In The
Supreme Court of the United States

David Aronstein, Lesley Stroll,
Petitioners,

v.

Thompson Creek Metals Company, Inc.,
Kevin Loughrey, Pamela Saxton, Pamela Solly,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The United States Securities and Exchange Commission ("SEC"), through its regulatory releases under Item 303, has defined the circumstances under which a reporting company must disclose corporate information to the public. Two conditions determine the necessity of disclosure. First, management must assess whether or not a known trend or event is reasonably likely to occur. Second, if the answer is either indeterminate or affirmative, disclosure is required if the known trend or event would have a material effect upon the company's financial condition.

The question at hand is whether the SEC's regulatory framework is to be given controlling weight in consonance with the Court's prior ruling in *United States v. O'Hagan*, 521 U.S. 642, 673 (1997) "This Court must accord the SEC's assessment in that regard controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute." or whether lower courts, as they did in this instance, are free to substitute their judgment in deciding upon the adequacy of corporate disclosure.

II. The Court has held that "half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations. This rule recurs throughout the common law. ...we have used this definition in other statutory contexts. See, e.g., *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011) (securities law)." *Universal Health Services, Inc. v. United States*, 579 U.S. (2016).

Adjunctive to this ruling, cases in the circuit courts have held to the maxim that "where a party without a duty elects to disclose material facts, he must speak fully and truthfully, and provide complete and non-misleading information with respect to the subjects on which he undertakes to speak" *SEC v. Curshen*, No. 09-1196 (10th Cir. 2010) see also *In Re: K-TEL International, Inc. Securities Litigation* (8th Cir. 2002) "even absent a duty to speak, a party who discloses material facts in connection with securities transactions assume[s] a duty to speak fully and truthfully on those subjects."

The facts of *Curshen,* where defendant posted misleading statements on an internet bulletin board in furtherance of a stock pump and dump scheme, were distinguished from the instant case, by the courts below, asserting that "Here, Loughrey [the CEO] was merely answering questions put to him by analysts".

Accordingly, the question presented is whether or not a corporate officer on an investor conference call may declaim half-truths because he is 'merely answering questions put to him by analysts'.

III. Several of the circuit courts including the Tenth, have addressed the issue as to whether or not knowledge may be imputed to one side in a securities action based upon the statutory language of section 12(2) and the various state uniform securities acts that were in part modeled thereafter. All have come to the same conclusion. "Taken together, section 12(2) and its case law support our conclusion that the plain

meaning of both section 12(2) and section 408(a)(2) requires only that purchasers of securities show a lack of actual knowledge of a material omission in order to prevail." *MidAmerica Fed. S L v. Shearson/American*, 886 F.2d 1249, 1257 (10th Cir. 1989).

The courts below found that because Plaintiffs had read a portion of the Company's 2010 10K, knowledge of other filings, incorporated by reference therein, could be imputed to them.

The question presented is whether or not an exception to the actual knowledge standard is warranted for securities actions under section 12(2) or their state equivalents such as the Connecticut Uniform Securities Act ("CUSA") under which this action was brought.

IV. The Court has held "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938).

The question presented is, whether or not a federal court sitting in diversity jurisdiction is free to discard the applicable state common law as expressed by the supreme court of that state, in deciding a motion for summary judgment.

V. The Court has held that "[D]ue process is flexible and calls for such procedural protections as the particular situation demands", *Morrissey v. Brewer*, 408 U.S. 471. In the case at bar, the district court implemented two separate procedures for the parties with respect to their cross filings for summary judgment.

For the Plaintiffs, the district court held that for claims upon which there were no briefings the Plaintiffs would not be awarded summary judgment even if the facts as presented would warrant that award.

For the Defendants, the district court on multiple occasions acted *sua sponte*, awarding summary judgment where it had neither been briefed nor requested by the Defendants.

The question presented is whether or not Plaintiffs' due process rights have been violated as a result of the two differing procedural standards imposed.

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David Aronstein and Lesley Stroll respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Order and Judgment of the Tenth Circuit, Case No. 17-1178, (February 14, 2018), is reprinted at Appendix A.

The Opinion and Order of the District Court of Colorado, Case No. 15-cv-00204-RM-NYW (April 28, 2017) is reprinted at Appendix B.

The Order of the Tenth Circuit Denying Petition for Rehearing (April 3, 2018) is reprinted at Appendix C.

JURISDICTION

The court of appeals denied rehearing en banc on April 3, 2018 (Appendix C). This Court has jurisdiction under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SEC [Release Nos. 33-6835; 34-26831; IC-16961; FR-36;] Section III (B)

> Where a trend, demand, commitment, event or uncertainty is known, management must make two assessments:
>
> (1) Is the known trend, demand, commitment, event or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required.
>
> (2) If management cannot make that determination, it must evaluate objectively the consequences of the known trend, demand, commitment, event or uncertainty, on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the registrant's financial condition or results of operations is not reasonably likely to occur."

