be achieved by the Williams Act, consider (1) whether a substantial number of shares were purchased after the misleading disclosures and before corrective disclosure, (2) whether the curative disclosure occurred simultaneously with or on the eve of the tendor offer, and (3) whether the violation was egregious. [¶] *These seem like sensible tests*.

*Id.* at 1009 (emphasis added).

*Amici* believe that an injunction preventing TCI and 3G from voting their illegally obtained shares at the June 25, 2008 annual shareholders' meeting is appropriate and necessary to prevent other CSX shareholders from being irreparably harmed.[10] Indeed, there even are some grounds for concluding that, in light of TCI's and 3G's egregious misconduct, an injunction barring the proxy contest from going forward is also warranted. It is true, of course, that CSX

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[10] Under the SEC standards adopted by the First Circuit, an injunction preventing the voting of those shares is surely warranted, given that: (1) TCI and 3G purchased a substantial number of CSX shares illegally before filing its Schedule 13D; (2) right up until the date of the shareholders' meeting, TCI and 3G were still disputing Judge Kaplan's finding that they had violated § 13(d); and (3) their violations can properly be categorized as "egregious" in light their persistent and deliberate nature.

shareholders had an opportunity to read the Group's Schedule 13D and its proxy statement prior to the June 25 annual meeting. But even assuming the accuracy of those materials, shareholders in June 2008 were arguably faced with the prospect of being forced to take sides in a proxy contest for which they lacked adequate information.[11] Particularly in light of TCI's and 3G's "ballot-stuffing" activities (*e.g.*, changing the composition of the shareholder base by illegally purchasing CSX shares) there are some grounds for asserting that the proxy contest could not be conducted fairly and thus that the district court should have enjoined it from taking place.

*Amici* are also mindful of the need to impose a temporal limit on any injunctive relief. "[A] permanent, as distinguished from corrective, ban against participation in a takeover should rarely, if ever, be imposed because of securities law violations, and certainly only as a last resort." *ICN Pharmaceuticals*, 2 F.3d at 490. Accordingly, should TCI and 3G still be CSX shareholders at the time of the 2009 annual shareholders' meeting, the rationale for continuing an injunction against the voting of all illegally obtained shares would be considerably weakened.

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[11] For example, TCI, 3G, and some of their supporters told shareholders that Judge Kaplan (who issued his ruling just weeks before the election) was wrong in concluding that TCI and 3G had blatantly and deliberately violated the Williams Act.

But sterilization of the illegally obtained shares is a wholly appropriate remedy on at least the first occasion on which TCI and 3G attempt to vote them. Sterilization at the June 25 annual shareholders' meeting is particularly appropriate because TCI's and 3G's scheme to deceive continued right through the May 2008 proceedings in the district court, during which (the district court found) officials from TCI and 3G repeatedly provided false testimony in an effort to conceal that they had been working jointly – from February 2007 forward – to gain effective control of CSX. *See* CSX Br. 35-39 (summarizing numerous instances in which the district court found that TCI and 3G officials testified falsely).

## II. THE DISTRICT COURT'S RESTRICTIVE VIEW OF ITS EQUITABLE POWERS WAS BASED ON A MISREADING OF *RONDEAU* AND *TREADWAY*

The district court's restrictive view of its equitable powers was based largely on its reading of two decisions: the Supreme Court's *Rondeau* decision and this Court's *Treadway* decision. *Amici* respectfully submit that the district court misinterpreted those decisions. While in each instance the court declined to grant broad injunctive relief, neither court suggested that the relief sought here – sterilization of a portion of the Group's shares – is categorically foreclosed.

