UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-30227

KARL L. KAPPS, et al.,

Plaintiffs-Appellants,

v.

TORCH OFFSHORE, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Louisiana

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION AMICUS CURIAE IN SUPPORT OF APPELLANTS ON ISSUE ADDRESSED

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION 1

ISSUE ADDRESSED BY THE COMMISSION 2

STATEMENT OF THE CASE 3

A. The Parties' Contentions 3

B. The District Court Decision 4

SUMMARY OF ARGUMENT 5

STANDARD OF REVIEW 8

ARGUMENT 9

A. The Disclosure Required by the Securities Act in Securities Registration Statements Is Determined by the Language of the Statute, Which Does Not Restrict That Disclosure to Firm-Specific or Non-Public Information. 9

A. The Securities Act Requires the Material Disclosure in Registration Statements to Be Truthful, to Contain All Information Required by Law, and Not to Omit Information Necessary to Make the Statements Therein Not Misleading 9

B. It Is Not an Absolute Defense to the Securities Act's Disclosure Requirements That Information Is Not Firm-Specific or Is Publicly Available. 12

TABLE OF CONTENTS (Continued)

Page

II. The Disclosure of "Trends" Required by Item 303 Is Not Limited to Firm-Specific or Non-Public Trends 22

CONCLUSION 25

CERTIFICATES

TABLE OF AUTHORITIES

Cases **Page**

Affiliated Ute Citizens of Utah v. United States,
406 U.S. 128 (1972) 9

Auer v. Robbins, 519 U.S. 452 (1997) 8, 22

Basic Inc. v. Levinson, 485 U.S. 224 (1988) 18

Central Bank of Denver v. First Interstate Bank of Denver,
511 U.S. 164 (1994) 9, 12

Chevron U. S. A. Inc. v. NRDC, 467 U.S. 837 (1984) 8, 13

Gustafson v. Alloyd, Co., 513 U.S. 561 (1995) 9

Herman & Maclean v. Huddleston, 459 U.S. 375 (1983) 11

Johnson v. Wiggs, 443 F.2d 803 (5th Cir. 1971) 17

Klein v. General Nutrition Cos., 186 F.3d 338 (3d Cir. 1999) 19

Krim v. BancTexas Group, Inc., 989 F.2d 1435 (5th Cir. 1993) 17, 19

Press v. Quick & Reilly, Inc., 218 F.3d 121 (2d Cir. 2000) 3

TSC Industries, Inc. v. Northway, 426 U.S. 438 (1976) 18, 19, 20

United States v.Mead Corp., 533 U.S. 218 (2001) 8

Ward v. Succession of Freeman, 854 F.2d 780 (5th Cir. 1988) 17

Cases (Continued) **Page**

Wielgos v. Commonwealth Edison, Co., 892 F.2d 509
(7th Cir. 1989) 14, 15, 16
passim

Commission Releases

Amendments to Annual Report Form, Related Forms, Rules, Regulations
and Guides; Integration of Securities Acts Disclosure Systems,
SEC Release No. 33-6231, 20 S.E.C. Docket 1059 (September 2, 1980) 23

Management's Discussion and Analysis of Financial Conditions
and Results of Operations, SEC Release No. 33-6349,
23 S.E.C. Docket 962 (September 28, 1981) 23

Statutes and Rules

Securities Act of 1933, 15 U.S.C. 77a, et seq.

Section 5(a), 5 U.S.C. 77e(a) 10
Section 5(b), 15 U.S.C. 77e(b) 10
Section 7(a), 15 U.S.C. 77g(a) 10, 13
Section 8(d), 15 U.S.C. 77h(d) 10
Section 10(a), 15 U.S.C. 77j(a) 10
Section 11, 15 U.S.C. 77k 2, 3, 4
passim
Section 12(a)(2), 15 U.S.C. 77l(a)(2) 11
Section 17(a), 15 U.S.C. 77q(a) 11
Section 24, 15 U.S.C. 77x 11

Rule Under the Securities Act of 1933, 17 C.F.R. 230.01, et seq.