SEC [Release Nos. 33-8350; 34-48960; FR-72] Section III (B)(3):

> As we have explained in prior guidance, disclosure of a trend, demand, commitment, event or uncertainty is required unless a company is able to conclude either that it is not reasonably likely that the trend, uncertainty or other event will occur or come to fruition, or that a material effect on the company's liquidity, capital resources or results of operations is not reasonably likely to occur.

SEC [Release Nos. 33-8350; 34-48960; FR-72] Section IV:

> In determining required or appropriate disclosure, companies should evaluate separately their ability to meet upcoming cash requirements over both the short and long term. Merely stating that a company has adequate resources to meet its short-term and/or long-term cash requirements is insufficient unless no additional more detailed or nuanced information is material. In particular, such a statement would be insufficient if there are any known material trends or uncertainties related to cash flow, capital resources, capital requirements, or liquidity.

Connecticut Uniform Securities Act Section 36b-29:

> Buyer's remedies.
> (a) Any person who: (1) ... or (2) offers or sells or materially assists any person who offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, who knew or in the exercise of reasonable care should have known of the untruth or omission, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight per cent

per year from the date of payment, costs and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security.

Connecticut Uniform Securities Act Section 36b-4:

Prohibited activities re the offer, sale or purchase of any security.
(a) No person shall, in connection with the offer, sale or purchase of any security, directly or indirectly: (1) Employ any device, scheme or artifice to defraud; (2) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.
(b) No person shall, in connection with the offer, sale or purchase of any security, directly or indirectly engage in any dishonest or unethical practice.

GLOSSARY OF TERMS

TCM or Company - Defendant Thompson Creek Metals Company Inc.
CEO - Chairman and Chief Executive Officer TCM, Defendant Kevin Loughrey

CFO - Chief Financial Officer TCM, Defendant Pamela Saxton
IR Director - Director of Investor Relations TCM, Defendant Pamela Solly
Projects Director - Director of Projects TCM, Mr. Terry Owen
Terrane - Terrane Metals Corp., acquired by TCM on October 20, 2011, and thereafter a wholly owned subsidiary of TCM.
Mount Milligan Property - A large copper and gold deposit owned by TCM, as a result of its acquisition of Terrane.
Mount Milligan Project - The engineering project that converted the Mount Milligan Property into an operating mine.
EPCM - Engineering, Procurement and Construction Management.
BCMJV - British Columbia Mining Joint Venture. A joint venture between two global scale engineering firms (Flour Canada Ltd. and AMEC Americas Ltd.) that contracted for the majority of the EPCM of the Mt. Milligan Project.
OWNER - With regards to the Mount Milligan Project, the work was divided between the BCMJV and TCM. TCM is the Owner.
REVOLVER - $300 Million revolving credit facility entered into by TCM on December 10, 2010.
ARES Analysis - A risk based cost estimate uncertainty analysis, produced by ARES Corporation on behalf of TCM in February, 2011.
SEC - United States Securities and Exchange Commission

STATEMENT OF THE CASE - QUESTION I

Facts as they pertain to the Mt. Milligan Project Budget

On July 15, 2010, in action he would later describe as being inspired by Winston Churchill, Defendant Kevin Loughrey, the chief executive officer ("CEO") and chairman of the board Thompson Creek Metals Company Inc. ("TCM"), made a "bet the company offer" to acquire Terrane Metals Company and its flagship copper and gold project, Mount Milligan.

Three days prior to the offer, TCM's Projects Director, who had performed the technical due diligence on the project, advised the Board of Directors "that the current capital estimate might need to be increased from the current US$852 million estimate, some of which had been incurred, to approximately US$1.1 billion" an increase of $248 million. The board minutes additionally state that "It was agreed that the likely increase in the capital estimate would be refined and discussed at the next meeting." (App. A-91)

On October 20, 2010, the Company closed on the Terrane acquisition and in an accompanying news release stated that "Thompson Creek intends to continue the construction and development of the Mt. Milligan property, with Terrane's estimated total capital expenditures to construct and develop the mine of approximately CD$ 915 million." (App. A-92)

Though fully aware of the likely large, material, and non-public increase in the capital budget of the Mt.

