In the

Supreme Court of the United States

Howard Piper, et al., Petitioners, v. Chris-Craft Industries, Inc. Respondent.	)	
The First Boston Corporation, Petitioner, v. Chris-Craft Industries, Inc., Respondent.	)	No. 75-353
Bangor Punta Corporation, et al., Petitioners, v. Chris-Craft Industries, Inc., Respondent.	)	No. 75-354
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Washington, D. C.
October 6, 1976

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Washington, D. C.,

Wednesday, October 6, 1976.

The above-entitled matters came on for consolidated argument at 10:02 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LLOYD N. CUTLER, ESQ., Wilmer, Cutler & Pickering, 1666 K Street, N.W., Washington, D. C. 20006; on behalf of Bangor Punta Corporation.

DAVID W. PECK, ESQ., 48 Wall Street, New York, New York 10005; on behalf of The First Boston Corporation.

PAUL G. PENNOYER, JR., ESQ., Chadbourne, Parke, Whiteside & Wolff, 30 Rockefeller Plaza, New York, New York 10020; on behalf of Howard Piper, et al.

ARTHUR L. LIMAN, ESQ., Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Avenue, New York, New York 10022; on behalf of the Respondent, Chris-Craft Industries, Inc.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in three related cases, 75-353, 354 and 55, Piper and others against Chris-Craft and the related cases.

Mr. Cutler, you may proceed whenever you're ready.

ORAL ARGUMENT OF LLOYD N. CUTLER, ESQ.,

ON BEHALF OF BANGOR PUNTA CORPORATION

MR. CUTLER: Mr. Chief Justice, and may it please the Court:

There are three sets of petitioners in this case, held jointly and severally liable on different combinations of events. I shall argue for Bangor Punta, Judge Peck shall argue for First Boston, and Mr. Pennoyer will argue for the Piper family defendants.

This case involves a bid by Chris-Craft to take over the Piper Aircraft Company in January of 1969. The bid was resisted by management, including members of the Piper family.

In April of '69 Piper's financial adviser, First Boston, invited Bangor Punta to submit a competing bid. Bangor did so and won in the marketplace. Christ-Craft went to court and won a $36 million judgment, the largest ever rendered in a private action under the Securities laws, and far more than any conceivable difference between the value of the 42 percent of Piper that Chris-Craft still owns and the 51 percent that it sought.

If you will pick up, Your Honors, the blue-covered Bangor brief and look at page 9, that's our main brief, you will find a table summarizing the control contest, of which the Clerk has extra copies.

Two technical violations of the Securities laws were found against Bangor Punta. The first related to Item 5, on that table, when, after announcing its intention to make an exchange offer for Piper shares, Bangor bought three blocks from institutions in off-Exchange transactions.

In a first-impression ruling on the application of SEC Rule 10b-6, these purchases of Piper shares were held to have violated the rules, even though they were found below to have been made without any manipulative intent or effect.

The second violation was found in connection with Item 7 on that table. Bangor's exchange prospectus did not mention an offer it had received by one of its assets, the Bangor and Aroostook Railroad, at a price in cash well below its carrying value on Bangor's books. In an SEC injunctive suit that was tried together with the Chris-Craft privats suit, the district court found that this omission was made in good faith and without intent to mislead.

QUESTION: Mr. Cutler, you refer to both of those as technical violations. Do you have a -- is that a word of art, or do you use it in a particular context?

MR. CUTLER: I use it in the sense, Justice Rehnquist,

that the violations were, as I have just said, found by the district court to have been made in good faith and without intent to mislead.

QUESTION: May I ask, Mr. Cutler, am I correct in my understanding that the question of whether or not either or both of these constituted a violation is not in issue here before this Court?

MR. CUTLER: That's correct, Justice Stewart. We argued below, and we still believe, that they were not violations, but we did not think either issue as to violation was of sufficient importance to raise on certiorari and those issues are not here.

QUESTION: So we proceed here on the premise --

MR. CUTLER: Yes.

QUESTION: -- that they both did constitute violations?

MR. CUTLER: Right.

QUESTION: Is it your position that the violations, however they are characterized, caused no injury?

MR. CUTLER: It is our position that the violations caused no injury to Chris-Craft, the plaintiff in this action, or, indeed, to anyone else.

The court below, the trial court, expressly rejected charges that Bangor had already accepted that offer to buy the railroad, or that it had even decided to accept the offer, and

they also rejected charges that a loss should have been recorded in Bangor's financial statements.