Rule 175, 17 C.F.R. 230.175 . . . . 14, 15, 17

Statutes and Rules (Continued) **Page**

Rule Under the Securities Exchange Act of 1934, 17 C.F.R. 240.01, et seq.

Rule 10b-5, 17 C.F.R. 240.10b-5 17

Regulation S-K, 17 C.F.R. 229

Item 103, Regulation S-K, 17 C.F.R. 229.103 14
Item 303, Regulation S-K, 17 C.F.R. 229.303(a)(3)(ii) . . . . 4, 7, 8 passim

Miscellaneous

ALI, Federal Securities Code, Section 202(92), Comment (1) 12, 19

H. R. Rep. No. 85, 73d Cong., 1st Sess. (1993) 9, 10

Joel Seligman, Transformation of Wall Street (Rev. Ed. 1995) 9

Restatement (Second) of Torts, Section 538(2)(a) 19

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission, the agency responsible for the administration and enforcement of the federal securities laws, submits this brief as amicus curiae to address the district court's ruling on the securities registration statement disclosure obligations imposed on issuers by the Securities Act of 1933, 15 U.S.C. 77a et seq. The district court held that the "[f]ederal securities laws do not impose a duty on issuers to disclose industry-wide trends or publicly available information," so that the failure to disclose that information may never give rise to a claim under Section 11 of the Securities Act, 15 U.S.C. 77k, the provision that creates a private right of action for certain untrue statements and omissions in registration statements. The district court's ruling on actionable omissions is incorrect, because it creates a per se defense to liability that is contemplated neither by the statute, the Commission's regulations thereunder, nor applicable Supreme Court precedent.

If accepted as a correct view of the law, the district court's ruling would create substantial gaps in the fundamental protections extended to investors by the Securities Act's registration and disclosure requirements, gaps that were not intended by Congress. Furthermore, some of the reasoning urged by the defendants in the district court would lead to the conclusion that issuers could not only omit to

include industry-wide or public information in their registration statements, but that they could also make untrue statements about that information. Moreover, although this case is a Section 11 private action, the principles enunciated by the district court and urged by the defendants could also restrict the disclosure obligations enforced by the Commission in its own proceedings. For these reasons, the Commission submits this brief amicus curiae to address the district court's erroneous views.

ISSUE ADDRESSED BY THE COMMISSION

Section 11 creates a private damages action for any person acquiring a security issued pursuant to a registration statement that "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading (unless it is proved that at the time of such acquisition he knew of such untruth or omission)." The issue addressed by the Commission is whether it is an absolute defense to an action under Section 11 that the untrue or omitted information is not specific to the firm issuing the securities, or is publicly available.

STATEMENT OF THE CASE

A. The Parties' Contentions

The plaintiffs, purchasers in the initial public offering of shares in Torch Offshore Inc., sued Torch, Torch officers and directors, and the underwriters of the IPO under Section 11. Plaintiffs allege that in its discussion of the market price of natural gas, an important determinant of Torch's business prospects, the registration statement for the offering made untrue statements of material fact, omitted to state material facts required to be stated therein when it failed to disclose a "trend" in the price of gas, and omitted to state material facts necessary to make the statements therein not misleading.

Defendants moved to dismiss. They contended that, read in context, the statements challenged by plaintiffs were not untrue or misleading, and also that the price changes plaintiffs identified did not have to be disclosed because they were not a "trend," but were instead only short term fluctuations in a volatile market. These arguments, which were not addressed by the district court, are the sort of fact-bound issues that the Commission ordinarily does not address in an amicus brief, see e.g., Press v. Quick & Reilly, Inc., 218 F.3d 121, 128 (2d Cir. 2000) (court notes that, in keeping with its usual practice, the Commission's amicus brief expressed no views on fact-bound issues involving the application of legal

principles to the specific factual allegations in the complaint), and we do not address them here.