Milligan Project, nonetheless several officers and directors of TCM, including the CEO, sold millions of dollars of TCM's common shares in December 2010 and January 2011. (App. A-93)

The construction of the Mt. Milligan Project was to be split between TCM (aka "OWNERS") and an outside engineering joint venture ("BCMJV"). Separate budgets were created for each entity, the sum of which would define the entirety of the Mt. Milligan project budget. Sometime prior to February, 2011, an external entity, ARES Corporation, was hired by TCM or its agents to perform a risk based cost uncertainly analysis for the Mt. Milligan Project. This analysis was used to develop a contingency budget for the project which would sit on top of the budgeted baseline project costs. In early February, 2011, ARES received spreadsheets from TCM or its agents, detailing the baseline project costs for each of the two entities TCM and the BCMJV (App. A-98, A-99).

The sum of the baseline cost estimates for TCM of $244 million (App. A-98) and the BCMJV of $959 million (App. A-100) brought the total baseline cost of the Mt. Milligan Project to a little more than $1.203 billion (244 + 959 = 1203). The recommended contingency budget as calculated by ARES was $136 million bringing the central estimate of the project cost to $1.339 billion (App. A-100).

On February 23, 2011, one day prior to the Company filing its 2010 10K, the Projects Director gave a presentation to the Board entitled "Mt. Milligan Project Update". It stated that the basic engineering for

the project is complete, the scope of the project is frozen as is the process flow (App. A-103). The contract for structural steel has been awarded, and a concrete tender offered, to be awarded by the end of February (App. A-104). Detail engineering had advanced to 27% complete (App. A-103), a stage of completion approximately twice the industry standard needed to produce a bankable feasibility study.

The presentation also contains an updated range on the estimated project budget (App. A-104):

- Overall estimate
- Highest value at $1,425 M (Feasibility Update Study $915 M)
- Probable lowest value in range of $1,250 M

The Merriam Webster dictionary "defines probable as:

1. supported by evidence strong enough to establish presumption but not proof.

https://www.merriam-webster.com/dictionary/probable

On February 24, 2011 the Company filed its 2010 10K with the SEC. Net income for FY 2010 was reported as $114 million (App. A-106).

Nowhere within the 10K is it stated that the Company's central expectation of the construction costs of the Mt. Milligan Project had increased from $915 million to over $1.33 billion, an increase of some $415

million nor that the probable lower bound cost increase would be approximately $335 million.

On April 22, 2011, the Projects Director presented an updated Mt. Milligan Project Estimate to the Board whose new estimate was $1.265 billion, within the previously defined estimate range. The presentation states, as a note to the estimate, that "the $1.25B **does not include**: ramp-up costs, financing, and working capital build-up including spares/M&S inventory" (App. A-107).

On March 1, 2012 Mr. Steve Stulock, a member of the Company's Project Planning and Budgeting group, in an email (App. A-108:110) to the Projects Director and the COO, gave calculations and explanations of those non-construction costs. The letter refers to these items as 'Below the Line Costs' and states that:

1. Total working capital requirement is estimated to be $107 Million
2. Caterpillar Mobile Equipment Financing $7.9 Million
3. Corporate Debt Offering — not calculated
4. Transition Ramp-up Costs — not calculated

Plaintiffs did rough calculations of items 3 and 4 in (App. A-92), with item 3 coming in at a minimum of $50 million and item 4 coming in at $32.6 million. Defendants did not dispute the calculations, so that the calculated values are undisputed facts for purposes of this litigation. The sum of items 1 thru 4 is $197.5 million.

On May 6, 2011 the Company filed with the SEC its form 10Q for the quarter ending March 31, 2011. In the MD&A section it is stated that "TCM's current estimate to construct and develop the Mt. Milligan project is C$1.265 Billion" (App. A-111). This filing does not contain any disclosure of the "Below the Line Costs".

On August 8, 2011 the Company filed with the SEC its form 10Q for the quarter ending June 30, 2011. In the MD&A section it is stated that "TCM's current estimate to construct and develop the Mt. Milligan project is C$1.265 Billion (App. A-112). This filing does not contain any disclosure of the "Below the Line Costs".

The omission of the impending cost increase at the Mt. Milligan Project and the subsequent omission of the so called 'Below the Line Costs' were both material

In upholding a CEO's criminal conviction for insider trading in *United States v. Nacchio*, 519 F.3d 1140, 1145 (10th Cir. 2008) the 10th Circuit relied upon the SEC's guidelines for materiality in dealing with an estimate of expected revenues:

> We take our cue from the SEC's guidelines for the materiality of errors in reported revenues. *See* Staff Accounting Bulletin No. 99, 64 Fed.Reg. 45,150 (1999). In that bulletin, the accounting staff applied the principles of *TSC Industries* and *Basic, Inc.,* to assess the common "rule of thumb" among accountants "that the

> misstatement or omission of an item that falls under a 5% threshold is not material in the absence of particularly egregious circumstances.