But the court found that the failure to mention the offer was material, because the offer made the carrying value obsolete, as the trial court said, absent the disclosure. And it ordered Bangor to provide the exchanging Piper shareholders an opportunity to rescind, which none of them accepted.

QUESTION: Did you say the trial court held that that rendered the valuation obsolete?

MR. CUTLER: That the carrying value was obsolete, was the trial court's word, without some mention of the fact that the offer had been received. It did not say that the carrying value should be changed, but that some mention should have been made of the fact that the offer had been received.

QUESTION: This is in the SEC action?

MR. CUTLER: This was in the SEC action, that carried over to --

QUESTION: But not in this action?

MR. CUTLER: It also carried over to the private action, Justice Stewart.

QUESTION: I see.

MR. CUTLER: Yes.

As I said, the court ordered Bangor to provide an opportunity to rescind to the accepting Piper shareholders, which none of them accepted, because the market value of the

Bangor exchange package continued at all times to be higher than the value of the Piper shares that had been offered in exchange.

QUESTION: Mr. Cutler, when was that offer to rescind made?

MR. CUTLER: That offer was made in, I believe, March of 1976, Justice Stevens. The delay from the time that cert was denied in this Court on the original order having occurred primarily because the four Chris-Craft directors of Piper, representing their 42 percent, were anxious, since Piper had to issue a prospectus or a registration relating to this exchange offer, that independent counsel be retained for that purpose, and that updated financials be provided. And that delay was entirely satisfactory to the SEC, the enforcing arm; but it made no real difference, because at all times, as I said, throughout, the value of the Bangor package was higher. And no one rescinded.

The Court of Appeals affirmed all of these particular findings and orders relating to the SEC case, and in that action the SEC obtained all of the relief that was appropriate for the exchanging Piper shareholders, none of whom have brought any private damage action of their own.

Now, Chris-Craft's private action has been before the Second Circuit three times, and each time the Second Circuit reversed the District Court on the critical points of law that

are now here for review. In so doing, the Court created an implied damage action for a non-purchaser under Rule 10b-6 in conflict, we say, with this Court's ruling in Blue Chip; it created an implied action for a competing offeror under 14(e), in conflict, we say, with the principles of this Court's later opinion in Cort v. Ash; it held scienter was required but defined it to equal mere awareness of the undisclosed fact about those railroad negotiations, which we say is in conflict with this Court's later opinion in Hochfelder.

And it found causation on the basis of presumptions, despite findings in the trial court that causal effect had not been proven. It computed damages itself, on the theory that wrongly insured Chris-Craft against a later and unrelated decline in the value of the Piper shares, and that confused the value of control with a mere opportunity to compete for control.

Now, Mr. Liman is doubtless going to tell you a more colorful tale, in which he will portray Chris-Craft as the victim of the greatest Securities fraud since the Mississippi bubble. But Chris-Craft's tale utterly failed to convince the district court, which, as I've said, found that Bangor's technical violations were made in good faith and without intent to deceive.

We assume that this Court did not grant certiorari to re-try these findings of the experienced trial judge, findings which the Court of Appeals affirmed.

QUESTION: Was Judge Pollack the trial judge in each -- each time?

MR. CUTLER: Judge Pollack was the trial judge in all of the matters of which I have spoken. There was, Justice Rehnquist, --

QUESTION: Judge Tenney was in there earlier, wasn't he?

MR. CUTLER: There was an earlier Chris-Craft suit for a preliminary injunction, tried by Judge Tenney.

I want to turn first to whether Congress intended to create these private damage actions that Chris-Craft is now pursuing.

As to Rule 10b-6, it seems to us that Blue Chip just settles the issue. Chris-Craft did not purchase any of the Bangor securities that were offered in distribution, and the violation was not committed in connection with those words of 10b, any of the Piper stock that was purchased by Chris-Craft.

As to 14(e), whether any private damage action was created under 14(e) should be implied or any other section of the Williams Act, has not been squarely passed on by this Court.

Under Cort v. Ash and Wyandotte, courts have implied damage remedies only when the plaintiff is within the class for whose especial benefit, as Cort says, Congress acted, and only when the harm alleged to him is the type of harm that Congress

wanted to prevent.

In Rondeau, this Court held that target company shareholders are the class that Congress wanted to protect in the Williams Act, and it indicated that the harm to them from a violation is the only type of harm that Congress wanted to prevent.