Defendants also made a broader argument that the Securities Act requires disclosure only of firm-specific information that is not available to the public. Based on this premise, they urged that there can never be a duty to disclose information that is not firm-specific, or that is publicly available, so that the omission of that information from a registration statement can never be the basis for liability under Section 11. They also contended that information that is not firm-specific or that is publicly available can never be "material," which would be an additional ground for barring recovery under Section 11; the logic of this argument would suggest that a lie about such information would also not be actionable. Finally, they averred that the requirement in Item 303 of Regulation S-K, 17 C.F.R. 229.303(a)(3)(ii), that the issuer disclose "any known trends" that have had or that it reasonably believes will have a material impact on its finances, is limited to firm-specific trends that are not available to the public.

B. The District Court Decision

The district court granted the motion to dismiss. It did not specifically mention materiality or Item 303, nor did it mention plaintiff's allegation that, in addition to omitting information that should have been included, defendants also

made false statements. It ruled that the failure to disclose non-firm-specific or publicly available information could not be the basis for a claim under Section 11:

> Federal securities laws do not impose a duty on issuers to disclose industry-wide trends or publicly available information. Information concerning publicly traded commodities such as natural gas and gasoline are readily available in the public domain, and therefore, omission of such information is not actionable under Section 11. In addition, non-disclosure of the industry wide-trend of drilling project delays does not form the basis for a securities fraud claim. [1]

Op. at 3 (citations omitted).

SUMMARY OF ARGUMENT

The Securities Act requires issuers of securities that are to be sold to the public to disclose specified information in a registration statement that is filed with the Commission, and in a prospectus that is delivered to investors. These disclosure requirements are enforceable by the Commission and through private rights of action, including Section 11 of the Act, which authorizes a suit for recovery of damages whenever the registration statement contains an untrue statement of material fact, omits a material fact required to be stated therein by statute or Commission regulation, or omits to state a material fact necessary to make the statements therein not misleading, unless it is proven that at the time of the acquisition, the acquirer knew of the untruth or omission.

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[1] Plaintiffs alleged that Torch's customers had delayed projects in response to changes in the market price for gas.

1. Neither the statute nor the Commission's regulations provide that it is an absolute defense to liability that omitted information is not firm-specific or is publicly available. What the statute says about disclosure of material facts is that all information required to be disclosed by the statute or Commission regulations must be included; that no untrue statement may be made, whether the statement is required or not; and that no information may be omitted if the omission would make any of the statements in the registration statement misleading. If material information is called for under this standard, it must be disclosed. There is no blanket requirement that the information be firm-specific, or that it not be publicly available. Indeed, as to public availability, the provision in Section 11 that liability is defeated if the acquirer knew of the untruth or omission cannot be reconciled with an absolute requirement that investors are required, as a matter of law, to appreciate the need to search in other sources, and then to look in those sources – which may be remote, technical, or otherwise difficult to obtain or apply – for information necessary to correct incomplete or misleading statements in the registration statement. Conversely, if material information is not required to be disclosed, and if it may be omitted without making statements in the registration statement materially misleading, it need not be stated, even if it is firm-specific or is not publicly available.

Nor is the definition of "material" under the Act strictly limited to information that is firm-specific and non-public. Information is material if there is a substantial likelihood that a reasonable investor would consider the information an important part of the total mix of information made available when making an investment decision. Because Section 11 is a remedy only when an untrue statement or omission is material, to hold that industry-wide trends or publicly available information can never be material would mean not only that issuers do not have to disclose that information in their registration statements, but also that they could make untrue statements about it. To restrict the definition with bright line rules about firm specificity and public availability is directly contrary to the philosophy of full and fair disclosure underlying by the Securities Act. That does not mean that all material information must be included in the registration statement, but it does mean that an issuer is not free to make material misrepresentations, or to omit material information if it is required to be disclosed by law or needs to be disclosed in order to prevent statements made from being misleading.