In *Nacchio,* the non-public inside information in possession of the defendant, was an internal estimate showing that one year forward revenues were expected to decline $900 million from a public presentation of $21.3 billion, a shortfall of 4.2%. And although a close question, the 10th Circuit found as a matter of law, a reasonable jury could find this material.

In this action, substantially all of the misstatements and omissions that are complained about, are either non-disclosed expected project cost increases, other capital requirements, or constraints on existing sources of funding.

For materiality purposes, all of these are correctly compared to earnings because the Company would be forced to make up these funding needs directly from existing cash or future earnings.

TCM's earnings for fiscal year 2010 were approximately $114 million (App. A-106). Hence a reasonable starting point for a materiality analysis would amount to 5% of $114 million or $5.7 million.

Because the Company was strapped for cash, significant cost overruns and their financings could make the securities markets potentially inaccessible. This would put the Company's ability to complete their projects in jeopardy, which in turn would put their ability to operate as an ongoing concern at risk.

Therefore the qualitative aspects of materiality would argue for a lower as opposed to a higher threshold.

The Company's failure to disclose the pending increase in the cost of the Mt. Milligan Project as required by Item 303, was a material omission

From the above facts it is seen that the Company failed to disclose in its 2010 10K, as required by Item 303, the pending material increase to the Mt. Milligan project budget.

In adjudicating a similar material omission action, the Second Circuit in *Stratte-McClure v. Morgan Stanley,* No. 13-0627-CV, 2015 WL 136312 (2d Cir. Jan. 12, 2015), first states correctly, and then performs an analysis, in consonance with the regulatory directive:

> The SEC's test for a duty to report under Item 303, on the other hand, involves a two-part (and different) inquiry. Once a trend becomes known, management must make two assessments:
>
> (1) Is the known trend . . . likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required.
>
> (2) If management cannot make that determination, it must evaluate objectively the conse-

> quences of the known trend . . . on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the registrant's financial condition or results of operations is not reasonably likely to occur.

The Project Director's presentation says that at a minimum, supported by evidence strong enough to establish presumption, the cost of the project is expected to increase some $335 million above the current estimate. This increase represents nearly 300% of prior year earnings, a number approximately seventy times greater than a 4.2% estimate of a forward revenue decline that the 10th Circuit found could be material in sending a man to prison.

This evidence satisfies both prongs of the SEC test, where first it is shown that the event or uncertainty (the increase in the Mt. Milligan Project cost), is likely to occur, and second that it is material and so that it must be disclosed.

In their award of summary judgment, the courts below hold, without any support in the law, that TCM's statement in its 2010 10K:

> ... TCM is currently conducting a detailed review of the Mt. Milligan project, including a review of the engineering and design of the equipment and facilities and the amount of capital expenditures required to construct and develop the project (which was originally estimated by Terrane to be C$915 million). This review is expected to be

> completed by the end of the second quarter of 2011 (App. A-34).

inoculates the Company, from having to disclose to investors that it is **already known** to them that the cost of the Mt. Milligan Project is heading materially higher. The rational is contained in the *non sequitur*:

> In other words, to the extent that an event or uncertainty affecting TCM's liquidity was reasonably likely (i.e., an increase in the cost of Mt. Milligan Project), TCM disclosed that uncertainty by explaining to investors that the cost of the project was under review. (App. A-111)

Remarkably, the courts below find that disclosing that you are examining something, is legally equivalent to disclosing the results of what you have found in your examination. In countenancing this kind of deception the 10th Circuit radically departs from the 3rd Circuit's eloquent holding "`[t]o warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit'")" *In Re: Westinghouse Securities Litigation*, 90 F.3d 696, 710 (3d Cir. 1996).

Were the Court to embrace the 10th Circuit's reasoning, it would create a simple road map for other reporting companies to hide from investors the actual state of their financial condition. This would negate the fundamental purpose of the securities laws as expressed by the Court in *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164

(1994) holding, "Together, the Acts "embrace a fundamental purpose ... to substitute a philosophy of full disclosure for the philosophy of caveat emptor." Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151 (1972)".

The Company's failure to disclose the 'below the line costs' of the Mt. Milligan Project as required by Item 303, was a material omission

As the undisputed facts show, the Company was aware that the $1.265 billion Mt. Milligan Project budget excluded $197 million of cash needed to complete the project and bring it through the beginnings of commercial production. Even though this actual need for capital is equivalent to 170% of 2010 earnings, the courts below found this immaterial as a matter of law because of the amount of the Company's current cash on hand at the time of the releases, even though all that cash and more would be needed to fund the construction costs of the Company's projects.