*Rondeau* involved an investor who was unaware of the existence of the then-recently enacted Williams Act and thus failed to file a Schedule 13D in a timely manner after purchasing more than 5% of the stock of a publicly traded corporation. Soon after being informed of the disclosure requirements, he filed a Schedule 13D, about three months after the deadline established by the Williams Act. The investor never undertook a proxy contest or made a tender offer. The corporation nonetheless filed suit, alleging that the late filing violated the Williams Act and requesting injunctive relief that included a bar on voting existing stock and purchasing new stock and a requirement that the investor sell all his stock. The district court declined to issue injunctive relief on the grounds that the investor's violation had not been deliberate and that the corporation had not suffered any damages. The appeals court reversed, finding that a Williams Act plaintiff need not show irreparable harm in order to obtain injunctive relief; it ordered that the investor be barred from voting his shares for five years.

The Supreme Court reversed the appeals court's ruling and reinstated the district court's ruling. *Rondeau,* 422 U.S. at 65. The Court could find nothing in the legislative history of the Williams Act suggesting that Congress intended to relieve Williams Act plaintiffs of the burden of establishing the "traditional prerequisites of relief" – which in the case of injunctive relief includes a demonstration that irreparable harm is threatened in the absence of an injunction. *Id.* at 63. The Court also held that the possibility that the plaintiff's shareholders would suffer harm of *any* type – let alone irreparable harm – was too remote to warrant injunctive relief, particularly given "the lack of an imminent contest for control" of the corporation. *Id.* at 60.

Nothing in *Rondeau* precludes an award of injunctive relief in a Williams Act case when, as here, irreparable harm *is* threatened. Indeed, *Rondeau* provided no definition of what should be deemed to constitute irreparable harm in a Williams Act case. The district court held that *Rondeau* limits "irreparable harm" findings to cases in which § 13(d) violations have resulted in shareholders being denied information regarding potential changes in corporate control and that "private plaintiffs usually are unable to establish an irreparable harm once the relevant information has been made available to the public," because (according to the district court) the provision of such information is the only interest that § 13(d) seeks to protect. Slip Op. at 107. Nothing in *Rondeau* supports the district court's narrow definition of "irreparable harm" and its narrow understanding of the interests § 13(d) seeks to protect. While *Rondeau* states that § 13(d) is intended to protect shareholders' interests in receiving information regarding potential changes in corporate control, it nowhere suggests that that is the *only* interest that § 13(d) is intended to protect.

Nor does *Treadway* preclude a finding of irreparable harm in this case. In

*Treadway*, the defendant (Care Corp.) filed its Schedule 13D in a timely manner, but the company whose shares Care purchased (Treadway) contended in its lawsuit that the Schedule 13D contained false statements regarding Care's investment objectives. Treadway sought to require Care to divest itself of Treadway stock. The district court dismissed the § 13(d) claim on the ground that "any deficiencies" in Care's first Schedule 13D were cured once Care amended its filing. This Court affirmed, finding that four months elapsed between the filing of the curative amendment and Care's initiation of a proxy contest, that "the informative purpose of § 13(d) had thereby been fulfilled," and thus that there was no basis for injunctive relief because Treadway faced no risk of irreparable harm. *Treadway*, 638 F.2d at 380. The district court interpreted *Treadway* as precluding an irreparable harm finding "once the relevant information has been made available to the public" through a Schedule 13D filing. Slip Op. at 107.

*Treadway* held no such thing. The *actual claim* in *Treadway* was that the plaintiff's shareholders were suffering irreparable injury because they were being denied information about Care's investment plans. Thus, this Court correctly held that the claimed irreparable harm disappeared once Care supplied the requisite information. But *Treadway* contained no irreparable injury claim even remotely similar to the irreparable injury asserted in this case: that TCI and 3G used their deliberate noncompliance with the Williams Act as a means of secretly accumulating CSX stock at a price they could not have obtained had they complied with the Williams Act, and that CSX shareholders were prejudiced by the Group's resulting increased power within CSX. Because no such claim was raised in *Treadway*, the Court had no occasion to consider whether such claims could constitute irreparable harm.