2. The relevant provision of Item 303 is not limited to disclosure of trends that are firm-specific or that are not available to the public. Rather, under the plain language of the Item, issuers must disclose "<u>any</u> known trends * * * that have had

or that the registrant reasonably believes will have a material favorable or unfavorable impact" on company finances (emphasis added). Many such trends will be industry-wide or publicly available, but that does not excuse the issuer from complying with the requirements of the Item.

STANDARD OF REVIEW

The Commission's interpretation in notice-and-comment rulemaking of the statutes it administers, including the scope of disclosure required by the Securities Act, is entitled to Chevron deference, which is to say that the Commission's reasonable interpretation of the Act controls unless Congress has clearly and unambiguously addressed the question. See, e.g., United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). The Commission's interpretation in an amicus brief of one of its own regulations, such as what "trend" means in Item 303 of Regulation S-K, is controlling unless plainly erroneous or inconsistent with the regulation. Auer v. Robbins, 519 U.S. 452, 461-63 (1997).

ARGUMENT

I. The Disclosure Required by the Securities Act in Securities Registration Statements Is Determined by the Language of the Statute, Which Does Not Restrict That Disclosure to Firm-Specific or Non-Public Information.

A. The Securities Act Requires the Material Disclosure in Registration Statements to Be Truthful, to Contain All Information Required by Law, and Not to Omit Information Necessary to Make the Statements Therein Not Misleading.

Following the 1929 market crash, Congress ascertained that fully half of the securities issued in the post-World War I decade were worthless. H. R. Rep. No. 85, 73d Cong., 1st Sess. 2 (1933). One of the very first tasks taken up by the new administration in the weeks after the inauguration in March, 1933, was to submit to Congress a bill requiring full disclosure with respect to securities to be offered to the public. See Joel Seligman, The Transformation of Wall Street, 50-72 (Rev. ed. 1995). This statute, which was enacted as the Securities Act of 1933, 15 U.S.C. 77a et seq., embraced as a fundamental purpose "'to substitute a philosophy of full disclosure for the philosophy of caveat emptor.'" Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 171 (1994) quoting Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151 (1972).

"The primary innovation of the 1933 Act was the creation of federal duties – for the most part, registration and disclosure obligations – in connection with public offerings." Gustafson v. Alloyd, Co., 513 U.S. 561, 571 (1995). The Act

requires issuers that wish to sell their securities to the public to file a registration statement with the Commission that contains mandatory disclosures of material information.[2] It also requires delivery to investors of a prospectus containing essential information from the registration statement.[3] Congress intended that the registration statement and prospectus would contain "the basic information by which the public is solicited" to buy offered securities. H. R. Rep. 85 at 9.

The Act also creates a range of remedies for violations of its requirements. Section 8(d), 15 U.S.C. 77h(d), for instance, authorizes the Commission to issue a stop order suspending the effectiveness of any registration statement that "includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading."

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[2] See Section 5(a), 5 U.S.C. 77e(a) (unlawful to sell or deliver any security by means of interstate commerce or the mails unless a registration statement for that security is in effect); Section 7(a), 15 U.S.C. 77g(a) (registration statement must include information called for by statute or Commission regulation); Schedule A (disclosure requirements for registration of securities other than a security issued by a foreign government or political subdivision thereof); Regulation S-K, 17 C.F.R. 229 (disclosure requirements applicable to the content of the non-financial statement portions of a registration statement).

[3] See Section 5(b), 15 U.S.C. 77e(b) (prospectus complying with Section 10 of the Act must be delivered to the purchaser of the security either before or at the same time as delivery of the security); Section 10(a), 15 U.S.C. 77j(a) (information required to be contained in the prospectus).