Again the courts below, in opposition to the Courts holding in *United States v. O'Hagan,* ignore the guidance of the SEC that specifically describes as insufficient, only the disclosure of current liquidity when it is known that there are material future demands on liquidity as there were here (Release Nos. 33-8350;34-48960; FR-72] Section IV).

In addition to the Item 303 omission, the courts below in their *sua sponte* ruling on these claims failed to take up the question as to whether or not the state-

ments in the Q1 and Q2 10Q's "TCM's current estimate to **construct and develop** the Mt. Milligan project is C$1.265 Billion" were on their own materially misleading, when they omitted the $197 million of 'Below the line costs'.

STATEMENT OF THE CASE - QUESTION II

Facts as they pertain to the TCM 2010 Q4 earnings conference call, Feb 25, 2011.

On February 25, 2011, the Company held its Q4 2010 earnings conference call. On that call, with the CFO and IR Director in attendance, the CEO had three exchanges with analysts concerning the potential for cost increases at the Mt. Milligan Project:

> Analyst: ... the only concern I would have is if you've had so much cost inflation at Endako, how do we know that we're not going to see similar percentages of cost inflation ultimately at Mt. Milligan?
>
> CEO: ... Um, *we looked at the Mt. Milligan numbers pretty hard when we made that acquisition*, and we are now going through to a very thorough re-evaluation of that project, doing our own engineering evaluation, etc. and we expect to have that completed sometime this quarter. *Um, we don't know, of course, what that number will turn out to be....*
>
> ... So that's all I can say Jorge is that we'll do that evaluation have a valuation, we'll disclose

those numbers when they become available, and I'm not doing the engineering myself, which by the way is a good thing, *and uh, we will find, whether or not that the inflationary impact has a bearing on those numbers as they come out*

Analyst: Um, just want a little more detail on the Mt. Milligan. If you could maybe suggest some kind of a timeline here...

CEO: Well the timeline in terms of the completion of the project remains unchanged ... *As to any revision, if one occurs, of the cost element of the project,* I think by the time we do this call next quarter or before, we will be done that work. And we will announce, we will announce it as soon as we are done.

Analyst: So this this um number, the 350 million that you have talked about for this year, that is mostly in the back half of 2011?

CEO: Uh, no, that's relatively evenly spread throughout 2011. And um *I think that number is good.* The full evaluation should take place within the next couple of months as I mentioned and that will then include the project costs through completion, *but I think the number for 2011 will remain constant.* (App. A-113:116)

With regards to the increase in baseline costs of the Mt. Milligan Project, the Projects Director testified:

Q. So how do you account for that, the move from 915 to 1.2, pre-contingent 1.2?
A. There is — there is different factors that are looked into. I mean, price increases. A lot of the equipment pricing was a couple of years old. A lot of the pricing for contracting was a couple of years old. I mean, these guys had done that feasibility study in previous times. And you had to bring a lot of that forward. So a lot of that just was eaten up in the time element of —
Q. So you knew that the 915 number was an old number with old prices?
A. That's correct.
Q. And that because of new prices, 915 couldn't fly?
A. That's correct.
Q. Just from inflation alone, it had to go up?
A. Correct
(App. A-117)

The Court should hold all of a corporate officer's communications, regardless of the forum, to the standard as set forth in *Universal Health Services, Inc.*

The courts below have held that the CEO, on the February 25, 2011 investor call, was not required to disclose material facts related to expected budget increases for the Mt. Milligan project because his discussion of the topic was in response to questions from analysts:

> The circumstances of the case to which plaintiffs cite *S.E.C. v. Curshen,* 372 F.App'x 872 (10th Cir. 2010), are not the same as here, given that in *Curshen* the defendant made voluntary postings to the Internet vouching for the management of a company. *Id* at 850-881. Here, Loughrey was merely answering questions put to him by analysts. (App. A-70)

The courts below give no explanation as to why a corporate officer may declaim half-truths in response to analysts' questions but simply assert that they can.

There are no requirements for a reporting company to hold an investor conference call in the first place. The entirety of a company's required corporate communications may be done through their filings with the SEC. Hence in this instance all of the CEO's communications are completely voluntary and must be construed as willful. What the courts below have in essence held, is that a corporate officer may willfully declaim half-truths in response to analysts' questions on investor conference calls. The Court should simply not accept this as it would destroy an enormous part of communications framework that currently exists in the public securities markets today.

As the facts above show, the CEO communicated that at the time of the investor conference call, it was still indeterminate as to whether or not the cost of the Mt. Milligan project would be increasing because of inflation, or whether or not the cost of the Mt. Milligan project would be increasing at all. Additionally, the

CEO states that he thinks that the capital spending budget for 2011 will remain constant.

