CASE NO. 08-1037

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiffs-Appellees,

v.

PIRATE INVESTOR LLC AND FRANK PORTER STANSBERRY,
Defendants.

APPEAL FROM A FINAL JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLANTS-DEFENDANTS PIRATE INVESTOR LLC AND FRANK PORTER STANSBERRY FOR REVERSAL OF THE DISTRICT COURT'S DECISION

Bruce W. Sanford
Lee T. Ellis, Jr.
Bruce D. Brown
Laurie A. Babinski
BAKER & HOSTETLER LLP
1050 Connecticut Avenue NW
Washington Square, Suite 1100
Washington, D.C. 20036
Telephone: (202) 861-1500
Facsimile: (202) 861-1783

Matthew J. Turner
14 West Mount Vernon Place
Baltimore, Maryland 21201
Telephone: (410) 783-8410
Facsimile: (410) 783-8409

Attorneys for Appellants

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1
JURISDICTIONAL STATEMENT 4
ISSUES PRESENTED 5
STATEMENT OF THE CASE 5
STATEMENT OF FACTS 6
SUMMARY OF ARGUMENT 15
STANDARD OF REVIEW 16
ARGUMENT 17

I. The Publisher and Author engaged in no conduct "in connection with the purchase or sale of any security" under § 10(b) 17

A. The Supreme Court requires fraud to "coincide" with the purchase or sale of a security to satisfy the "in connection with" requirement 17

B. The district court ignored the O'Hagan test and misapplied a test for fiduciaries from SEC v. Texas Gulf Sulphur 22

C. The Supreme Court has consistently blocked efforts to extend the scope of § 10(b) through the recognition of new duties 27

D. The '34 Act, like the '40 Act, must not be construed so "broadly" or "flexibly" as to implicate constitutional concerns 30

II. Under independent appellate review, the SEC has failed to prove, by clear and convincing evidence, that the Publisher and Author published materially-false statements with actual malice 37

A. Heightened protections are required when the SEC seeks to impose liability on the basis of pure speech about a public company 38

B. The SEC did not prove that the statements were material and false 40

1. USEC's failure to correct the statements proves their immateriality 40

2. The stock price evidence is confounded by multiple factors and does not establish materiality 41

3. The prediction of a rise in USEC's stock is protected opinion 46

C. The record is devoid of proof that the Publisher and Author had serious, subjective doubts about the truth 47

1. The district court confused falsity with fault 48

2. An alleged failure to investigate a "bombastic" claim does not establish actual malice 51

3. Under Bose, an appeals court cannot overlook the considerable evidence negating actual malice that the district court ignored 53

III. The permanent injunction on the Publisher and Author's future speech constitutes a prior restraint in violation of the First Amendment 55

CONCLUSION 57

REQUEST FOR ORAL ARGUMENT 57

ADDENDUM 59

CERTIFICATE OF COMPLIANCE 60

TABLE OF AUTHORITIES

CASES

Affiliated Ute Citizens of Utah v. United States,
406 U.S. 128 (1972) 18

Alexander v. United States,
509 U.S. 544 (1993) 55

Basic v. Levinson,
485 U.S. 224 (1988) 40

Batson v. Shiflett,
602 A.2d 1191 (Md. 1992) 39

Biospherics v. Forbes,
151 F.3d 180 (4th Cir. 1998) 47

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 27, 35, 36

Bose Corp. v. Consumers Union of U.S.,
466 U.S. 485 (1984) .... passim

CBS v. Davis,
510 U.S. 1315 (1994) 56

In re Carnation Co.,
Securities Exchange Act of 1934 Release No. 22214,
49 S.E.C. 377 (July 8, 1985) 41

In re Carter-Wallace Sec. Litig.,
150 F.3d 153 (2d Cir. 1998) 22, 23, 25

In re Cascade Int'l Sec. Litig.,
894 F. Supp. 437 (S.D. Fla. 1995) 25

Celle v. Filipino Reporter Enters.,
209 F.3d 163 (2d Cir. 2000) 40

Chiarella v. United States,
445 U.S. 222 (1980) 27, 28

Daniel v. Dow Jones & Co.,
137 Misc. 2d 94 (N.Y. Cty. Spec. Term 1987) 30, 35

Dirks v. SEC,
463 U.S. 646 (1983) 27, 35

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building & Constr. Trades Council, 485 U.S. 568 (1988) 33, 34

Firestone v. Time,
460 F.2d 712 (5th Cir. 1972) 40

First Equity Corp. v. Standard & Poor's,
690 F. Supp. 256 (S.D.N.Y. 1988) 39

First Equity Corp. v. Standard & Poor's,
869 F.2d 175 (2d Cir. 1989) 30, 35, 39

Fitzgerald v. Penthouse Int'l,
776 F.2d 1236 (4th Cir. 1985) 45

Fletcher v. San Jose Mercury News,
264 Cal. Rptr. 699 (Cal. Ct. App. 1989) 51

Garrison v. Louisiana,
379 U.S. 64 (1964) 47, 53

Ginsburg v. Agora,
915 F. Supp. 733 (D. Md. 1995) 30, 31, 39

Greenbelt Coop. Publ'g Ass'n v. Bressler,
398 U.S. 6 (1970) 52, 53

Greenhouse v. MCG Capital Corp.,
392 F.3d 650 (4th Cir. 2004) 41, 42, 43

Gutter v. Dow Jones,
490 N.E.2d 898 (Ohio 1986) 30, 35, 39

Hart v. Internet Wire,
2002 U.S. App. LEXIS 21310 (2d Cir. Oct. 10, 2002) 29

Harte-Hanks Commc'ns v. Connaughton,
491 U.S. 657 (1989) 52

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983) 16

Hillson Partners Ltd. P'ship v. Adage,
42 F.3d 204 (4th Cir. 1994) 46

Hustler Magazine v. Falwell,
485 U.S. 46 (1988) 38

Levan v. Capital Cities/ABC,
90 F.3d 1230 (11th Cir. 1999) 39

Long v. Arcell,
618 F.2d 1145 (5th Cir. 1980) 50

Lowe v. SEC,
472 U.S. 181 (1985) 4, 31, 32, 33

Lubin v. Agora,
882 A.2d 833 (Md. 2005) 20, 37, 56

Mandel v. Boston Phoenix,
456 F.3d 198 (1st Cir. 2006) 40

Marine Bank v. Weaver,
455 U.S. 551 (1982) 19

Near v. Minnesota,
283 U.S. 697 (1931) 56, 57

New York Times v. Sullivan,
376 U.S. 254 (1964) 36, 38-40, 47, 57

Newton v. Nat'l Broad. Co.,
930 F.2d 662 (9th Cir. 1990) 39, 48, 54

Org. for a Better Austin v. Keefe,
402 U.S. 415 (1971) 56

Phillips v. LCI Int'l,
190 F.3d 609 (4th Cir. 1999) 26

Piper v. Chris-Craft Indus.,
430 U.S. 1 (1977) 17

Pritt v. Republican Nat'l Comm.,
557 S.E.2d 853 (W. Va. 2001) 39

Raab v. Gen. Physics Corp.,
4 F.3d 286 (4th Cir. 1993) 46

Regents of the Univ. of Cal. v. Credit Suisse First Boston,
482 F.3d 372 (5th Cir. 2007) 21

Reliance Ins. Co. v. Barron's,
442 F. Supp. 1341 (S.D.N.Y. 1977) 29, 33, 34

Reuber v. Food Chem. News,
925 F.2d 703 (4th Cir. 1991) 38, 39

Robertson v. McCloskey,
666 F. Supp. 241 (D.D.C. 1987) 40

Ryan v. Brooks,
34 F.2d 726 (4th Cir. 1980) 52

SEC v. Capital Gains Research Bureau,
375 U.S. 180 (1963) 28

SEC v. Datronics Eng'rs,
490 F.2d 250 (4th Cir. 1973) 26

SEC v. Merchant Capital,
483 F.3d 747 (11th Cir. 2007) 17

SEC v. Savoy Indus.,
587 F.2d 1149 (D.C. Cir. 1978) 22, 25

SEC v. Terry's Tips,
409 F. Supp. 2d 526 (D. Vt. 2006) 26

SEC v. Texas Gulf Sulphur Co.,
401 F.2d 833 (2d Cir. 1968) .... passim

SEC v. Wall St. Publ'g Inst.,
664 F. Supp. 554 (D.D.C. 1986) 29, 30

SEC v. Zandford,
535 U.S. 813 (2002) .... passim

Santa Fe Indus. v. Green,
430 U.S. 462 (1977) 27

St. Amant v. Thompson,
390 U.S. 727 (1958) 47, 50, 52

Stoneridge Inv. Partners v. Scientific-Atlanta,
128 S. Ct. 761 (2008) .... passim

Sup't of Ins. v. Bankers Life & Cas. Co.,
404 U.S. 6 (1971) 17

TSC Indus. v. Northway,
426 U.S. 438 (1976) 40

The Wharf (Holdings) Ltd. v. United Int'l Holdings,
532 U.S. 588 (2001) 18

Thomson Newspaper Publ'g v. Coody,
896 S.W.2d 897 (Ark. 1995) 50, 51

Time v. Hill,
385 U.S. 374 (1967) 38

Time v. Pape,
401 U.S. 279 (1971) 51

United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.,
210 F.3d 1207 (10th Cir. 2000) 25

United States v. Cong. of Indus. Orgs.,
335 U.S. 106 (1948) 34

United States v. O'Hagan,
521 U.S. 642 (1997) .... passim

Virginia Carolina Tools v. Int'l Tool Supply,
984 F.2d 113 (4th Cir. 1993) 56

Washington Post Co. v. Keogh,
365 F.2d 965 (D.C. Cir. 1966) 53

Zweig v. Hearst,
594 F.2d 1261 (9th Cir. 1979) 30

STATUTES

15 U.S.C. § 17(j)(b) 59

15 U.S.C. § 77u(a) 4

15 U.S.C. § 78u(d) 4

15 U.S.C. § 80b-2(a)(11) 31, 32

17 C.F.R. § 240.10b-5 59

28 U.S.C. § 1291 4

MISCELLANEOUS

Barbara Black, The Second Circuit's Approach to the 'In Connection With' Requirement of Rule 10b-5, 53 Brooklyn L. Rev. 539 (1987) 22

S. Rep. 792, 73d Cong., 2d Sess. 8 (1934) 24

Sack on Defamation 5-89 (3d ed. 1999) 51

PRELIMINARY STATEMENT

This Court promptly intervened over the SEC's objections to stay the district court's permanent injunction (when the district court declined to do so) to consider a question of first impression in this circuit: whether § 10(b) of the Securities Exchange Act of 1934 (the "'34 Act") covers speech about stocks by persons who do not trade the securities and who do not exercise fiduciary duties.