Section 11, the provision at issue in this case, authorizes a suit for damages by any person who acquires a security issued pursuant to a registration statement that contains any of these same defects, "unless it is proved that at the time of such acquisition he knew of such untruth or omission." [4] Section 11was designed "to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." Herman & Maclean v.. Huddleston, 459 U.S. 375, 382(1983). A plaintiff who acquires a security issued pursuant to a registration statement need only show a material misstatement or prohibited omission to establish his prima facie case. Once he has done so, "[l]iability against the issuer of a security is virtually absolute, even for innocent misstatements. Other defendants bear the burden of demonstrating due diligence." Id. [5]

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[4] The Act also contains other remedies for untrue statements or prohibited omissions of material fact. See Section 12(a)(2), 15 U.S.C. 77l(a)(2) (creating purchaser's right of action for untrue statement or misleading omission in prospectus); Section 17(a), 15 U.S.C. 77q(a) (prohibiting fraud in the offer and sale of securities, including obtaining money or property by means of an untrue statement or misleading omission); Section 24, 15 U.S.C. 77x (criminal liability for willfully making an untrue statement or misleading omission, or omitting required information in a registration statement).

[5] In addition to the issuer, other possible defendants include every person who signed the statement, directors of the issuer, and the underwriter of the security.

The protections of the Act are broad, reaching not only an affirmatively untrue material statement, but also a literally true statement that is nonetheless misleading because of material information that is omitted – a half truth, in other words, "which is, of course, a lie." ALI, Federal Securities Code, Section 202(92), Comment (1). And Section 11 makes it clear that there is no duty on the part of the investor to make a reasonable inquiry into information available outside the registration statement. Rather, where a misrepresentation or omission is material, the investor's recovery may be defeated only if "it is proved that at the time of such acquisition he knew of such untruth or omission" (emphasis added).

B. It Is Not an Absolute Defense to the Securities Act's Disclosure Requirements That Information Is Not Firm-specific or Is Publicly Available.

The disclosure duties imposed by the federal securities laws, like all the substantive requirements of those laws, are embodied in the statutes and the regulations adopted thereunder, and issues about the scope of those duties must be resolved in accordance with the language of the applicable provisions. See, e.g., Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. at 164 (with respect to the issue of "the scope of conduct prohibited by §10(b), the text of the statute controls our decision"). As we have seen, nothing in the language of Section 11 supports an absolute defense based on the fact that the information is

publicly available or pertains to industry wide trends. Indeed, to hold that liability for a material misstatement or omission may be defeated as a matter of law by proving that corrective information could have been obtained by examining industry wide trends or other public information is contrary to the express statutory defense that plaintiff may recover unless it is proved that the person acquiring the security "knew" of the untrue statement or omission.

Moreover, in keeping with the language and purpose of the Act, the Commission's regulations have never treated registration disclosure obligations as being limited strictly to information that is firm-specific and that is not publicly available. As discussed in more detail below, a Commission rule requires the issuer to disclose certain "trends" that could affect its business, and that requirement extends to disclosure of industry-wide trends and to those that may in some way be public. The Commission's determination in a notice-and-comment rulemaking that this disclosure is necessary or appropriate in the public interest, or for the protection of investors, even though it is not limited to information that is firm-specific or that is not publicly available, is an interpretation of the Securities Act that is entitled to deference under Chevron U. S. A. Inc. v. NRDC, 467 U.S. 837 (1984). See Section 7(a) of the Securities Act, 15 U.S.C. 77g(a) (registration statement shall contain such other information "as the Commission may by rules

and regulations require as being necessary or appropriate in the public interest or for the protection of investors").

Yet the district court in this case held that the "[f]ederal securities laws do not impose a duty on issuers to disclose industry-wide trends or publicly available information" and that "[i]nformation concerning publicly traded commodities such as natural gas and gasoline are readily available in the public domain, and therefore, omission of such information is not actionable under Section 11." The court seems to have based these conclusions, not on the language of the statute, but on certain remarks made by the court of appeals in Wielgos v. Commonwealth Edison, Co., 892 F.2d 509 (7th Cir. 1989), and on cases citing that case. The beginning place for our analysis, therefore, is what the Seventh Circuit did, and what it did not, say in Wielgos.