The Projects Director's testimony establishes that 'a lot' of the increase from $915 million to $1,200 million in baseline costs is due to inflation alone. That $285 million dollar increase represents a 31% increase over the initial $915 million budget and more than 200% of the Company's FY 2010 earnings, so is material.

The CEO is speaking only forty eight hours after the Board meeting of February 23, 2011, in which the Projects Director presented that the probable minimum increase in the cost of the Mt. Milligan Project was $335 million with a central estimate for an increase of $415 million, so giving lie as to the indeterminism of the project cost in the statement 'As to any revision, *if one occurs*, of the cost element of the project'.

Finally the CEO has no basis to believe that the capital spending budget for 2011 will remain constant, based upon his knowledge of the impending budget increases. And indeed when the increased budget was announced three months later, the capital spending budget for 2011 increased by $87 million.

STATEMENT OF THE CASE - QUESTION III

Facts as they pertain to the liquidity covenant of TCM's revolving credit agreement.

On December 10, 2010, the Company secured a $300 million revolving credit facility ("REVOLVER") from

a consortium of banks, headed by J. P. Morgan. The terms of the agreement were disclosed in an 8K filed December 13, 2010 and were incorporated by reference in the Company's 2010 10k filed in February 24, 2011.

There is **no evidence** in the record that shows that Plaintiffs had actual knowledge of either the 8K filing or its contents and strong evidence that they did not as Plaintiffs initial complaint in this action stated as a fact (erroneously) that TCM had **never** disclosed the terms of the REVOLVER.

The district court recognized this in its ruling on Plaintiffs' objection to the magistrates R&R on Defendants' Motion to Dismiss in stating:

> Here, it is undisputed that plaintiffs did not read the Credit Agreement at any time prior to filing this action. (*See* ECF No. 72 at 10.) (ECF 123 at 12)

As a condition of the REVOLVER, the Company would need to maintain a minimum of $75 million or $100 million in consolidated liquidity, prior to the time when the Mt. Milligan Project had reached its designed production throughput for 75 days. The $100 million minimum would be in place until a secondary development project had reached commercial production which it had not at the time of the investor presentations at issue (App. A-118).

This would have the practical effect of limiting the availability of the Company's cash plus the amount of

money available in the REVOLVER for Mt. Milligan Project development at the time that the investor presentations were issued to $100 million fewer than otherwise. And $75 million fewer, if one assumed that the secondary project would complete prior to the Mt. Milligan Project.

A series of investor presentations beginning May 6, 2011 and ending February 27, 2012 show as available sources of funding for the development of the Mt. Milligan Project the full amount of cash on hand plus the undrawn portion of the REVOLVER. An example from an investor presentation of November 7, 2011 appears at App. A-119.

Each of these presentations overstate the currently available funding for the Mt. Milligan Project by $100 million.

On May 7, 2012, one day prior to the Company's $400 million securities issuance the Company released an investor presentation showing that their funding shortfall is directly affected by the $75 million liquidity covenant, under the assumption that the secondary project will complete (App. A-120).

The Court should not countenance an exception to the settled law of the actual knowledge standard as it applies to actions based on Section 12(2) or state equivalents.

In imputing the knowledge of the liquidity covenant to the Plaintiffs the courts below hold:

> Plaintiffs assert that this Court should follow MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/ American Express, Inc., 886 F.2d 1249 (10th Cir. 1989). (ECF No. 223 at 12.) However, contrary to plaintiffs' belief, the Court is not ignoring or overturning the Tenth Circuit Court of Appeals' decision in that case. Notably, although the Tenth Circuit explained that actual knowledge was required for claims such as the ones plaintiffs bring under the CUSA, the Circuit premised that holding on that fact that (1) the correct information was not provided to the plaintiff prior to its first purchase, even though that information was subsequently provided, and (2) the defendant's oral misrepresentations induced the plaintiff. MidAmerica, 886 F.2d at 1254-55. Here, the correct information (i.e., information on the negative covenants) was provided to plaintiffs before Aronstein's first investment in TCM stock in March 2011. (ECF No. 113-7 at 62:19-22.) (App. A-22:23)

The language of the CUSA 36b-4 and 36b-29 is nearly identical to that of the State of Virginia's similarly constructed statutes 13.1-502 and 13.1-522(A). *Dunn v. Borta,* 369 F.3d 421, 433 (4th Cir. 2004) "The Act does not, however, impose any duty to investigate upon a purchaser, and the court thus impermissibly imposed a due diligence requirement upon Dunn". *Haralson v. EF Hutton Group, Inc.*, 919 F.2d 1014 (5th Cir. 1990) "We do not suggest that a purchaser has any duty to find out the truth under section 12(2) or its Texas equivalent. Indeed, a purchaser who is

actually ignorant that a seller's representation is inaccurate or incomplete may recover even though the full truth is apparent from materials in her possession. *Casella v. Webb*, 883 F.2d 805, 809 (9th Cir. 1989). The concept of a plaintiff's constructive knowledge has no place in section 12(2) actions"

In reaching its decision, the courts below split from the settled law of all the other circuits, and in doing so, unjustly impose their will on the citizens of Connecticut whose legislature has created a statute that is unambiguous in its construction ("the buyer not knowing of the untruth or omission"), the upshot of which would create a legal avenue for premeditated deception as was done here. The Court should not endorse exceptions to this established law.