The controlling facts have never been in dispute. The SEC has sued an investment newsletter writer and his publisher for violation of § 10(b) in publishing information about USEC, Inc., a public corporation listed on the New York Stock Exchange. Neither appellant Frank Porter Stansberry (the "Author") nor appellant Pirate Investor LLC (the "Publisher") traded in USEC shares for themselves, managed investments in USEC for their subscribers, or bore any fiduciary obligations to the public.

The defendants are not investment advisers, bankers, brokers, dealers, issuers, underwriters, lawyers, or accountants. Unlike these licensed and regulated actors in the securities markets, whom § 10(b) covers because of their direct involvement in the buying and selling of stocks or their fiduciary roles or special professional duties to investors, the Publisher and Author simply publish writings about investments. They do not issue certified opinions or recommendations. They are not required to be licensed. They offer no personalized advice.

Section 10(b) requires false statements to be "in connection with the purchase or sale of any security." But here the SEC seeks to extend the statute to a claim that is not "in connection with the purchase or sale of any security" but "in connection with the purchase or sale" of information. The allegation the SEC makes in the complaint – that the defendants' allegedly false statements "induce[d] investors to pay [them] ... for subscriptions," JA42 (emphasis added), is a claim of common-law fraud in the sale of a publication, and "[s]ection 10(b) does not incorporate common-law fraud into federal law." Stoneridge Inv. Partners v. Scientific-Atlanta, 128 S. Ct. 761, 771 (2008) (emphasis added). Such claims are "already governed by functioning and effective state-law guarantees." Id.

The falsity the SEC alleges boils down to whether a USEC official told the Author at the end of a one-hour telephone conversation (the content of which is otherwise not in dispute) to "watch the stock" the day before a superpower summit opened in Moscow, thereby indicating that USEC believed it was on the verge of positive news regarding an already-anticipated government contract approval. Whether the Author erred in what he heard, he was not mistaken about the tie between the summit and the contract – U.S. approval was announced just weeks after the summit, and USEC's stock rose on the news if not as dramatically as the Author's informed speculation had predicted.

The SEC states that the broad, remedial powers of § 10(b) cover this case. It further claims that the falsity and fraud it alleged in the complaint are not, in any event, protected forms of speech. But this argument is a red herring. The question in this appeal is not whether the speech of any particular publisher or speaker is false or not but whether the SEC can claim to have jurisdiction over all speech about stocks it claims to be untrue.

Supreme Court authority indicates the SEC is exceeding the scope of § 10(b). In recently rejecting so-called "scheme liability" under § 10(b) for vendors who allegedly assisted a corporation in committing fraud, the Court in Stoneridge refused to apply § 10(b) "beyond the securities markets – the realm of financing business – to purchase and supply contracts – the realm of ordinary business operations." Stoneridge, 128 S. Ct. at 770. The Court drew a bright line between the "investment sphere" regulated by § 10(b) and "the marketplace for goods and services," id. at 774, where the statute did not reach. Because the relationship between a publisher of non-personalized advice and general news about stocks and a reader who consumes the information exists purely in this "marketplace" of goods and services, not in the "investment sphere," it lacks the necessary statutory mandate of being "in connection with the purchase or sale of any security." The federal statute specifically covering stock advice is the Investment Advisers Act of 1940 (the "'40 Act"), but the SEC dropped its threat to sue the defendants under

this law and instead chose to stretch the jurisdictional boundaries of § 10(b).

Finally, given that this case deals solely with pure speech, a constitutional component exists to the proper construction of the statute, as the Supreme Court recognized in interpreting the '40 Act. See Lowe v. SEC, 472 U.S. 181, 205 n.50 (1985) ("[I]n areas where legislation might intrude on constitutional guarantees, we believe that Congress, which has always sworn to protect the Constitution, would err on the side of fundamental constitutional liberties when its legislation implicates those liberties." (citation omitted)). To this end, any doubts as to the propriety of applying the statute here should be resolved in favor of avoiding constitutional questions. If, however, the statute were found to reach disinterested speech on stocks and the financial markets, the simple labeling of speech as "false" or "fraudulent" by the SEC or private § 10(b) plaintiffs would not end the inquiry, it would only begin it. First Amendment principles require the SEC to prove its case through a heightened evidentiary standard – a standard that it cannot meet on this record. Reversal of the judgment and permanent injunction is warranted.

JURISDICTIONAL STATEMENT

The district court, which had jurisdiction pursuant to 15 U.S.C. § 77u(a) and 15 U.S.C. § 78u(d), entered its final orders on October 3, 2007. The defendants noted a timely appeal on November 29, 2007. This Court has jurisdiction over the final orders of the district court pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether § 10(b) reaches the speech of the Publisher and the Author who did not trade in USEC stock and who owe no fiduciary or special duties to the public or to the securities marketplace.

2. Whether, if § 10(b) applies, the SEC has met the dual constitutionally-imposed burdens of proving, by clear and convincing evidence, the publication of a materially-false statement of fact with actual malice.

3. Whether, if § 10(b) applies, the permanent injunctive relief violates the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

The SEC sued the Publisher and Author under § 10(b) and Rule 10b-5 thereunder. JA15-38, 39-60. They filed a Motion to Dismiss, which the district court denied. JA3[8], 61. The Publisher and Author sought certification of the statutory question of law that is now the focus of this appeal. JA5[34]. The district court denied certification. JA84-85. The Publisher and Author moved for leave to file a Motion for Summary Judgment, which the district court denied. JA6[52], JA89-95.

The case was tried before the district court. Nearly 28 months later, the court found the Publisher and the Author liable, issued civil penalties, disgorged their profits, and enjoined them from future violations. JA147-97. The district

court rescinded its Judgment Order and entered an Amended Judgment Order and Permanent Injunction. JA198-207. The Publisher and Author filed a motion to stay the injunction pending appeal, which the district court denied. JA13[127], 209.

The Publisher and Author petitioned this Court for a stay. App.Dkt.35. The SEC opposed, and this Court granted the relief. JA5864-65.

STATEMENT OF FACTS

The following facts are in the joint pretrial stipulations. The Author is the editor-in-chief of Porter Stansberry's Investment Advisory ("the Newsletter"), which is published monthly and owned by the Publisher. JA117-18. In addition to the Newsletter and other financial publications, the Publisher also publishes an e-mail service to its subscribers called the "Blast." JA120-21. The Publisher is a limited-liability company wholly-owned by Agora, Inc., a Maryland corporation based in Baltimore that has been in the publishing business for over 20 years and which publishes dozens of newsletters in fields ranging from investment and health advice to travel and leisure activities. JA117-18. In 2002, Agora had approximately 448,000 paid subscribers. JA117-18.

On May 2, 2002, the Author interviewed the director of investor relations for

USEC, the world's largest processor of uranium for power plants. JA118-19.[1] In February, USEC had negotiated with its Russian supplier Tenex a new market-based pricing agreement that required approval by both the United States and Russia. JA119. USEC told the United States government in April that Russia had approved the new terms. JA123-24. As of May 2, American approval had not been announced, but USEC had asked the United States government to place the pricing agreement on the agenda of the May 23-26 summit between Presidents Bush and Putin. JA119. Indeed, on April 16, USEC raised with Bank of America a potential connection between the approval of the pricing agreement and the summit. JA120.

After the Author and the USEC executive, Steven Wingfield, spoke by telephone for approximately an hour on May 2 (Mari Major-Sosias, USEC's new manager of investor relations, was also present), the Author prepared a publication recommending investment in USEC (the "Report") and a promotional e-mail offering the Report for sale to subscribers (the "E-mail"). JA118, 120. In the E-mail, which described the reasons for investing in the company but which did not identify USEC by name, the Author stated that "[i]nvestors in this company are going to make a fortune – for reasons that I can detail for you here. And, best of all, because of my source – a senior company executive – I can tell you

[1] All dates unless specified are in 2002.

EXACTLY WHEN the deal will be finalized and announced to the public. The deal will close on May 22nd, only a few days from now." JA120.

The E-mail also contained the following cautionary language: "[T]here's one more thing I have to remind you about. I can't guarantee that the stock will pop. Nobody can guarantee the actions of the stock market." JA120.

On the evening of May 13, the Publisher and the Author published the E-mail to subscribers on the "Blast" service. JA120. They offered the Report, which identified USEC as the company poised for positive news, for sale for $1,000. JA121. On the morning of May 14, just hours after publication, the Author sent both the Report and E-mail to Wingfield. JA121. Wingfield had earlier received from the Author a password and user name to the Publisher's website. JA123. Wingfield did not contact the Author to raise any concerns about the two publications. JA121. USEC did not issue a press release denying or commenting upon the contents of the E-mail or the Report. JA121.

Neither the Publisher nor the Author owned or traded USEC stock or offered personalized investment advice in violation of the '40 Act. JA124. They sold 1,217 copies of the Report. JA122. They received 215 refund requests and honored them all. JA123. The Author and the Publisher published six follow-up reports on USEC. JA123. The Author sent Wingfield copies of the May 30 and June 18 reports the day they were published. JA123. On May 22, the approval of

the USEC-Tenex pricing agreement was not announced. JA123. It was announced approximately three weeks later, on June 19. JA124.

The following facts are uncontroverted and were introduced at trial. The new pricing agreement with Tenex would, according to a USEC press release on April 24, "provide [USEC] strong future benefits." JA4000. USEC officials were at this time speaking with certainty about approval for the pricing agreement. On April 25, USEC told investors in a conference call that it was "look[ing] forward" to approval of the agreement in the "near future" and that "signals from the U.S. government indicate that approval is near." JA4097. The Washington Post reported on April 29 that USEC believed the approval would "come soon." JA4050. On May 10, USEC told the newspaper in Paducah, Kentucky where its plant is located that it was "confident" of the agreement's approval. JA4066. The Wall Street Journal, on May 14, quoted Wingfield saying "[t]he new pricing agreement will improve our earnings" and noting that he saw the approval "com[ing] along soon." JA4070.

At the same time that USEC officials were publicly anticipating approval of the pricing agreement with Tenex, articles were appearing about a new arms treaty with the Russian government. The Wall Street Journal, for example, indicated on May 8 that the Bush-Putin summit was expected to produce a major deal to cut the two nations' nuclear arsenals. JA4244.