The two issues in that case, which sought recovery under Section 11, were (a) whether the defendant's cost projections complied with the safe harbor for forward-looking statements contained in Commission Rule 175, 17 C.F.R. 230.175, and (b) whether the disclosure made in the registration statement with respect to a pending license application before a branch of the Nuclear Regulatory Commission satisfied Item 103 of Regulation S-K, 17 C.F.R. 229.103, which requires disclosure of material pending legal proceedings. 892 F.2d at 512. The

court did not resolve either of those issues on the ground that an issuer can never have a duty to disclose information that is not firm-specific or that is in the public domain. Rather, it decided the case based on the application of the specific language of Rule 175 and Item 103 to the allegations in the complaint. 892 F.2d at 512-17.

Before addressing each issue before it, however, the Wielgos court offered its thumbnail view of the general way in which the securities disclosure regime works. [6] The district court treated the Wielgos court's general statements as laying

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[6] First, discussing the safe harbor created by Rule 175, the court observed:

> Issuers need not "disclose" Murphy's Law or the Peter Principle, even though these have substantial effects on business. * * * Securities laws require issuers to disclose firm-specific information; investors and analysts combine that information with knowledge about the competition, regulatory conditions, and the economy as a whole to produce a value for stock. Just as a firm needn't disclose that 50% of all new products vanish from the market within a short time, so [defendant] needn't disclose the hazards of its business, hazards apparent to all serious observers and most casual ones. (892 F.2d at 515 (citation omitted).)

Then the court made a similar statement in the course of rejecting the claim that details of the licensing proceeding had not been adequately disclosed:

> Issuers of securities must reveal firm-specific information.

(continued...)

down the absolute rule that the securities laws never require disclosure of any information that is not firm-specific or that is publicly available, thereby creating an absolute defense to liability under Section 11 for the omission of that sort of information from a registration statement.

The district court's ruling in this regard was error. As has been mentioned, for instance, the Commission requires the issuer to disclose certain "trends" that could affect its business, and this requirement is not restricted to trends that are firm-specific, or not publicly available. Certainly, the court in Wielgos did not suggest that an issuer is free to ignore this requirement, or any other requirement that is set forth in statute or regulations, just because the information was not firm-specific or was in the public domain.

Furthermore, it may be that a statement in the registration statement is materially misleading unless other statements are also included. In that event, the issuer is not free to omit the necessary additional disclosure – as a matter of absolute legal defense – simply because the information is not firm-specific, or

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[6](...continued)

> Investors combine this with public information to derive estimates about the securities' value. It is pointless and costly to compel firms to reprint information already in the public domain. (892 F.2d at 517).

because the investor, if alerted to the need to check, could find it out if he or she looked to some other source.

In addition to Wielgos, the district court also cited this Court's decision in Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1446 (5th Cir. 1993), which quoted one of the statements from Wielgos. This Court in Krim, however, like the court in Wielgos, did not decide the case on the broad ground that there could never be a duty to disclose non-firm-specific or publicly available information, but on the ground that the disclosure challenged in that case complied with the Rule 175 safe-harbor. (Krim did hold that certain omitted information was not material, but it did so on the ground that the substance of the information was adequately set forth in the prospectus, not on the ground that the information was not firm-specific or was publicly available.) [7]

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[7] In the district court, Torch also cited Ward v. Succession of Freeman, 854 F.2d 780, 792-93 (5th Cir. 1988), a case brought under Rule 10b-5 under the Securities Exchange Act of 1934, 17 C.F.R. 240.10b-5, in support of the proposition that there can never be a duty to disclose public information. While it may well have been that the specific omissions in that case were not misleading, the Court's reasoning is unclear – it cited in connection with its statement that the information was in the public domain only Johnson v. Wiggs, 443 F.2d 803 (5th Cir. 1971). But Johnson was an insider trading case, in which one of the elements of plaintiff's claim is that the defendant bought or sold securities while in possession of non-public information. Thus, it is true that information that is publicly known cannot be the basis of an insider trading violation, but that does not mean that the failure to (continued...)