Finally, as a purely factual matter, the courts below hold, based entirely on their own mistaken analysis of the facts, that:

> Plaintiffs assert that the statement was material because the negative covenant "forces" defendants to raise additional funding (ECF No. 219 at 12), but plaintiffs provide no evidence that the negative covenant alone or in part forced defendants to raise additional capital. (App. A-63)

The courts below simply ignore the Investor Presentation of May 7, 2012, issued one day prior to their $400 million capital raise, which specifically includes the liquidity constraint as a direct input into the Company's funding shortfall (App. A-120).

STATEMENT OF THE CASE - QUESTION IV

Facts as they pertain to Plaintiffs common law claims

On April 25, 2012, Plaintiff Aronstein had a series of communications with the CFO and IR Director in which he sought to understand the Company's financial position. The timeline and the summaries of those conversations can be found at (App. A-94:97).

The courts below erroneously overruled the Connecticut Supreme Court in finding lack of intent as grounds for granting summary judgment

Plaintiffs complain that four statements in particular and the communication as a whole, were false and misleading, and designed to induce Plaintiffs to hold onto their shares in front of the $400 million securities offering that the Company was preparing to launch eight business days later. That offering would contain mandatory convertible securities whose conversion range would depend on the closing price of the common shares of TCM on the day prior to the offering. The statements are as follows:

1. There are only $200 million in variable costs left in the Mt. Milligan Project with the rest having been fixed through monies spent or contracts executed.
2. TCM is trying to renegotiate the liquidity covenant of the REVOLVER.

3. TCM is examining other forms of financing including selling off another piece of the gold stream.
4. The funding shortfall is around $100 million.

Although the courts below found that Plaintiffs had produced evidence showing that a jury could find that statement three was false and misleading it nonetheless found summary judgment on the claim because Plaintiffs "presented no evidence that Saxton and Solly made their statements on April 25, 2012 in order to induce plaintiffs to hold onto their TCM shares." (App. A-85)

Ignoring for a moment the falsity of the assertion and granting its truthfulness for arguments sake, it is still not grounds for finding summary judgment, because under Connecticut common law, "A question of intent raises an issue of material fact, which cannot be decided on a motion for summary judgment. *Suarez v. Dickmont Plastics Corp.*, 229 Conn. 99, 111, 639 A.2d 507 (1994)" *Picataggio v. Romeo*, 36 Conn. App. 791, 794 (Conn. App. Ct. 1995).

Even if the Court were to hold that the courts below were entitled to overrule the Connecticut Supreme Court, there is ample evidence in the record whereby a reasonable jury could find for the Plaintiffs under the summary judgment standard that the Court has set in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986):

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, **not those of a judge**, whether he is ruling on a motion for summary judgment or for a directed verdict. **The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor**

After being informed by the CFO and IR Director of the liquidity constraint and a requirement of the Company to immediately post $75 million reclamation bond, Plaintiff Aronstein left a message on the CFO's answering machine (the prior conversation had been terminated when the line dropped) stating that he was giving up on the Company (App. A-95).

Four minutes later, the CFO and IR Director call him back and convince him to hold onto his shares by falsely relating that the Company was trying to renegotiate the liquidity constraint and were also pursuing financing by selling off another portion of their forward gold sales which would have been non-dilutive (App. A-96).

A jury could easily believe that the CFO and IR Director were trying to get Plaintiffs to hold onto their shares. Indeed, it is hard to come up with any other reasonable explanation for the lies. And after four years of litigation neither the Defendants nor the courts below have even tried.

In addition to the legal and factual errors with respect to the third statement, the courts below made a factual error in dismissing the fourth statement, when *sua sponte,* they came to the erroneous conclusion that there was no evidence in the record that the CFO had knowledge that the Company's funding shortfall was $400 million as opposed to the $100 million that had been communicated to Plaintiff Aronstein (App. A-86).