When the Author interviewed Wingfield on May 2, they covered the broad basics of USEC's business, including the approval of the market-based pricing agreement. JA279-80 (Wingfield); JA635, 638 (Author). They also spoke of the upcoming summit. JA280 (Wingfield); JA638-39 (Author). About his conversation with the Author, Wingfield stated in a May 14 memorandum (written at the request of USEC lawyers), "In response to questions about the Bush and Putin summit meeting in May, I said that we hoped something positive about our deal would come out of that meeting." JA280, 3204. He also wrote that he told the Author that USEC "expected the agreement to be approved by the government in the near term." JA3204. Under the heading "Thoughts on IR," Major-Sosias recorded in her notes from this time period, "While we can't directly link our [a]greement to the [a]rms control treaty, it would be only logical to acknowledge that indeed the two governments have a committed interest in seeing that our agreement proceeds [with] success." JA3277.

President Bush announced the new arms treaty with the Russians on May 13. JA4023. USEC's share price started the morning at $6.85. JA4176. A rise in the stock price began later that day, <u>after</u> the Bush announcement but <u>prior</u> to publication of the E-mail and the Report, which didn't occur until 6:30 p.m. JA3168. The increase in share price continued through May 22, the ex-dividend date for the stock, when the shares closed at $8.20. JA4176.

As USEC's share price climbed, news reports attributed the movement to a connection between the treaty and the pricing agreement. On May 15, for example, the Nightly Business Report on PBS concluded from the rise of USEC's stock over the previous two days that "The U.S. and Russia have now agreed on a nuclear arms reduction treaty and that could mean lifting price controls on enriched uranium, and that's what the company deals in." JA480, 5179. Also on May 15, in an articled entitled, "USEC Up 10%: US-Russia Arms Deal Continues To Boost Stock," The Wall Street Journal quoted an analyst who suggested that "[t]he hope is clearly that – as part of these other talks between the Russia [sic] and the U.S. – the governments will finally approve the tentative agreements USEC has with its Russian trading partner." JA4072.

The stock's rise was also tied to the expectation that the company, as the exclusive processor of decommissioned Russian warheads, would benefit from the treaty itself. Major-Sosias was quoted telling Bloomberg News that the treaty was "good for the nuclear industry as a whole." JA4074. According to Bloomberg's May 20 article entitled "USEC Shares Climb in Wake of U.S.-Russia Weapons Agreement," she said, "Looking at our stock price, it's having a big effect even though we are not directly related to anything that's going on in this treaty." JA4074. A Washington Post headline on the same day read, "U.S.-Russia Arsenal Reduction Pact Lifts USEC Shares." JA4076.

A May 17 memorandum from Wingfield to USEC's CEO on the climb in the company's share price did not mention the Report, the E-mail, the Author, or the Publisher. JA3205-07. Nor were they mentioned in any of the many news accounts reporting on the stock's rise.

Around the same time that the Author published the E-mail and the Report, Forbes magazine published an article by Nobel Prize-winning economist Joseph Stiglitz suggesting that USEC should be renationalized. JA4790-93. The Forbes article was mailed to subscribers for delivery between May 11 and May 13. JA146. On May 15, The Gartman Letter, a newsletter specializing in energy companies, attributed the rise in USEC's stock price on May 14 to the Stiglitz article and speculation that USEC shares would be repurchased at a premium by the government. JA146, 4788. On May 18, the newsletter Personal Finance advised its readers to purchase USEC shares. JA146, 4776.

The Author did not write about USEC in the Newsletter because USEC did not fit the profile of the technology leaders the Newsletter featured. JA600. Instead, he published the E-Mail and the Report in the "Blast" service, which was published several times a week. JA1258. Because he was not covering USEC in the Newsletter that bears his name, he published under a company pen name, Jay McDaniel. JA2972-78. The Publisher had introduced the pen name in the September 22, 2001 edition of the "Blast" and used it regularly. JA561, 3897. The

Author also included a link in the Report to a Yahoo website where subscribers could check USEC's SEC filings, including its eight percent dividend and other fundamentals that he found appealing in the event USEC shares did not significantly rise after the pricing agreement was approved. JA886, 1315-17, 3110.

The E-mail began with the headline "Double your money on May 22nd with this 'super insider' tip" and provided details about the unnamed company, its line of business, its fundamentals, its pending pricing agreement with the Russians, the upcoming May 23-26 summit, and the indication from a high-ranking insider that the Russian deal would be approved on May 22. JA2972-78. "This is the kind of insider information that could make you a lot of money," the Author wrote. JA2972-73. The Report concluded: "I consider this a safe speculation. It's hard to imagine investors getting hurt with this stock at its current price – you're buying at roughly half of book value and you're getting paid 8% a year to wait until the Russian supply deal gets worked out. Hopefully, if my source is right, it won't take long ..." JA3112 (emphasis in original).

On May 17, the Author edited the E-mail to account for the rise in USEC's shares leading up to the Bush-Putin summit. JA780-81. Because the stock had already increased in price, he no longer predicted a doubling. JA3113-17. In a May 17 e-mail to Jody Madron, an independent contractor working for the

Publisher, the Author remarked that when the Report is updated, "the stock will probably be near $9.00 ... so there's still a 55% gain to be had ... if the deal goes through as we expect." JA3177. After the May 22 announcement did not come, Madron wrote to George Rayburn, who also worked for the Publisher, "[W]ithout having verified myself, I can't imagine that [the Author] put anything false in the promo or the report." JA3395. A May 24 e-mail from Rayburn said, "Finally got in touch with [the Author] and he still believes this stock will rise." JA6[52, Ex. C]. The Author contacted Wingfield again in late May and interviewed him a second time as he continued to follow the stock. JA331. His final published report on USEC was on November 5. JA123.

By March 21, 2005, the first day of trial, USEC stock had almost tripled since the Publisher and Author recommended the company. JA237, 242.

The single dispute is what was said at the end of the May 2 conversation that everyone agrees touched upon the pricing agreement and the upcoming summit. JA279-80 (Wingfield), 638-39 (Author). The Author testified that Wingfield told him before hanging up to "watch the stock on May 22." JA636, 640-41, 774, 783, 808, 1318. To the Author, this statement indicated that USEC believed the pricing agreement would be approved and announced before the summit. JA639-41, 774, 783, 807-09, 1318. Consistent with that understanding, the Author wrote in the Report, "A USEC senior executive has assured me that the new Russian agreement

will be approved just prior to the upcoming Bush-Putin summit. In fact, he said 'watch the stock on May 22.'" JA3111. Wingfield denies making the remark. JA299, 501. Major-Sosias testified that Wingfield did not make the remark. JA526. On cross-examination, she said she didn't recall him saying that. JA540.

SUMMARY OF ARGUMENT

The Publisher and Author cannot be held liable under § 10(b) because they did not engage in conduct "in connection with the purchase or sale of any security." The district court ignored the appropriate test for the "in connection with" requirement in United States v. O'Hagan, 521 U.S. 642, 656 (1997), which requires fraud to "coincide" with or be dependent upon the purchase or sale of a security, and instead it misapplied a test from SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 860 (2d Cir. 1968) relating to fiduciaries. The Author and Publisher, however, are not fiduciaries and owe no duties to the public or the securities marketplace. The Supreme Court has consistently blocked attempts to recognize new fiduciary duties under § 10(b). The only time the Court has read a securities statute in the context of non-personalized investment advice, it interpreted the law narrowly to avoid constitutional concerns, and the same should be done here.

If the statute were construed to apply to disinterested speech about securities, under a traditional § 10(b) analysis, the SEC cannot prove that the E-mail and the Report were either materially false or published with scienter. The

evidentiary weakness of the government's case is only amplified by the heightened standard of review in cases involving pure speech. That standard requires a reviewing court to conduct an independent review of the entire record to determine whether the SEC has proven by clear and convincing evidence that the Publisher and Author published materially-false statements of fact with actual malice.

Finally, especially where the district court concedes that the defendants publish many writings that deserve "heightened" and "substantial First Amendment protection," see JA148, 174, the permanent injunction constitutes a prior restraint that violates the Constitution.

STANDARD OF REVIEW

To establish a claim under § 10(b) and Rule 10b-5, the SEC must show that a defendant: (i) misrepresented or omitted a material fact, (ii) in connection with the purchase or sale of any security, (iii) with scienter. Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983).[2] On appeal, a § 10(b) case would typically be reviewed under the same standard as all civil cases. Issues of law, such as the meaning of the "in connection with" requirement, are reviewed de novo, while

[2] Since "[t]he scope of Rule 10b-5 is coextensive with the coverage of § 10(b) ... we use § 10(b) to refer to both the statutory provision and the Rule." SEC v. Zandford, 535 U.S. 813, 816 n.1 (2002).

issues of fact, such as whether the SEC proved scienter and material falsity, are reviewed for clear error. See SEC v. Merchant Capital, 483 F.3d 747, 754 (11th Cir. 2007). However, in this case, if the Court determines that § 10(b) covers the published speech of a defendant who did not breach fiduciary duties or trade stock, then application of the statute would raise substantial First Amendment concerns. In this instance, the statutory requirement of material falsity and the scienter or fault element would call for a heightened standard of review under Bose Corp. v. Consumers Union of U.S., 466 U.S. 485 (1984).

ARGUMENT

I. The Publisher and Author engaged in no conduct "in connection with the purchase or sale of any security" under § 10(b).

Whether the allegations against the defendants are "in connection with the purchase or sale of any security" under § 10(b) is a question of law subject to de novo review. Sup't of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 (1971).

A. The Supreme Court requires fraud to "coincide" with the purchase or sale of a security to satisfy the "in connection with" requirement.

"In connection with the purchase or sale of any security" is "limiting language." Piper v. Chris-Craft Indus., 430 U.S. 1, 38 (1977). Only two classes of defendants have been found by the Supreme Court to meet the "in connection with" requirement in § 10(b) – those who improperly traded in securities and those who breached fiduciary duties to investors (and some who did both). See Bankers

Life, 404 U.S. at 8 (trading of securities and breach of fiduciary duty); Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153 (1972) (breach of fiduciary duty); O'Hagan, 521 U.S. at 647, 656 (trading of securities and breach of fiduciary duty); The Wharf (Holdings) Ltd. v. United Int'l Holdings, 532 U.S. 588, 596 (2001) (trading of securities); Zandford, 535 U.S. at 823 (breach of fiduciary duty). The Publisher and the Author are in neither of these categories. As sellers of newsletters who did not trade in USEC stock, who do not buy and sell shares for their subscribers, and who have no fiduciary or special duties to the reading public or to investors, the Publisher and the Author lack the requisite nexus to the "securities markets – the realm of financing business" to be sued under § 10(b). Stoneridge, 128 S. Ct. at 770.