## III. THE INCREASING WILLINGNESS OF HEDGE FUNDS TO SEEK CONTROL OF PUBLICLY TRADED COMPANIES WARRANTS THE COURT'S CAREFUL CONSIDERATION

Hedge funds have displayed an increased willingness to mount shareholder challenges to publicly traded companies. As this case illustrates, hedge funds now have both the will and the resources to take on even the very largest corporations. *Amici* take no position on whether such challenges, when carried out in compliance with the federal securities laws, are a net plus for the American economy.

*Amici* nonetheless urge the Court – when determining what remedies are necessary and appropriate under the securities laws in order to carry out Congress's broad remedial purposes – to take into account several features of the typical hedge fund that often drives its approach to corporate control issues. In particular, most hedge fund managers have relatively short-term investment horizons; they typically seek to maximize a stock's price over the short term and then to move on to other investment opportunities. *See, e.g.*, Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L.REV. 561, 579 (2006).[12] Such interests often conflict with those of shareholders who seek to stay invested in a corporation for the long haul and are focused on long-term, sustained growth.

Moreover, because of the huge amounts of capital available to larger hedge funds and their ability to move assets quickly, hedge funds often are well positioned to take advantage of areas of securities law where potential penalties are minimal. Section 13(d) disclosure requirements appear to be one such area. If the district court's view prevails – that is, if the remedies for § 13(d) violations are to be limited to little more than requiring corrective disclosure – then little can be done to repair the damage to market integrity that occurs whenever, as here, major investors deliberately and flagrantly flout the § 13(d) disclosure requirements. Federal courts must be provided the tools necessary to ensure that hedge funds are not permitted to employ schemes prohibited under the federal securities laws as a means of gaining an unfair advantage over shareholders who do not share their investment goals. Moreover, Congress has made clear that the courts need not await new legislation to create such tools; rather, it has delegated the authority to

[12] *Amici* note that many of the specific criticisms of CSX management leveled by TCI personnel have tended to focus on short-term issues.

the federal courts to craft the tools necessary to address changing conditions within the securities industry. *See, e.g.*, *J.I. Case*, 377 U.S. at 433.

Finally, many commentators have noted the tendency of hedge funds to adopt "wolfpack" behavior, to enter into loose coalitions with other hedge funds for purposes of applying concerted pressure on the management of targeted corporations. *See, e.g.,* Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control,* 155 U. PA. L. REV. 1021, 1080 (2007); Andrew M. Kulka, *The Wolf in Shareholder's Clothing: Hedge Fund Use of Cooperative Game Theory and Voting Structures to Exploit Corporate Control and Governance*, 6 U.C. DAVIS. BUS. L.J. 78, 82 (2005). Indeed, such behavior was evident in this case: the district court found that while TCI and 3G were hiding the extent of their CSX investments from the general public, they were alerting friendly hedge funds to their activities in hopes of persuading those other funds to purchase CSX stock – on the assumption that the managers of those friendly hedge funds would be likely to support TCI and 3G in any proxy contest.[13]

[13] Indeed, TCI's and 3G's efforts to enlist the support of other hedge funds was just one more part of their effort to tilt the playing field in their favor and against the interests of other, longer-term shareholders. Given the Williams Act's well-recognized goal of maintaining a "level playing field" among all participants in contests for corporate control, the tilt caused by TCI's and 3G's resort to a "wolfpack" strategy provides just one more reason why the injunctive relief requested by CSX is essential to restoring a level playing field and

*Amici* urge the Court to keep such tendencies in mind when determining § 13(d) disclosure requirements, as well as the remedies available to those injured by violations of those requirements.

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preventing CSX's shareholders from suffering irreparable harm.

## CONCLUSION

The Washington Legal Foundation, the National Association of Manufacturers, and the Business Roundtable respectfully request that the Court reverse the district court's determination that it was foreclosed as a matter of law from granting Plaintiff/Appellant the injunctive relief it sought.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 6,845, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

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## <u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that on this 17th day of July, 2008, I deposited two copies of the *amicus curiae* brief of WLF, *et al.*, the U.S. Mail, First Class postage prepaid, addressed to the following:

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