There is nothing, I think our briefs make clear, there is absolutely nothing in the language or the legislative intent of the Williams Act that shows Congress intended in 14(e) to confer rights on anyone other than the target company shareholders or to prevent any harm suffered by a competing offeror, but not suffered by the target shareholders as a class.

As our briefs show, Congress gave no clue that it wanted to, and neither did the SEC draftsman of the Williams Act, or anyone who testified in its favor.

Now, Chris-Craft, while it holds Piper stock, is very plainly not suing in that capacity, any more than a displaced officer or director of a target company would be suing in his capacity as a shareholder, if he was suing to recover the fees and the salaries he lost because the new people in control kicked him out.

QUESTION: Mr. Cutler, it's pretty well settled, isn't it, in the federal courts generally, that a competing offeror in a proposed, in an effort, in a takeover situation can go into a federal district court and get an injunction?

MR. CUTLER: He can go -- he may very well be able to go, Justice Stewart, into a federal court to seek an injunction; but, as I will reach in a moment, it seems to us --

QUESTION: It is an injunction against a competing offeror?

MR. CUTLER: Right. An injunction against a competing offeror, in order to protect the rights of the protected class, the target company shareholders. And only, all the cases to date, in those circumstances.

QUESTION: You accept that as the law, do you?

MR. CUTLER: We do not challenge that. And, as I'll show in a moment, when Congress has legislated both expressed private injunctive and private damage remedies, it has frequently granted a wider class the right to sue for an injunction than the class it has allowed to sue for damages to itself.

Now, what Chris-Craft is asking for here is the damages for the loss of this opportunity to compete for control, something no other target shareholder can have. It's more than any other target shareholder could collect. And, moreover, they are trying to collect it at the ultimate expense of the very target shareholders, the innocent shareholders, who accepted the Bangor securities in the exchange offer and now hold Bangor stock.

And that ironic result is going to occur in every

case of competing exchange offers if the lower is allowed to recover damages against the winner.

And what we put to you is, Is it reasonable to believe that target shareholders, who are the supposed victims of the violation, but who are not complaining themselves, are to be turned into defendants instead of plaintiffs, and are to be injured by the judgment that's supposed to protect them?

Yet the Court of Appeals here said that evidence of legislative intent was unnecessary, and then, under common law tort principles, Chris-Craft should have a federal damage remedy, simply because it claimed injury from a violation of the federal statute. But there is supposed to be no federal common law, and there is no universal statutory principle of a federal damage remedy for everyone claiming violation, or injury from a violation of a federal statute.

And when Your Honors look at the private remedies that Congress has expressly created in the Securities laws and many other laws, you'll find that they have weighed a variety of competing policy considerations and come out with a variety of answers. Sometimes, as in the Food and Drug Act, the Federal Trade Commission Act, courts have held that Congress created no private remedies at all. Sometimes, as in Water Pollution and the Toxic Substances Act, that's now before the President, Congress has created a private injunctive remedy, but not a damage remedy.

And, as in the Clayton Act and in the opinion in Hawaii, Justice Marshall, where Congress created both types of remedies, the Court held that Congress gave a broader class the right to sue for the injunction than the class it gave the right to sue for damages. And that's why, Justice Stewart, the cases that do allow persons outside the protective class to seek injunctions in order to protect the class don't establish that Congress meant to give those same people the right to sue for damages to themselves.

Now, in the Securities laws themselves, Congress has always created damage remedies on what the opinion in Hochfelder called a particularized basis, for a limited type of harm and a limited degree of culpability, and for a limited class of plaintiffs.

That's the principle that Blue Chip and Hochfelder follow and that the opinion below does not.

Let me come now to the scienter.

In Hochfelder, the Court ruled that scienter is required in a private damage action under 10b and also the SEC rule issued under 10b. And it defined scienter as "a mental state embracing intent to deceive, manipulate, and defraud."

QUESTION: That's a little more than scienter, isn't it? I mean, intent is more than simply scienter.

MR. CUTLER: Well, that was the definition of

scienter expressly used in Hochfelder, --

QUESTION: I know.

MR. CUTLER: -- with the reservation I'm about to come to dealing with recklessness, a point which was --

QUESTION: Which was left open.

MR. CUTLER: Right.

This decision was issued before Hochfelder and it held that no such intent was required. As for the 10b-6 violation, it seems to us, Hochfelder very plainly controls and the district court's findings of no manipulative intent or effect, affirmed on appeal, conclude the issue.