Supreme Court precedent makes it clear that conduct is "in connection with the purchase or sale of any security" only if the completion of a fraudulent act or a breach of a fiduciary duty required or depended upon the purchase or sale of a stock. O'Hagan, 521 U.S. at 656 (fraud would not have existed without improper securities transactions and was "consummated" by the trading); Zandford, 535 U.S. at 820-21, 823 (fraudulent acts and securities transactions by a "broker who has a fiduciary duty" to clients "were not independent events" as "each sale was made to further [a] fraudulent scheme" that "coincided with" and "require[d] the sale of securities" (emphasis added)).

As O'Hagan states, the "in connection with" element is satisfied in the case because "the fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities. The securities transaction and the breach of duty thus coincide." 521 U.S. at 656 (emphasis added). On the other hand, the Court states, quoting the Solicitor General's brief, a person who steals from a bank to buy securities does not fall under § 10(b) because "'the fraud would be complete as soon as the [bank's] money was obtained'" and was thus – in the Supreme Court's own words – "sufficiently detached from a subsequent securities transaction that § 10(b)'s 'in connection with' requirement would not be met." Id. at 656-57 (citation omitted) (emphasis added).

This statutory limitation is necessary because, without it, any string of allegations of common-law fraud in which a security at some point is bought or sold – no matter how superfluous or irrelevant the securities transaction is to the carrying out of the fraud itself – would be federalized under § 10(b). That, the Supreme Court has said on numerous occasions, is not the purpose or function of the statute. "Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud." Marine Bank v. Weaver, 455 U.S. 551, 556 (1982); see also Zandford, 535 U.S. at 820.

Even assuming, for the sake of argument, that every allegation against the

Publisher and Author is true, the "fraud" was "consummated" or "complete" when readers subscribed to and paid for the Report. O'Hagan, 521 U.S. at 656. No "subsequent securities transaction" by any subscriber was required to carry out the alleged fraud. Id. at 657. The defendants received the same payment for each Report regardless of whether a reader ever purchased USEC stock.

The unanimous Maryland Court of Appeals, looking at the very same publications in a subpoena enforcement proceeding, emphasized that the Report "did not propose that its readers should buy their shares [in USEC] from Agora." Lubin v. Agora, 882 A.2d 833, 848 (Md. 2005) (holding that regulators failed to make a heightened showing as required by the First Amendment when seeking the Publisher's subscriber lists) (emphasis added).[3] The SEC's complaint recognizes that the defendants' newsletters allegedly "induce[d] investors to pay [them] ... for subscriptions," not stocks. JA42 (emphasis added). The district court conceded as much when it wrote that readers "were induced" to pay not for a stock but a "stock tip" and that the Author's statements were intended to "induce the recipients" of the E-mail to "pay $1000" – for the Report. JA148, 170. The defendants sold a

[3] The defendants repeatedly brought Lubin to the district court's attention, but the court never cited it. JA12[118, Ex. 1 at 5], 13[127, Ex. 1 at 1, 2, 9, 12], 13[131 at 9-10].

publication about USEC, not securities in USEC.

The demarcation in Stoneridge between the securities markets and the ordinary commercial sphere is a line that is consistent with the Court's policing of the "in connection with" requirement to ensure § 10(b) does not extend beyond fraudulent acts that coincide with or depend upon the actual "purchase or sale" of a security. The SEC justifies its attempts to expand the statute on the grounds that, regardless of the defendants' lack of trading and fiduciary duties in this case, "lies" about stocks are not protected speech. But even awarding the SEC all inferences about the evidence (presumptions which it does not enjoy in this appeal), if every "lie" about a stock is now deemed "in connection with the purchase or sale of any security," then the statutory limitations imposed by Congress in § 10(b) will simply no longer exist. See Regents of the Univ. of Cal. v. Credit Suisse First Boston, 482 F.3d 372, 383-84, 386 (5th Cir. 2007) (rejecting § 10(b) claims against banks that partnered with Enron because they were not "fiduciaries" to the plaintiffs and "owed no dut[ies]").

Although Stoneridge was not decided on the "in connection with" requirement,[4] the Court cited with approval to a law review article explaining the

[4] The ruling in Stoneridge turned on the lack of reliance, an element required in a private § 10(b) action, as the allegedly deceptive conduct by the defendants was not communicated to the public.

role of "in connection with" in limiting the scope of the statute. Stoneridge, 128 S. Ct. at 770. Immediately prior to the passage the Court cites, the article states:

> [T]he lack of the requisite connection goes to the question of federal jurisdiction. Thus, even though there may be a security involved, the alleged misconduct may not have occurred in a securities transaction. Rather, properly analyzed, the plaintiff's allegations consist of ... commercial fraud and, hence, are outside the scope of federal securities fraud jurisdiction. In this situation, the "in connection with" requirement is necessary to limit Rule 10b-5 jurisdiction so that the rule does not encompass all of common-law fraud.

Barbara Black, The Second Circuit's Approach to the 'In Connection With' Requirement of Rule 10b-5, 53 Brooklyn L. Rev. 539, 540-41 (1987) (emphasis added). The SEC's allegations against the Publisher and Author are claims of commercial fraud that are outside the scope of federal securities fraud jurisdiction.

B. The district court ignored the O'Hagan test and misapplied a test for fiduciaries from SEC v. Texas Gulf Sulphur.

In an opinion subsequent to O'Hagan, the Supreme Court summed up its "in connection with" cases going back to Bankers Life as each involving "fraudulent scheme[s] in which the securities transactions and breaches of fiduciary duty coincide." Zandford, 535 U.S. at 825 (emphasis added). The district court, however, did not apply this test. In fact, it did not even acknowledge its existence. Instead, the court looked to In re Carter-Wallace Sec. Litig., 150 F.3d 153 (2d Cir. 1998) and SEC v. Savoy Indus., 587 F.2d 1149 (D.C. Cir. 1978), for the principle that the statutory nexus with securities trading is present when a statement "would

cause reasonable investors to rely thereon," and "so relying, cause them to purchase or sell a corporation's securities." JA172. In citing this language, the district court failed to see the obvious limitations of the context in which the statement was made. The language comes from Texas Gulf, 401 F.2d at 860, where the Second Circuit held that the defendant, a public company, could be sued under § 10(b) on the basis of a statement in a corporate press release. The question in Texas Gulf was not whether the statement of a non-issuer (such as the Publisher or the Author) was covered by § 10(b), but rather what kind of statement from an issuer was covered. The court decided that press releases and other kinds of statements from issuers apart from official SEC filings fell under the statute.

To reach this conclusion, the Second Circuit looked to the legislative history. According to the court, the law could be violated by a false corporate press release regardless of whether insiders were trading stock at the time because

> Congress intended to protect the investing public [from] ... misleading statements promulgated for or on behalf of corporations. ... [T]he Commission has been charged by Congress with the responsibility of policing all misleading corporate statements. ... [T]herefore, when materially misleading corporate statements ... have been uncovered, the courts ... have broadly construed the statutory phrase "in connection with the purchase or sale of any security."

Texas Gulf, 401 F.2d at 860-61 (emphasis added). The Second Circuit is abundantly clear – after reviewing the legislative history – that it tied its reading of the statute to wrongful corporate (i.e., fiduciary) behavior. Texas Gulf has

naturally been applied to other types of fiduciaries in the securities market. When such persons choose to speak to investors, they are appropriately covered by § 10(b). On the other hand, no legislative history shows that Congress intended to apply § 10(b) in the unbridled way now advocated by the SEC – to statements made by non-fiduciaries who are not themselves otherwise engaged in a fraud that requires the "purchase or sale of any security."

To the extent that the legislative history touches upon publishers at all, lawmakers were only concerned about the scalping or promoting of stocks by writers who were pretending to give "impartial, disinterested discussion of the stock market" when they were actually trading for themselves or receiving payments from issuers and not disclosing either activity. See S. Rep. 792, 73d Cong., 2d Sess. 8 (1934). The securities laws clearly cover these practices, and the SEC continues to pursue such cases vigorously – and would still be able to do so after a reversal of the district court in this appeal. See SEC v. Calandra (settlement with MarketWatch columnist) (available at http://www.sec.gov/news/press/2005-3.htm). What Congress plainly did not envision in 1934 was the regulation of publishers who were simply giving "impartial, disinterested" news or commentary.

Applying Texas Gulf to a non-fiduciary, non-trading defendant who has no duties to the market therefore clashes with the legislative history and with the Second Circuit's reasoning. The district court offered no judicial support for

extending Texas Gulf to the Publisher and Author. It simply stated that it does not "read" the precedent to limit extension of the Texas Gulf rule in this way – hardly a ringing endorsement for a historic expansion of § 10(b) to broad new classes of defendants. JA174. It is revealing that all of the cases the district court cites, JA172-73, including those that follow Texas Gulf, involve parties who were trading in stocks, had fiduciary responsibilities to investors, reporting obligations to the SEC, or special duties to the markets (such as accountants), or who provided personalized advice:

- In Carter-Wallace, 150 F.3d at 156, the "in connection with" requirement was fulfilled because the defendant company, an issuer (with fiduciary duties to investors) made allegedly false statements about its products in an advertisement in a medical journal.

- In Savoy Indus., 587 F.2d at 1171, a plan by an investor to gain control of Savoy by filing misleading statements with the SEC in a Schedule 13D (which the defendant was required to file as the buyer of the stock) satisfied the "in connection with" requirement.

- In United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207, 1221 (10th Cir. 2000), allegedly misleading statements made in negotiations for the grant of an option by the defendant to the plaintiff were actionable because the grant constituted the sale of a security between the parties – and thus met the "in connection with" requirement.

- In In re Cascade Int'l Sec. Litig., 894 F. Supp. 437, 442-44 (S.D. Fla. 1995) (citation omitted) (emphasis added), the court's holding that auditors have a "special duty to disclose" by virtue of their "'special relationship of trust vis-a-vis the public'" creates the context in which it found "in connection with" satisfied by the auditor's work with an issuer who made allegedly false statements in a Form 10-K filing to the SEC.