In the district court, the defendants suggested that the limitation of required disclosure to firm-specific and non-public information is to be found in the definition of "material." As noted, only material untrue statements and omissions are actionable, but the concept of material information is not restricted as defendants suggest.

A fact is "material" "if there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision. Basic Inc. v. Levinson, 485 U.S. 224, 231, 234 (1988), quoting TSC Industries, Inc. v. Northway, 426 U.S. 438, 449 (1976). For an omission to be material, "there must be a substantial likelihood that the disclosure would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Id. at 231-32. In other words, the "role of the materiality requirement" is "to filter out essentially useless information that a reasonable investor would not consider significant, even as part of a larger 'mix' of factors to consider in making an investment decision." Id. at 234. This Court has explained that the issue is whether "the information allegedly omitted or misrepresented in the prospectus was material, in the sense that it would have altered the way a

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[7](...continued)
disclose information that is publicly available can never be the basis of any claim under the securities laws.

reasonable investor would have perceived the total mix of information available in the prospectus as a whole." Krim, 989 F.2d at 1435.

These formulations of the standard do not absolutely limit materiality to information that is firm-specific or that it not publicly available. What is more, in TSC Industries, 426 U.S. at 445, the Court noted that the definition of materiality it accepted for the securities laws was the standard that was followed in the common law, see Restatement (Second) of Torts, Section 538(2)(a),[8] and also that was found in the proposed Federal Securities Code, see ALI, Federal Securities Code, Section 202(92).[9] Neither of these sources defines "material" in such a way as to limit the concept exclusively to firm-specific or non-publicly available information.

The district court did not expressly mention materiality in stating its rule that omission of information that is available in the public domain is not actionable under Section 11, but it did cite a case holding that certain omitted information was not material, Klein v. General Nutrition Cos., 186 F.3d 338 (3d Cir. 1999). The

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[8] A matter is "material" if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question."

[9] "A fact is 'material' if there is a substantial likelihood that a reasonable person would consider it important under the circumstances in determining his course of action."

court of appeals in Klein, however, by no means endorsed the proposition that non-firm-specific or publicly available information can never be material. Instead, the court observed that "[a] determination of 'materiality' takes into account considerations as to * * * [the information's] availability in the public domain" (emphasis added). 186 F.3d at 342.[10]

Rather than turning on bright-line rules, the question of whether an omission is materially misleading requires consideration of all the relevant facts and circumstances. That question may be resolved on the pleadings if plaintiff failed sufficiently to allege that the omissions were material misleading, and summary judgment may be granted if reasonable minds cannot differ on the question of whether they were so; otherwise, the issue is for the trier of fact. See TSC Industries, 426 U.S. at 438.

The result of applying a per se rule that any information that is not firm-specific or that is publicly available can never be material would be quite harmful to investor protection. Not only may information that is not material be omitted by the issuer without incurring Section 11 liability; an issuer will not be held liable

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[10] It is worth noting that the court in Wielgos explicitly stated that it was not addressing the question of whether the omitted facts were material, but was ruling on whether the disclosures complied with applicable Commission rules. 892 F.2d at 517 ("Our case may be decided, however, without regard to materiality. We think that Commonwealth Edison revealed all that Item 103 requires.").

even if it makes untrue statements about non-material information. See Basic, 485 U.S. at 249 (Court rejects "the proposition that 'information becomes material by virtue of a public statement denying it'") (internal quotation marks omitted). Thus, under the logic of defendants' argument, it would have been lawful, without regard to any other facts and circumstances, for Torch to state that the price of natural gas had gone up steadily for the last ten years, even thought that was false; to fail to disclose market trends that it knew would vitally affect its business; and to present information about gas prices in clearly misleading ways; all on the theory that this information was industry-wide, and that an alert and diligent investor could have found it if the investor looked for corrective information in other sources.