The Court of Appeals here recognized that scienter was required because 14(e) had been modeled on 10b-5. But after it affirmed the trial court's finding that the omission concerning the railroad negotiations had been made in good faith and without intent to mislead, the Second Circuit found scienter in Bangor's and First Boston's mere awareness of the negotiations; a standard totally incompatible, we say, with the intent to deceive that was required by Hochfelder.

In Hochfelder, Justice Stewart, as you noted, the Court left open the question of whether recklessness could ever meet the scienter requirement. But that, as Judge Friendly had said earlier, was the kind of recklessness that's equivalent to wilful fraud, and no such recklessness, in that sense, could possibly have been involved here.

QUESTION: Is this a point dispositive in itself? If we agreed with you.

MR. CUTLER: If you agreed with us that this was not recklessness, Justice White, yes, we think it would be dispositive.

QUESTION: Of the entire case?

MR. CUTLER: Of the entire case. Every one of the four points I had hoped to argue, I will not get to, --

QUESTION: Yes, I understand.

MR. CUTLER: -- causation of damages is dispositive.

QUESTION: But -- and you think this issue is concluded by a case decided here since the Court of Appeals action?

MR. CUTLER: Yes. Precisely.

The omission here was one that was fully discussed between Bangor and First Boston and experienced counsel for both of them, and it was deemed appropriate by all of them in good faith. And, while in hindsight it may have been in error, that kind of decision, it doesn't seem to us, can possibly fit within Hochfelder's description of recklessness, especially when the courts below both concluded that there was no intent to mislead, and that everything had been done in good faith.

QUESTION: May I ask this question: Does the record show what percentage of Bangor Punta's earnings were derived from the BAR Railroad?

MR. CUTLER: Practically none. If the record does

show, Justice Powell, the earnings, I think, in the last pertinent year amounted to $60,000.

QUESTION: What percentage --

MR. CUTLER: And when the BAR was sold, even prime rate interest on the five million in cash, that was later received when it was later sold, is obviously far more than $60,000.

QUESTION: Is there any evidence in the record that indicates the extent to which the market appraiser's earning power, as distinguished from the appraised value, --

MR. CUTLER: Well, there is the objective fact, Justice Powell, as Judge Peck will develop, that when the railroad was in fact sold for five million dollars in cash, after this exchange offer terminated, the price of Bangor Punta's stock went up within the succeeding two weeks.

Now, I may have missed my lights, Mr. Chief Justice. Have I used -- I was supposed to have 20 minutes at the beginning.

MR. CHIEF JUSTICE BURGER: Well, you've had a little over 20 minutes now.

MR. CUTLER: Yes. Well, I think, then, sir, I had better leave the issues of causation and damages, each of which would also be dispositive, to my brief, reserving five minutes for rebuttal, and I may have an opportunity to comment on both then.

Thank you.

MR. CHIEF JUSTICE BURGER: Judge Peck.

ORAL ARGUMENT OF DAVID W. PECK, ESQ.,

ON BEHALF OF THE FIRST BOSTON CORPORATION

MR. PECK: Mr. Chief Justice, may it please the Court:

The threshold question in this case as far as First Boston is concerned is: What duty it owed to whom, in its capacity as underwriter of Bangor Punta registration statement and exchange offer?

And specifically, did it owe any duty to Chris-Craft as a competing offeror?

The answer is found in Section 11 of the Securities Act, defining the responsibility of an underwriter on a registration statement, which is a duty of due diligence, created by Section 11, and owed only to persons acquiring the securities offered.

Now, Chris-Craft was not a member of that class, and there's no suggestion that it had any standing under Section 11.

The claim is that,notwithstanding the express provisions and limitations of Section 11, Chris-Craft -- First Boston had an implied responsibility under Section 14(e) of the Securities Exchange Act, an Act that makes no reference to underwriters and unlimited as to the persons to whom it might be liable, and as to the amount that might be recovered, because the registration statement was made in connection with

a tender offer. That fact, that connection makes all the difference.

Now, the untenability of such a claim, we submit, is apparent, both from its conflict with the express language of Section 11 and in necessary recognition of the fact that Section 11 is the source and the only source of an underwriter's responsibility on a registration statement.

QUESTION: Judge Peck, it's my understanding that the -- your brothers on the other side of the podium claim that you are acting here, while you may have been acting as a conventional statutory underwriter in the terms of the 1933 Act, in your capacity in connection with the registration statement, that you were, in addition, acting -- that you had a different hat on through a good deal of these negotiations, and that you were the general or the manager, or whatever the language is in their brief, I've forgotten, of the whole deal. And in that respect you were not a, quote, "underwriter", unquote, but you were acting in quite a different capacity. Isn't that -- do I understand that correctly?