- In SEC v. Terry's Tips, 409 F. Supp. 2d 526, 533 (D. Vt. 2006), the actions of online financial advisors, who offered auto-trading services as well as personalized investment advice, could be found to meet the "in connection with" requirement.

In its "in connection with" jurisprudence, the Supreme Court has never endorsed or cited Texas Gulf's test of considering whether a published statement "would cause reasonable investors to rely thereon," and "so relying, cause them to purchase or sell a corporation's securities." This Court, it is hardly surprising, has relied on Texas Gulf only where a defendant either dealt in securities or breached a fiduciary duty. See Phillips v. LCI Int'l, 190 F.3d 609, 613-14 (4th Cir. 1999) (statements by CEO to public related to merger); SEC v. Datronics Eng'rs, 490 F.2d 250, 254 (4th Cir. 1973) (statements by corporation to shareholders related to stock sales). As extended by the district court, the rule of Texas Gulf lacks any limiting principle. It would authorize § 10(b) suits over any published statement or any spoken words to which an investor may have been exposed – even in the absence of any fiduciary duties running from the speaker to the investor.

Finally, the district court's holding that the "in connection with the purchase or sale of any security" requirement is met whenever a speaker's actions "affected the price of the stock," JA173, creates a standard nowhere found in the text of the statute. It is also directly contradicted by the Supreme Court. See Stoneridge, 128 S. Ct. at 771 (noting that § 10(b) "does not reach all commercial transactions that are fraudulent and affect the price of a security in some attenuated way").

C. The Supreme Court has consistently blocked efforts to extend the scope of § 10(b) through the recognition of new duties.

The Supreme Court has halted expansion of § 10(b) when the SEC and private plaintiffs have tried to create new duties under the law or otherwise widen its reach. In Dirks v. SEC, 463 U.S. 646, 664 (1983), the Court rejected the SEC's argument for the extension of fiduciary obligations and possible § 10(b) liability to all persons who receive inside information from corporate insiders because such an approach would have "no limiting principle." See also Santa Fe Indus. v. Green, 430 U.S. 462, 478 (1977) (rejecting § 10(b) theory advanced by minority shareholders as "not be[ing] easily contained"); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 743 (1975) (limiting standing for actions under § 10(b) to purchasers and sellers in order to avoid the burdens of "vexatious litigation").

Similarly, in Chiarella v. United States, 445 U.S. 222 (1980), the Court overturned the § 10(b) conviction of a Wall Street printer who bought stocks based on advance knowledge of corporate takeovers. The statute did not apply because the printer had no "duty to disclose" his trading activities to investors. Id. at 230-31. The Court explained, "He was not their agent, he was not a fiduciary, he was not a person in whom the sellers had placed their trust and confidence. He was, in fact, a complete stranger who dealt with the sellers only through impersonal market transactions." Id. at 232-33 (emphasis added). As the Court further reasoned:

> We cannot affirm petitioner's conviction without recognizing a general duty between all participants in market transactions. ... Formulation of such a broad duty, which departs radically from the established doctrine that duty arises from a specific relationship between two parties ... should not be undertaken absent some explicit evidence of congressional intent.

Id. at 233 (emphasis added). Since the SEC stipulated that the Publisher and Author neither traded nor offered personalized advice, see JA124, this Court "cannot affirm" the judgment below "without recognizing" a new "general duty" between media companies and consumers of news and information that "departs radically" from "the established doctrine." Chiarella, 445 U.S. at 233.

Moreover, "[f]ormulation of such a broad duty" as the SEC demands here should not be undertaken "absent some explicit evidence of congressional intent." Id. The chief statutory argument from the SEC – that § 10(b) is construed "flexibly to effectuate its remedial purpose," Zandford, 535 U.S. at 819 – does not supply such "explicit evidence." No implicit, let alone express, evidence exists in the legislative history that Congress intended to subject all statements about stocks to SEC jurisdiction under § 10(b). Rather, Congress was concerned about statements by fiduciaries and by issuers, underwriters, brokers, dealers, etc. – the people of the securities business who may commit fraud "in connection with the purchase or sale" of securities. See Texas Gulf, 401 F.2d at 860-61; see also SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963) ('34 Act part of effort to "eliminate certain abuses in the securities industry" (emphasis added)).

The few courts that have considered the SEC's theory of § 10(b) liability have declined to expand the statute in this direction. See Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1353 (S.D.N.Y. 1977) (magazine and author "simply do not fall into any of the categories of non-privity parties who have been held liable to defrauded purchasers and sellers under Rule 10b-5"); Hart v. Internet Wire, 2002 U.S. App. LEXIS 21310, *5 (2d Cir. Oct. 10, 2002) ("plaintiffs allege a kind of deception by Bloomberg that is separated from the statutory mooring of § 10(b)"); SEC v. Wall St. Publ'g Inst., 664 F. Supp. 554, 555-56 (D.D.C. 1986) (publisher had no duty to "speak the full truth" under § 10(b)), rev'd on other grounds, 851 F.2d 365 (D.C. Cir. 1988).

At issue in Wall St. Publ'g were alleged misrepresentations in the masthead of Stock Market Magazine and claims that it failed to disclose that companies it recommended had submitted contents of articles themselves or paid public relations firms to write them. The district court rejected the notion that the publishing activities of the magazine could be said to "touch" securities transactions merely because readers might rely on its content in making investment decisions. Id. at 555. It also dismissed the SEC's argument that the magazine acquired a "duty" under the securities laws when it "undertook to supply information" to the public relating to securities. Id. at 556. The court noted that all the cases cited for this proposition were distinguishable because they involved

"parties to securities transactions." Id.

In an analogous area of the law, courts have repeatedly refused to recognize a "special relationship" between publishers and the public that would give rise to negligent misrepresentation claims over the publication of inaccurate financial information. See Gutter v. Dow Jones, 490 N.E.2d 898, 901-02 (Ohio 1986); Daniel v. Dow Jones & Co., 137 Misc. 2d 94, 99 (N.Y. Cty. Spec. Term 1987); First Equity Corp. v. Standard & Poor's, 869 F.2d 175, 180 (2d Cir. 1989); Ginsburg v. Agora, 915 F. Supp. 733, 739 (D. Md. 1995).

No courts have recognized fiduciary duties between publishers of impersonal financial news and investment advice and the readers who seek out the information. Only when a publisher trades on its own recommendations have some courts found that disclosure duties arise. See Zweig v. Hearst, 594 F.2d 1261, 1266 (9th Cir. 1979). If the SEC believes that a dramatic make-over of § 10(b) to cover all statements about stocks is warranted, "[t]he decision to extend the cause of action is for Congress, not [the courts]." Stoneridge, 128 S. Ct. at 773.

D. The '34 Act, like the '40 Act, must not be construed so "broadly" or "flexibly" as to implicate constitutional concerns.

It is not necessary in this appeal to reach any constitutional issues because the judgment of the district court can be reversed on statutory grounds alone. However, because the Constitution fully protects speech about the stock market

and public companies, see Lowe, 472 U.S. at 210 n.58; Ginsburg, 915 F. Supp. at 739-40, careful limitation on potentially overbroad securities laws such as § 10(b) is therefore required. In Lowe, the only time the Court has construed a securities law in relation to the speech of a media defendant who did not have fiduciary duties or trade in stocks, it read the defendant out of the statute.

The Court in Lowe interpreted language in the '40 Act defining "investment adviser." The term covers "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who ... issues or promulgates analyses or reports concerning securities." 15 U.S.C. § 80b-2(a)(11). Excluded from regulation, however, is "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." Id. In construing the exemption, the Court looked to the history and purpose of the law:

> The legislative history plainly demonstrates that Congress was primarily interested in regulating the business of rendering personalized investment advice, including publishing activities that are a normal incident thereto. On the other hand, 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.

Lowe, 472 U.S. at 204.

Mindful of these First Amendment concerns, and seeking to keep the statute tailored to the governmental interest in regulating "fiduciary, person-to-person relationships" between professional investment advisers and their clients, the Court held that the law covered only "those who provide personalized advice attuned to a client's concerns." Id. at 207-08, 210 (emphasis added). The creation of a bright line between personalized advice (that triggers the statute) and impersonal recommendations (that do not) was true to the '40 Act's purpose in regulating fiduciary relationships. The Court's solicitude for the breathing space First Amendment freedoms require is also evident in its application of the law to the facts. Even though the newsletters at issue were published irregularly (one was put out eight times in 15 months despite being marketed as a semi-monthly) and advertised "periodic letters with updated recommendations," id. at 185 n.7, they were entitled to the exemption as "general and regular" publications.

The SEC actually threatened to sue the Publisher and the Author under the '40 Act. JA4[21, Ex. E]. The '40 Act would have been the natural statute to invoke – it is, after all, called the "Investment Advisers Act," and the defendants "advise[] others" in "publications or writings" about "investing in, purchasing, or selling securities." 15 U.S.C. § 80b-2(a)(11). But instead of testing the application of Lowe to the E-mail and the Report, the SEC dropped its '40 Act allegations and picked a far broader statute, § 10(b), which on its face concerns securities

transactions and which is not limited to advice about stocks. It covers any factual statement about stocks. As applied in the way the SEC now urges, § 10(b) would not be restricted to the statements of fiduciaries or those who trade in stocks, but would cover all statements about securities by anyone who cared to speak to anyone who cared to listen. The constitutional concerns over this theory of § 10(b) far surpass what troubled the Supreme Court in Lowe regarding the '40 Act.

As the only Supreme Court decision addressing the conflict between the First Amendment and securities regulation, Lowe is a logical reference point for this Court's statutory analysis of § 10(b). In honoring Congress's intent to "keep the ['40] Act free of constitutional infirmities," id. at 207, and recognizing that First Amendment precedent "support[ed] a broad reading of the exclusion for publishers," id. at 205, the Court read the '40 Act narrowly to avoid both intrusions into free speech and the need to resolve the law's constitutionality. A similar bright line under § 10(b) is necessary for all the same reasons. The SEC's argument that § 10(b) must be read "broadly and flexibly" given its "remedial purpose" cannot overcome the controlling rule that where a reading of a statute "would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); see also Reliance Ins., 442 F. Supp. at 1353

("The securities laws, and particularly Rule 10b-5, were not developed with the intention of ... inhibit[ing] the exercise of freedom of the press."). There was no plain intent in the legislative history for § 10(b) to be applied in the manner now advanced by the SEC.