It is particularly inappropriate to say that investors are required as a matter of law – and entirely at their peril – to check the accuracy and completeness of representations in a registration statement (or prospectus) so long as the statements are not firm-specific, or if the truth could be tracked down in some publicly available source, given the registration statement is the key document in the registration and disclosure regime created by the Securities Act. (It would be even more inappropriate to conclude, on the same reasoning, that issuers may lie about such information in that document). Furthermore, as noted in the discussion of the

scope of duty to disclose created by the Securities Act, holding the investor liable for any information he could have found upon further investigation contradicts the express statutory provision that a plaintiff may recover unless it is proven that he "knew" of the untruth or omission.

II. The Disclosure of "Trends" Required by Item 303 Is Not Limited to Firm-Specific or Non-Public Trends.

Defendants' assertion in the district court that a company never has a duty under Item 303 of Regulation S-K (Management's Discussion and Analysis (MD & A)), to disclose industry-wide or publicly known trends is incorrect. The Commission's interpretation of its regulations, including its interpretation in notice-and-comment rulemaking or in an amicus brief, governs unless that interpretation is inconsistent with the language of the regulation or clearly erroneous, Auer, 519 U.S. at 461-63.

The relevant portion of Item 303 requires a company to describe:

> known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. Item 303(a)(3)(ii).

The language of the Item does not limit disclosure to firm-specific trends, or to trends that are not known to the public. Indeed, with respect to many trends that would have a material effect on a company's finances, it is difficult to conceive how the company could meaningfully disclose the anticipated consequences

without also disclosing information about non-firm-specific aspects of the trend, as well as information that is publicly available.

The absence of those limitations is not accidental. Rather, in the 1980 adopting release for the amendments to Regulation S-K that added this MD & A trend disclosure requirement, the Commission articulated its concern that pre-existing disclosure requirements were too narrow, and it recognized a "growing need to analyze an enterprise's liquidity and capital resources, in addition to its revenues and income." Amendments to Annual Report Form, Related Forms, Rules, Regulations and Guides; Integration of Securities Acts Disclosure Systems, SEC Release No. 33-6231, 20 S.E.C. Docket 1059, 1072 (September 2, 1980). The Commission's concerns specifically evolved from its recognition that macro events affecting all public companies were not being accounted for in company disclosures. As the Commission subsequently explained, the 1980 changes reflected its "concerns about the economic climate of the time. High interest rates and inflation were significant problems and the revised MD&A was designed to foster disclosure of trends and uncertainties arising from these and other factors." Concept Release on Management's Discussion and Analysis of Financial Condition and Operations, SEC Release No. 33-6711, 38 S.E.C. Docket 219, 220

(April 21, 1987). Therefore, economy-wide concerns were driving expansive changes in the regulatory disclosure requirements.

Part of the expanded MD&A required disclosure about the impacts of inflation and changing prices on individual registrant businesses. As the Commission stated: "In this regard the Commission believes that Management's Discussion and Analysis should contain information which changes the potentially confusing situation involving inflation impact disclosure into a meaningful discussion of the effects of changing prices on the registrant's business." SEC Release No. 33-6231, 20 S.E.C. Docket at 1071. In order to present that information, an issuer would have to describe macro economic conditions – information that is not firm-specific and that is publicly available. In other words, contrary to defendants' claim, Item 303 may call for disclosure of publicly known and industry-wide trends, where that information is relevant to an explanation of a given company's financial condition and comparative performance from reporting period to reporting period.

CONCLUSION

For the foregoing reasons, this Court should reject the contention that it is an absolute defense to an action under Section 11 of the Securities Act that the misstated or omitted information is not firm-specific, or is publicly available.

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June 2003

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2003, I caused two copies of the proposed amicus brief of the Securities and Exchange Commission (with electronic copy on diskette), and one copy of the Commission's motion for leave to file that brief to be served by overnight delivery on

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

I hereby certify that the brief of appellee Securities and Exchange Commission complies with FRAP 32(a)(7). It is produced in 14 point Times New Roman type, and contains 5624 words, as counted by the word processing program Corel WordPerfect 9.

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