MR. PECK: Yes, that is their contention, but it has been completely rejected, expressly and specifically, by both the district court and the Court of Appeals, whose only fault was found, as far as First Boston is concerned, with respect to 14(e), and it said that it had no directing or responsible connection with any of the other alleged violations, that it

acted only in a professional capacity and solely in good faith.

Those were the findings of both the district court and --

QUESTION: But that's not saying solely as an underwriter.

That, I thought, was their point.

MR. PECK: Well, cover it as you will, there was -- in the first place, the courts below said that it did not participate in these other matters in any respect other than lending professional advice and assistance.

Now, I submit that that doesn't make anyone a principal, or impose any of the liabilities of a principal.

QUESTION: Well, at least one of the claims is based on events that occurred before First Boston was in the picture; is that not so?

When did First Boston get in, in terms of --

MR. PECK: Well, First Boston came in, in its first connection, when the Pipers -- after the Pipers rejected -- well, the Pipers asked, in the first place, asked First Boston to appraise the value -- I mean Bangor Punta -- no, pardon me, I'm right the first time; the Pipers asked Bangor Punta to appraise the value of the Chris-Craft offer in the first place, which they did, and which they said had a value of $65 a share.

The next thing was after the Pipers decided that they

didn't want Chris-Craft as a partner, they asked First Boston to participate in finding another offeror, which it did, and that's when Bangor Punta came in.

Now, there is nothing in Section 14(e) to imply this cause of action that's been asserted here. There is nothing in the legislative history to suggest any such congressional intent. Indeed, the whole of the legislative history is perfectly clear that the intent was to protect only investors, the class to whom an offer is addressed, the only persons who can act upon the offer and the only persons who can be misled if there's anything misleading.

There is nothing to meet any of the tests that this Court has enumerated in the past for implied causes of action. Indeed, the very idea of causes of action to a person outside a protected class, upon showing that the class was misled, certainly does not give rise to the implication of a cause of action.

Now, the anomaly is illustrated here. Not one of the persons who accepted the Bangor offer has ever complained; not one accepted the offer of rescission by direction of the district court. And the anomaly is further illustrated by what the Court of Appeals did here about causation.

Chris-Craft adduced no evidence that the so-called admission of the BAR -- and that, I refer to BAR as the railroad and the sale of the railroad -- that the omission of that from

the Bangor Punta registration statement accounted either for Bangor Punta's success in the contest or for Bangor -- or for Chris-Craft's loss of the contest.

And the district court therefore held, and I'm going to quote, that Chris-Craft had failed to establish an essential element of an action for damages, to wit, a causal relation between the deficiency and the Bangor Punta prospectus and the harm complained of.

The Court of Appeals, however, faced with the inability to establish causation, solved the problem very simply. It said that proof of causation, injury and damage was unnecessary, all were to be presumed.

Now, the presumption that the Court had to indulge in to reach its decision is not only impermissible, as a matter of law, and demonstrative of the lack of proof of causation in this case, but, I submit, also demonstrative of why such a cause of action as Chris-Craft is asserting here does not exist under the law.

Common and statutory law down the years, even in this era of consumer litigation, have been both practical and sensible in not spawning endless litigation between competitors on charges that misleading advertising of one has taken away customers from the other. And Congress certainly didn't intend to launch such litigation by 14(e).

Now, the Court of Appeals must have understood all

this, for it offered a special theory of imposing a non-existing liability upon Bangor Punta and First Boston alike.

It is, as the Court expressed it, that 14(e) created, quote, "a broader standing to sue accorded to offerors based on fraudulent tri-transactions."

In other words, scienter creates standing. And then it proceeded to say what it meant by scienter, and it was that it meant something more than mere negligence.

QUESTION: You say that the Court of Appeals said scienter was a substitute not merely for intent but also for caustion.

MR. PECK: Standing.

QUESTION: Standing.

MR. PECK: Yes, Your Honor.

And then it made its great error, conclusive in the light of this Court's language in Hochfelder; it said that an intent to deceive is not an essential element of the cause of action.

In other words, even though you're in a fraud case, you don't need intent to defraud. Anything more than mere negligence, as it labeled First Boston's conduct here, would be sufficient.

Now, I'm going to come, therefore, to scienter as the way the Court of Appeals worked it out. It said that Bangor Punta was required to apprize the Piper shareholders of the

negotiation over the BAR, and of the consequent indication that it wasn't worth what it was carried at on the books. And that First Boston had enough information to reasonably deduce that the registration statement was inaccurate in this respect.