Additionally, "in connection with" is exactly the sort of loose, ambiguous language that must be confined to avoid constitutional concerns. In United States v. Cong. of Indus. Orgs., 335 U.S. 106 (1948), in order to prevent regulation of periodicals published by labor unions, the Supreme Court narrowly read a portion of the Federal Corrupt Practices Act concerning the prohibition of expenditures "in connection with" elections. In affirming the dismissal of indictments, the Court wrote, "[Congress] did not want to pass any legislation that would threaten interferences with the privileges of speech or press. ... The obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality." Id. at 120-21.

Moreover, in addition to heeding constitutional concerns, it is a longstanding practice to consider the "practical consequences of an expansion" of § 10(b). Stoneridge, 128 S. Ct. at 772. In its closing argument, the SEC gave plenty of warning of the breadth of its perceived enforcement power under the theory of § 10(b) it pursued in this case, claiming jurisdiction to sue speakers and publishers ranging from university presidents to The Wall Street Journal. JA1446-67, 1523.

The district court, however, failed to assess the far-reaching implications of the SEC's proposed reading of the statute. By permitting the SEC and private plaintiffs to prosecute fraud cases in which defendants have not purchased or sold stocks, or breached a fiduciary duty, the district court decision has left in place no "limiting principle," Dirks, 463 U.S. at 664, or "practical" limitation, Stoneridge, 128 S. Ct. at 772, on the scope of § 10(b).

The numerous courts that have dismissed negligent misrepresentation actions against financial publishers have been guided by pragmatic concerns in rejecting these theories. See Gutter, 490 N.E.2d at 900 n.3 (stating that a "contrary result" would have a "staggering deterrent effect on potential purveyors of printed material"); Daniel, 137 Misc. 2d at 100 (referring to the "potential devastating effects" for publishers and the "potential harm to the free dissemination of news and ideas"); First Equity, 869 F.2d at 180 ("The class of potential plaintiffs is multitudinous. ... The potential for meritless or even fraudulent claims is high, and the cost of even successful defenses may be prohibitive if publishers are to be exposed to discovery and trial."). The district court's ruling under § 10(b) would have similar "staggering" and "potential devastating" effects and would create a "multitudinous" class of both defendants and plaintiffs under the federal securities laws. "[Section] 10(b) 'is surely badly strained when construed to provide a cause of action ... to the world at large.'" Stoneridge, 128 S. Ct. at 771 (citing Blue Chip

Stamps, 421 U.S. at 733 n.5) (emphasis added).

Indeed, under the SEC's theory, the "world at large" would be welcomed into § 10(b) litigation against the media. No principled way exists, for example, to distinguish the reader who subscribes to a publication from an airplane passenger who happens to pick up an abandoned copy in a seat pocket for free. Both could sue the publisher under § 10(b) on the basis of the impersonalized content the publication may contain, claiming that they considered the content in making an investment. Publications can pass easily from hand to hand or, these days, from computer to computer. Fiduciary duties, of course, do not pass like that, and that is why they are a principled – and practical – way to contain the scope of the statute.

If § 10(b) is extended to cover the speech of the Publisher and the Author, its constitutionality as applied cannot be avoided. The district court imposed liability for the publication of a false statement of fact while refusing to provide the protections of the "actual malice" rules of New York Times v. Sullivan, 376 U.S. 254 (1964). It enjoined the publication of future false speech despite the strong constitutional presumption against prior restraints. Section 10(b), as applied to the Publisher and Author, thus violates the First Amendment. To avoid the need to reach these constitutional issues, the judgment of the district court should be reversed on the ground that § 10(b)'s "in connection with the purchase or sale of any security" requirement is missing in this case.

II. Under independent appellate review, the SEC has failed to prove, by clear and convincing evidence, that the Publisher and Author published materially-false statements with actual malice.

Although one would never know it from the district court's opinion, the former deputy chief economist for the SEC testified at trial for the Publisher and the Author. The complete omission of this expert economics testimony, as well as the district court's failure to consider the testimony of the defendants' journalism expert from Northwestern University who spoke about the newsletter industry, reflects the relentlessly one-sided view of the evidence in the opinion. The district court also ignored the considerable speculation in the press surrounding the U.S.-Russia summit in May 2002 and its impact on USEC stock as well as the multiple, contemporaneous manifestations of the Author's strong and steady belief in the truth of what he wrote.

Under the traditional standards of § 10(b), where a plaintiff must prove a case by a preponderance of the evidence, the SEC has not demonstrated the publication of a material falsity with scienter, and this Court can therefore reverse the judgment on these grounds. In addition, as the Maryland Court of Appeals recognized in applying constitutional protections to a subpoena to the Publisher for subscriber lists, this case requires heightened standards. Lubin, 882 A.2d at 843 ("The First Amendment is implicated ... when regulations deter or interfere with the receipt of information and free flow of ideas."). Pursuant to the standards

required by the Constitution, this Court has "an obligation," on appeal, to do what the district court did not do – "'make an independent examination of the whole record'" to see if the SEC established its case with "convincing clarity." Reuber v. Food Chem. News, 925 F.2d 703, 714 (4th Cir. 1991) (citation omitted).

A. Heightened protections are required when the SEC seeks to impose liability on the basis of pure speech about a public company.

Because the SEC has stipulated that no conduct is at issue in this case – no illegal securities trading, no fiduciary breaches – the government must prove, if § 10(b) applies, that the Publisher and Author acted with the degree of fault the Constitution requires to impose liability based simply on the alleged falsity of a publication. Under New York Times, 376 U.S. at 280, a showing of "actual malice" by clear and convincing evidence is necessary to meet this high bar. Although the heightened fault standard arose from libel law, it applies here because freedom of speech does not depend upon the "mere label[]" a plaintiff attaches to a claim. Id. at 269. Any law that seeks to impose liability on alleged false speech alone "must be measured by standards that satisfy the First Amendment." Id.

The Supreme Court has thus applied the actual malice rules to false light (Time v. Hill, 385 U.S. 374, 387-88 (1967)); product disparagement (Bose, 466 U.S. at 491); and intentional infliction of emotional distress (Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988)). When Attorney General Michael Mukasey served on the district court in New York, he applied the actual malice protections

to a common-law fraud suit against publisher Standard & Poor's. First Equity Corp. v. Standard & Poor's, 690 F. Supp. 256, 258-69 (S.D.N.Y. 1988), aff'd on other grounds, 869 F.2d 175 (2d Cir. 1989). Actual malice is also required in common-law misrepresentation cases against financial newsletters and newspapers. Ginsburg, 915 F. Supp. at 738-40; Gutter, 490 N.E.2d at 901-02.

On appeal, actual malice cases receive a searching, independent review of the proof of fault in the "entire record" to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." Bose, 466 U.S. at 499; see also Reuber, 925 F.2d 703, 714 (4th Cir. 1991). The traditional rules of appellate review are significantly modified, requiring a reviewing court to "depart[] from the considerable deference an appellate court normally accords to a fact-finder's determinations." Reuber, 925 F.2d at 714. Deference is particularly diminished "when a factfinder's findings rely on its weighing of evidence and drawing of inferences." Newton v. Nat'l Broad. Co., 930 F.2d 662, 671 (9th Cir. 1990); see also Levan v. Capital Cities/ABC, 190 F.3d 1230, 1239 (11th Cir. 1999) (citing Newton as the majority circuit rule).

Where the actual malice rules apply to prove fault, many courts also require proof of falsity by the same clear and convincing standard. See Batson v. Shiflett, 602 A.2d 1191, 1210 (Md. 1992); Pritt v. Republican Nat'l Comm., 557 S.E.2d 853, 862 (W. Va. 2001). This requirement is a natural corollary to New York

Times protections. See Robertson v. McCloskey, 666 F. Supp. 241, 248 (D.D.C. 1987); Firestone v. Time, 460 F.2d 712, 722 (5th Cir. 1972) (Bell, J., concurring). In appeals involving independent review on the issue of fault, federal courts have recognized an accompanying "constitutional duty to carefully scrutinize the record as an added protection of the press" so that the court is "left with no apprehension on the issue of falsity." Celle v. Filipino Reporter Enters., 209 F.3d 163, 182 (2d Cir. 2000); see also Mandel v. Boston Phoenix, 456 F.3d 198, 208 (1st Cir. 2006) (undertaking a "painstaking perusal" of the evidence of falsity on appeal).

B. The SEC did not prove that the statements were material and false.

A fact is material if there is "'a substantial likelihood that the disclosure of the ... fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" Basic v. Levinson, 485 U.S. 224, 231-32 (1988) (citation omitted). Unlike the test for the state of mind of the Author and Publisher, which is subjective, "the question of materiality ... is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." TSC Indus. v. Northway, 426 U.S. 438, 445 (1976).

1. USEC's failure to correct the statements proves their immateriality.

USEC is listed on the New York Stock Exchange. JA119. Under NYSE Rule 202.05, "[a] listed company should ... act promptly to dispel unfounded

rumors which result in unusual market activity or price variations." DX27. NYSE Rule 202.03 dictates: "If rumors or unusual market activity indicate that information on impending developments has leaked out, a frank and explicit announcement is clearly required. If rumors are in fact false or inaccurate, they should be promptly denied or clarified." JA4853. The SEC itself, citing NYSE Rule 202.03, "encourages public companies to respond promptly to market rumors concerning material corporate developments." In re Carnation Co., Securities Exchange Act of 1934 Release No. 22214, 49 S.E.C. 377, 382 n.6 (July 8, 1985). USEC did not issue a press release denying or commenting on the E-mail or the Report. JA121. Given the affirmative duties on USEC under the NYSE Rules to correct materially-false rumors, and USEC's efforts to obtain corrections from other publishers, JA5012, 5852, its silence about the Report and the E-mail is among the best evidence that the statements were not material.

2. The stock price evidence is confounded by multiple factors and does not establish materiality.

The SEC looks to USEC's stock price to show materiality, JA45-46, but "judges are not stockbrokers. ... [E]ven with the corrective lenses of hindsight, they must be chary of theories that purport to discern precisely what caused stock prices to rise or fall." Greenhouse v. MCG Capital Corp., 392 F.3d 650, 661 (4th Cir. 2004). In Greenhouse, the Court rejected claims under § 10(b) because the

plaintiffs could not show that a misrepresentation by a CEO – that he had received an undergraduate degree when he had not – altered the total mix of information. Id. at 658. The stock price of the company fell from $11.85 to $8.40 once a corrective announcement was made. Id. at 655. While it was "plausible" that the decline reflected the materiality of the deception, the "full price history" of the stock "complicate[d] the case." Id. at 654-55.