The evidence for this is contained in the minutes of TCM's Board Meeting April 12, 2012:

> Mr. Loughrey noted that management had called this special meeting for the purpose of discussing financing transactions that the Company had begun pursuing in light of the Company's expected capital requirements at Mt. Milligan ... Mr. Loughrey informed the Board that management was therefore proposing a $400 million public offering. ... Ms. Saxton [CFO] then reviewed with the Board the Company's current liquidity position...
> (App. A-121:122)

Even *without* this dispositive factual evidence, what reasonable jury, never mind all, could conclude that a company was pursuing a highly dilutive securities offering when in fact they didn't actually need the money?

STATEMENT OF THE CASE - QUESTION V

Facts as they pertain to due process

As written in the district court's opinion and order:

> The court notes that nowhere in plaintiffs' motion for partial summary judgment do plaintiffs explain how any of the alleged misrepresentations were negligent under Connecticut law. The Court will not act as plaintiffs' advocate, and thus, the Court will not grant them summary judgment with respect to any of their claims for negligent representation.
> (App. A-16)

Defendants, in their Motion For Summary Judgment, did not brief the district court on the issue surrounding the statements made by the CEO on the February 25, 2011 conference call, nor did they brief the district court on the issue regarding the non-disclosure of the so called 'below the line costs', nor did they contest Plaintiffs' correct assertion that the CFO knew of the $400 million dollar need for capital to complete the Mt. Milligan project that necessitated the Company's dilutive capital raise of May 8, 2012. And yet in all three of these instances, the district court acted precisely as Defendants' advocate in awarding summary judgment on the claims.

Plaintiffs due process rights have been violated

The district court, having established a procedural requirement for the granting of summary judgment for

Plaintiffs, abandoned that requirement for Defendants and awarded them summary judgment for claims not briefed on arguments not made. Nothing could be more inherently unfair and unseemly than for a court to so blatantly operate under two separate procedural frameworks.

Unfortunately, this double standard was not confined to this ruling, but permeated many of the prior proceedings starting from the moment Plaintiffs entered the district court of Colorado.

For example, having had the action transferred from the district of Connecticut to the district of Colorado under 1404(a), the case was eventually assigned to the Honorable Judge Moore, whose rules were that all motions were not to exceed twenty pages without leave of the court. Because both Defendants and Plaintiffs had previously briefed the Connecticut court on a motion to dismiss it was their desire to resubmit these briefings to the Colorado court.

Because Defendants' motion was thirty nine pages and Plaintiffs opposition was forty pages (as allowed by the Connecticut court), both parties had to request leave of the court for excess pages. In a portent of things to come, the magistrate judge granted Defendants' motion while denying Plaintiffs' motion, who were then forced to redraft their opposition with half of their prior arguments and information.

While admittedly lay persons, Plaintiffs are hard pressed to understand how this comports with their

constitutional rights of due process and any notion of fairness.

REASONS FOR GRANTING THE PETITION

The public securities markets are an essential component of the free market system that our country has embraced since its inception. They are the single most important mechanism for the capital formation process that powers investment in existing industry and the as yet unknown industries of the future.

Recognizing the importance of fair dealing in these markets, our legislatures have long ago adopted securities laws whose essence is to "embrace a fundamental purpose ... to substitute a philosophy of full disclosure for the philosophy of caveat emptor." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972)"

Questions I, II and III deal directly with the administration of both the federal and state laws that underlie the effective functioning of the securities markets.

In accepting the district court's decision without meaningful comment, the 10th Circuit has embraced a novel interpretation of the SEC's statutory guidance under Item 303 and creates a conflict with the 2d Circuit in *Stratte-McClure* that follows the SEC's guidance as written.

Additionally the 10th Circuit has carved out an exception to its own holding, *Curshen,* and has created a

conflict with the 8th Circuit's holding in *In Re: K-TEL International* and is in conflict with the Court's prior ruling in *Universal Health Services, Inc.*

In finding an exception to the actual knowledge standard of section 12(2) or its state equivalents, it has created a conflict with the 4th Circuit in *Dunn,* the 5th Circuit in *Haralson* and the 9th Circuit in *Casella.* And in doing so, has illegally imposed its will on the citizens of the State of Connecticut, by failing to follow the unambiguous intent of its legislature.

With regards to Question IV, the 10th Circuit has chosen to ignore eighty years of precedent in refusing to correct the plain legal error of the district court.

Finally, if our system of justice is to stand for anything, its paramount directive should be equal treatment under the law.

Plaintiffs have done nothing but follow the procedural rules as best they could and have been respectful of the courts every step of the way. And for this they have been treated with disdain and have had their rights trampled upon.

Having been empowered by the Constitution as the ultimate repository of judicial power the Court states that its mission is to superintend the administration of justice. And that its core values are fairness, accessibility, independence, integrity and impartiality. In keeping with this spirit, the Court should not let the legal errors nor the inherently unfair procedures of the courts below stand.

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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