In May 2002, an abundance of information about USEC or impacting USEC was reaching the market. In the days leading up to May 13, USEC was speaking with confident certainty about approval for the new pricing agreement in the "near term." See supra at 9. Likewise, the approaching summit between Presidents Bush and Putin was the source of much speculation about a possible arms treaty. See supra at 9. On May 13, President Bush announced that the United States had agreed to large warhead cuts with the Russians.[5] USEC's stock began to rise that same day at 3 p.m. – more than three hours before the E-mail went to subscribers. As Dr. Robert Comment, the SEC's former deputy chief economist, testified at trial, the initial increase in price on May 13 is attributable to the arrival of material information in the market completely independent of the E-mail and the Report. JA1042-43.

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[5] The district court incorrectly states that President Bush's press conference was on May 14. It occurred on May 13. JA165, 4023.

As USEC's share price climbed, news reports in The Wall Street Journal and elsewhere ascribed the movement to a connection between the arms treaty and the pricing agreement. See supra at 10-11. The rise was also tied to the expectation that USEC would ultimately benefit from the Russian warheads, as The Washington Post and others suggested. See supra at 11. At the same time this speculation was spreading throughout the market, the Stiglitz article in Forbes was reaching readers – and prompting an industry authority such as The Gartman Letter to state that the Nobel Laureate economist was responsible for the "gap-up" in USEC stock the morning of May 14 (the morning after the E-mail and the Report were published). JA4788. On May 18, the newsletter Personal Finance recommended USEC shares. JA4776.

These independent factors – all ignored by the district court – were entering the mix leading up to the Bush-Putin summit and the May 22 ex-dividend date for USEC (also not mentioned by the district court), a time when Wingfield concedes there was customarily increased volatility for USEC's shares. JA460-61, 4190. The "complications" that led this Court in Greenhouse to pronounce its caution for stock-price evidence are thus even more apparent in this record.

While the district court ignored Dr. Comment, it could not but agree that the Bush announcement "caused the jump in price and volume" on May 13. JA165. But then the court states that the increase in price and volume on the next day, May

14, cannot be “fully ascribed” to President Bush because his press conference did not “directly pertain to USEC” (JA165) – even though, as the record shows, countless news stories immediately tied USEC to the new treaty. Having acknowledged the existence of a confounding factor that continued to have an effect on the rise in the stock on May 14 (responsible if not “fully” responsible is the court’s factual conclusion), the district court then tries to salvage materiality by arguing that a publication which had sold 107 copies as of May 14 was more potent than the President’s nationally-televised news conference because the Report “related specifically to USEC.” JA165 (emphasis in original), 121. That a statement “related” to a company is not the test for materiality.

Unlike the district court, Dr. Comment rejected the reliability of the stock price evidence. JA1055-56. He looked instead to the text of the publications and testified that they contained two principal disclosures: 1) USEC management saw approval of the pricing agreement being causally tied to the summit, and 2) approval would come on May 22. JA1015, 1077.

As to May 22, Dr. Comment stated that the exact targeting of this date was immaterial because a reasonable investor would have immediately bought the stock anyway before the opportunity was gone. JA1016, 1018, 1020, 1027. USEC had made it abundantly clear in late April that the pricing agreement would happen in the “near future.” JA4097. On May 13, the Author wrote that approval would

come on May 22. At the time of publication, "near future" was not materially different from May 22. The two versions of the timing only speak to when in the near term – not whether – approval would occur. A reasonable investor would only care that USEC saw the approval coming soon.

As to USEC perceiving a causal link between the summit and the pricing agreement, the record shows that USEC privately asked the U.S. government to place the pricing agreement on the summit's agenda. JA119. It is also uncontroverted that USEC told Bank of America in mid-April that it was possible that the agreement would be approved at the summit, JA120, 4932, and that handwritten notes on a Bank of America document observe: "Maybe May @ undersecretary levels." JA4964. Just weeks after the summit concluded, approval of the agreement was announced publicly. The "tie" to the summit seen by USEC management, in other words, if material according to Dr. Comment, see JA1071, was in fact accurate. JA1054, 4570-71.[6]

Thus, without disturbing any of the district court's factual findings, the full record reveals the following: the statement that a USEC official said that the

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[6] The defendants argued, see JA11[105], that the government's refusal to produce discovery required dismissal on the grounds that the government pursued a claim while simultaneously invoking the states' secret privilege to deprive the defendants of information essential to their defense. See Fitzgerald v. Penthouse Int'l, 776 F.2d 1236, 1242-44 (4th Cir. 1985). The district court never ruled on this issue.

approval would come on May 22 may have been false but the statement was immaterial, whereas the information in the Report more generally linking approval to the summit may have been material in some way – but it was true.

3. The prediction of a rise in USEC's stock is protected opinion.

What remains of the SEC's case for material falsity is the one statement that is plainly nonactionable opinion: the Author's prediction USEC's stock would double in price. That the district court characterized the "essential fraudulent scheme" as a statement that the Author had a source inside the company for "the precise date on which the stock price would rise," JA156, shows that it, too, confused a statement of fact in the Report – that a USEC insider indicated that the pricing agreement would be approved on May 22 – with the Author's opinion that the shares would double on the news.

Reasonable investors disregard forward-looking statements containing subjective analysis. Raab v. Gen. Physics Corp., 4 F.3d 286, 290 (4th Cir. 1993). Such statements are only actionable if they are guarantees. Hillson Partners Ltd. P'ship v. Adage, 42 F.3d 204, 211-12 (4th Cir. 1994). No guarantee whatsoever is made in the E-mail or the Report. While the district court claimed that "[n]o cautionary language" was contained in the publications, see JA169, the Author in fact made the following disclaimers:

- "I <u>can't</u> <u>guarantee</u> that the stock will pop."
- "[I] consider this a safe <u>speculation</u>."
- "I can even tell you exactly which day the pop in the stock <u>should happen</u>."
- "<u>Hopefully</u>, <u>if</u> <u>my</u> <u>source</u> <u>is</u> <u>right</u>, it won't take long."

JA2974, 2977, 3112 (emphasis added). The Author may have misjudged the potential increase in the share price after approval of the Tenex pricing agreement, but a "stock tip" reflecting a writer's "subjective and speculative supposition" is protected speech. <u>Biospherics v. Forbes</u>, 151 F.3d 180, 184, 186 (4th Cir. 1998).

C. The record is devoid of proof that the Publisher and Author had <u>serious, subjective doubts about the truth</u>.

The SEC must prove that the Publisher and Author published a materially-false statement of fact with clear and convincing evidence of actual malice; i.e., "with knowledge that it was false or with reckless disregard of whether it was false or not." <u>New York Times</u>, 376 U.S. at 280. "Reckless disregard" requires a showing that a defendant "entertained serious doubts as to the truth of [the] publication," <u>St. Amant v. Thompson</u>, 390 U.S. 727, 731 (1958), or had a "high degree of awareness of ... probable falsity." <u>Garrison v. Louisiana</u>, 379 U.S. 64, 74 (1964). The test is subjective; it examines the defendant's state of mind. <u>St. Amant</u>, 390 U.S. at 731. Actual malice "cannot be predicated on the factfinder's negative assessment of the speaker's credibility at trial. ... [D]iscredited testimony

... 'does not constitute clear and convincing evidence of actual malice.'" Newton, 930 F.2d at 671 (citing Bose, 466 U.S. at 512). Moreover, the actual malice standard focuses solely on a defendant's state of mind "at the time of publication." Bose, 466 U.S. at 512.

1. The district court confused falsity with fault.

In finding that the Author acted with fault ("scienter" under § 10(b)), the district court made a classic error: it confused proof of falsity with proof of fault. Indeed, "[t]here is a significant difference between proof of actual malice and mere proof of falsity." Id. at 511. The district court found that Wingfield did not tell the Author on May 2 that approval of the pricing would follow on May 22. JA159. The statement to that effect in the E-mail and the Report, in other words, was false. But the district court then leaps to a conclusion about fault, without any evidence to support it, that the Author "knew full well that Wingfield had not told him that the pricing agreement would be announced on May 22." JA170 (emphasis added). It is not necessary to revisit any of the court's credibility determinations to see, under independent review, that the inferences drawn by the court, and its weighing of the evidence, are not supported by clear and convincing evidence of actual malice. In fact, that is precisely the route the Supreme Court took to reversal of the lower court in Bose.

At issue in Bose was the alleged product disparagement of a speaker system

by a consumer magazine that said that the sound tended to "wander about the room." 466 U.S. at 488. The district court – as in this case there was a bench trial – determined that the article contained a factual error because the sound, in fact, traveled "along the wall" not "about the room." Id. at 490. The Supreme Court did not disturb this finding nor did it question the trial court's conclusion that the testimony of the product's tester, Arnold Seligson, was not credible on the key point of why he used the phrase "about the room" when writing the report on which the article was based. Id. at 512. But even with this testimony discredited, the Supreme Court drew a different inference than the trial court did:

> Seligson displayed a capacity for rationalization. He had made a mistake and when confronted with it, he refused to admit it and steadfastly attempted to maintain that no mistake had been made – that the inaccurate was accurate. That attempt failed, but [that] ... does not establish that he realized the inaccuracy at the time of publication.

Id.

According to the Court, far from realizing that his statement was false when he wrote it, Seligson suffered from a "misconception." Id. at 513. The Supreme Court found the district court's inference – that Seligson's testimony that "I know what I heard" indicated he must have been aware that his report was inaccurate when he wrote it – improper under the actual malice rule. Id. at 512. Because the "only evidence" of actual malice was the falsity of the statement itself, the discrediting of Seligson's testimony on what he heard did not clear the high

constitutional hurdle of clear and convincing proof. See St. Amant, 390 U.S. at 733 (defendant's "mistake ... does not evidence doubtful mind on his part").

As in Bose, the district court's finding of fault rests entirely on its finding of falsity. The Author insisted that he heard Wingfield say "watch the stock on May 22," and the district court found that Wingfield did not make the statement. JA170. This factual conclusion, however, also as in Bose, cannot support an inference, by clear and convincing proof, that the Author therefore "realized the inaccuracy at the time of publication," Bose, 466 U.S. at 512, or "entertained serious doubts as to the truth of [the] publication." St. Amant, 390 U.S. at 731. Therefore, as in Bose, this Court should reject the district court's inferences because the "misconception" of the Author is "not enough" to establish actual malice. See Time v. Pape, 401 U.S. 279, 290 (1971).

Because of the "breathing space" First Amendment freedoms require, id. at 292 (citation omitted), courts have repeatedly reversed trial judgments and held that a dispute between a source and a writer about what was said in a conversation cannot not establish actual malice. See Long v. Arcell, 618 F.2d 1145, 1148 (5th Cir. 1980) (no clear and convincing proof of actual malice where "no documentary evidence" existed showing that defendants knew they were publishing falsehoods and the jury was simply "left to decide the case based on the conflicting accounts of the conversations"); Thomson Newspaper Publ'g v. Coody, 896 S.W.2d 897,

902 (Ark. 1995) (no actual malice arising out of dispute over conversation "which admittedly occurred" because journalist's "perception, even though possibly mistaken ... must be protected"); Fletcher v. San Jose Mercury News, 264 Cal. Rptr. 699, 707 (Cal. Ct. App. 1989) (conflict between reporter and source over accuracy of quotation does not demonstrate actual malice with convincing clarity); see also Sack on Defamation 5-89 (3d ed. 1999) (Second Circuit judge notes that it would be "troubling" to find actual malice based on "mere preference for the testimony of the source to that of the defendant.").

The interview between the Author and Wingfield not only "admittedly occurred," see Thomson, 896 S.W.2d at 902, the Author and Wingfield agreed on virtually everything that was said until the very end of the conversation. JA279-80 (Wingfield), 638-39 (Author). Even if the Author was wrong by, in effect, insisting that "I know what I heard" about being told to "watch the stock" just before the Bush-Putin summit, and even if he made a "vain attempt to defend his statement," where this is the "only evidence of actual malice on which the District Court relied," the SEC has failed to prove fault with the convincing clarity required by the Constitution. Bose, 466 U.S. at 512.

2. An alleged failure to investigate a "bombastic" claim does not establish actual malice.

The district court erred when it determined that the Publisher's failure to independently verify the E-mail and Report was enough to find fault. JA171-72.

Under the actual malice rules, failure to investigate is not reckless disregard for the truth. Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 688 (1989); Ryan v. Brooks, 634 F.2d 726, 733 (4th Cir. 1980). Nor can actual malice be established by what a "reasonable editor" would have done in the situation, as the district court held. JA172. "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." St. Amant, 390 U.S. at 731 (emphasis added). The notion that clear and convincing evidence of actual malice can be found whenever "one person" authors and edits an article, as the district court implies, has no support in the law. JA171.

The district court misreads the record in stating that the Publisher deviated from its regular editing procedures in publishing the E-mail and Report. JA171. The court suggests that this alleged failure to follow a usual practice is another sign of bad faith. JA171. However, the testimony the district court cites plainly shows that the Publisher did not have a regular fact-checker and that the editorial personnel who wrote the articles checked their own text – which is exactly what happened in this instance with the Author. JA961.

Nor is the district court's discomfort with what it calls the "bombastic" nature of the publications sufficient to prove actual malice. JA171. In Greenbelt Coop. Publ'g Ass'n v. Bressler, 398 U.S. 6, 10 and n.3 (1970), the Supreme Court held that a jury instruction that permitted a finding of actual malice based on a

perception that a publication was "excessive, intemperate, unreasonable and abusive" was an "error of constitutional magnitude." See also Washington Post Co. v. Keogh, 365 F.2d 965, 969 (D.C. Cir. 1966) (The "character and content of the publication ... [is] a constitutionally impermissible evidentiary basis for a finding of actual malice.").

Finally, actual malice cannot be predicated on the notion that the references to "insider information" in the publications created an awareness of probable falsity. The district court concedes, as it must, that simply publishing "inside information" to the public is not illegal. JA158. The defendants' journalism expert, Northwestern University Professor David Nelson, agreed that, industry-wide, newsletters of all kinds customarily seek to provide their readers with "inside information" and that their rhetorical style reflects that editorial objective. JA1193. The Author may have been mistaken in what he believed he heard on May 2 from Wingfield, but calling it "insider information" was not a sign of serious, subjective doubts as to the truth.

3. Under Bose, an appeals court cannot overlook the considerable evidence negating actual malice that the district court ignored.

Not only is the record devoid of clear and convincing evidence that the defendants had a "high degree of awareness of ... probable falsity," Garrison, 379 U.S. at 74, significant affirmative proof exists showing that the Author's state of mind was brimming with confidence in his statements.

He sent the E-mail and the Report to Wingfield, for example, within hours of their publication and gave Wingfield copies of several follow-up reports on USEC. JA121, 123. He provided an Internet link in the Report to enable subscribers to investigate USEC for themselves. JA189, 1317, 3110. As USEC's shares begin to rise in advance of the Bush-Putin summit, in order to keep his assessment of the stock's potential value consistent with the fluctuating market, he updated his prediction to a 55 percent gain. JA780, 3113-17, 3177. Later in May, after the May 22 announcement did not come, he interviewed Wingfield again. JA331. During this entire time period, Wingfield had full access to the Publisher's website because the Author had given him a password. JA123.

These efforts to follow the company post-publication and to reach out repeatedly to his source dispel inferences of actual malice. See Newton, 930 F.2d at 686 (evidence that reporters attempted twice to interview plaintiff is proof that they were not seeking to avoid the truth). Neither USEC nor Wingfield ever contacted the defendants to demand a correction. JA121.

Interactions between the Author and his colleagues reveal no sign of known falsity or subjective doubts about the truth. In fact, they show the opposite. The Author volunteered to Rayburn, for example, that Wingfield was his confidential source. JA962, 1263. Rayburn testified that the Author never expressed doubts about what he believed Wingfield had told him. JA1264. E-mail communications

at the time further reflect the Author's conviction that his information was accurate. See supra at 13-14. These e-mails were not written in anticipation of litigation or at the request of company lawyers (as was Wingfield's May 14 summary of his discussions with the Author).[7]

The district court ignored all of them, but under Bose, a reviewing court must examine the "entire record" for clear and convincing proof of actual malice. 466 U.S. at 499. The SEC has failed to meet its burden.

III. The permanent injunction on the Publisher and Author's future speech constitutes a prior restraint in violation of the First Amendment.

As the district court itself conceded, the Publisher and Author publish many writings that deserve "heightened" and "substantial First Amendment protection." JA148, 174. Yet the injunction issued by the district court, which simply tracks the language of Rule 10b-5(a) and (b), JA199-207, covers everything they write. "[P]ermanent injunctions ... are classic examples of prior restraints." Alexander v. United States, 509 U.S. 544, 550 (1993). This "'most extraordinary remedy'" is only employed "where the evil that would result" otherwise is "both great and

[7] In yet another example of the district court's misreading of the record, it states that Wingfield's May 14 memo to company lawyers memorialized his notes. It did not. Wingfield expressly stated that he took no notes of his May 2 conversation with the Author. JA278.

certain." CBS v. Davis, 510 U.S. 1315, 1317 (1994) (citation omitted). Prior restraints thus carry a "'heavy presumption' against [their] constitutional validity." Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (citation omitted). This Court's review of the law is de novo, see Virginia Carolina Tools v. Int'l Tool Supply, 984 F.2d 113, 116 (4th Cir. 1993), and its review of the factual findings supporting the injunction is reviewed under Bose.

The Supreme Court declared prior restraints unconstitutional except in the most extreme situations in Near v. Minnesota, 283 U.S. 697, 706 (1931), where the Court struck down an injunction barring a publisher from publishing a "malicious, scandalous, or defamatory newspaper." An injunction under such a broad statute was "the essence of censorship." Id. at 713. Just as in Near, where the previous publication of defamatory material could not justify a prior restraint on the further publication of defamatory material, so in this case is the district court's finding that the defendants published a false statement in the past constitutionally-insufficient to support an injunction against all false speech in the future.

Moreover, any injunction would chill all of the Publisher and Author's speech, even speech which other courts have deemed fully protected. For example, the district court held that the Report and E-mail are commercial speech with limited constitutional protection, JA177, while the Maryland Court of Appeals rejected the same argument. See Lubin, 882 A.2d at 848. Faced with

directly conflicting interpretations of the law within the same state, the Publisher and Author have no choice but to adhere to the less protective standard.

The permanent injunction imposes a "true restraint on future speech" in the precise manner the Supreme Court condemned as unconstitutional in Near. Subjecting the Publisher and Author, who are not in the securities business, to a sweeping injunction targeting expression that other courts have expressly protected places them in the impossible position of guessing whether the district court will punish or permit their future speech and thus forces them to "make only statements which 'steer far wider of the unlawful zone.'" New York Times, 376 U.S. at 279 (citation omitted). This Court stayed the injunction pending appeal. A permanent injunction would violate the First Amendment.

CONCLUSION

For the foregoing reasons, the Publisher and the Author respectfully ask this Court to reverse the judgment and permanent injunction of the district court and enter judgment in their favor.

REQUEST FOR ORAL ARGUMENT

The Publisher and the Author respectfully request oral argument.

Respectfully submitted,

/s/ Laurie A. Babinski

Bruce W. Sanford
Lee T. Ellis, Jr.
Bruce D. Brown
Laurie A. Babinski
BAKER & HOSTETLER LLP
1050 Connecticut Avenue NW, Ste. 1100
Washington, D.C. 20036
Telephone: (202) 861-1500
Facsimile: (202) 861-1783

Matthew J. Turner
14 West Mount Vernon Place
Baltimore, Maryland 21201
Telephone: (410) 783-8410
Facsimile: (410) 783-8409

Attorneys for Appellants

ADDENDUM

Securities Exchange Act of 1934, Section 10(B)
15 U.S.C. § 17(j)(b)

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange ... (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities Exchange Act of 1934, Rule 10b-5
17 C.F.R. § 240.10b-5

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Investment Advisers Act of 1940
15 U.S.C. § 80b-2(a)(11)

(11) “Investment adviser” means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include ... (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation ...

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,782 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

/s/ Laurie A. Babinski
Laurie A. Babinski

25th day of July, 2008

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on this 25th day of July, 2008, I caused two copies of the foregoing Brief of Appellants-Defendants for Reversal of the District Court's Decision, which was also filed via CM/ECF and sent to the Clerk of Court by FedEx Overnight this same day, to be served via CM/ECF and FedEx Overnight, postage prepaid on:

Michael Conley, Esq.
Mark Pennington, Esq.
Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-8010

Attorneys for Appellees

/s/ Laurie A. Babinski
Laurie A. Babinski