The particulars given, however, were entirely in the terms of First Boston's investigation, which it said wasn't sufficient, that it should have carried, undertaken a further investigation.

Now, there's no suggestion in the opinion as to what any further investigation of First Boston would have disclosed, or that it would have disclosed anything other than what First Boston, the district court and the Court of Appeals alike found, that there had been no decision to sell the railroad at the time the registration statement was out.

Indeed, the district court rejected as having no substance Chris-Craft's basic claim that at the time of Bangor Punta's exchange offer it had intended to sell the BAR and delayed the sale to avoid disclosure.

And said that it could find, not even find that there was any probability, reasonable probability of a sale at that time, that there was no purposeful omission of it from the prospectus, and that First Boston acted solely in good faith.

Now, the Court of Appeals upheld those findings, and agreed that the failure to disclose the sale negotiations was not in bad faith. And then adding, however, these fateful

words: that intent to defraud is not an indispensable element in the private action for damages under the anti-fraud provisions of the federal securities law.

That is the key sentence and the critical one, as far as scienter is concerned in this case, and by this Court's definition of it in Hochfelder the Court of Appeals was clearly in error. Of course, it didn't have the benefit of this Court's decision at that time.

QUESTION: Suppose we agree with you, Judge, should we decide that question here, or remand it to the Court of Appeals to reconsider, in the light of Hochfelder?

MR. PECK: I certainly think there's nothing to remand. Any claim, assuming standing, any claim under 14(e) would have to establish an intent to deceive or defraud; that has not been -- not only has it -- it hasn't even been attempted here, I would say, but it's certainly the finding of both courts, against it; so there has already been a determination.

QUESTION: What was the date of Ernst & Ernst, do you remember?

QUESTION: March 30th.

MR. PECK: I haven't -- the case --

QUESTION: March 30, Judge.

MR. PECK: 1976.

QUESTION: And we granted certiorari after that, I take

it?

MR. PECK: Yes. You granted certiorari --

QUESTION: Maybe it was our mistake.

MR. PECK: -- that's right, very shortly afterwards; very shortly afterwards.

All right. Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Pennoyer.

ORAL ARGUMENT OF PAUL G. PENNOYER, JR., ESQ.,

ON BEHALF OF HOWARD PIPER, ET AL.

MR. PENNOYER: Mr. Chief Justice, may it please the Court:

Speaking in behalf of the Piper individuals, at a slow gallop for five minutes, I'd like to discuss the issues of causation and damages and the issue of scienter and touch briefly on the issue of individual liability and joint and several liability.

On the question of causation and damages, -- and I won't repeat the legal points made by my colleagues, but solely the facts -- the sole basis for this $36 million judgment against the Piper individuals hangs on three communications sent by Piper management in January of 1969, in the course of Chris-Craft's cash tender offer for 300,000 shares for $65 a share, at a time when Chris-Craft needed about 620,000 shares to get control, and at a time when it said right in its cash tender offer that it did not intend by that cash tender offer

to acquire control.

Now, the Piper contribution to Chris-Craft's lost opportunity to get control seven months later hangs, in the Court of Appeals opinion, on a presumption. Chris-Craft tells this Court that, but for the acts of others later, it was a sure winner and would have had a 99 percent chance of getting control.

So that against the position of the party, the Court of Appeals, nevertheless, makes a presumption that the acts of the Pipers in communicating, as they did, in January caused this lost opportunity seven months later.

We say that is contrary to the lesson of Mills, and I will touch that no further, we've covered it in our brief.

On the question of scienter, the district court, as trier of fact, construed the two letters that were sent in January -- and I might say they are all reproduced in the Reply Brief -- construed the statement that management is convinced the offer is inadequate as a reference to the offer as a whole.

The Court of Appeals simply disagreed and gave its own construction, concluding that the reference was to price, and,based on its own construction, declared that these letters were materially misleading, and therefore, said the Court of Appeals, the Pipers or the Piper management, in sending the letters, recklessly and knowingly disregarded its obligations to shareholders.

Similarly with the other, the third communication, the Grumman press release, the Court of Appeals stated that one of the many terms of the agreement should have been specified in the joint press release put out by Grumman and the Pipers. The term, that is, that dealt with the right to resell the shares to Piper.

The Court of Appeals said, with that provision in the press release, there was a material omission, and therefore, said the Court of Appeals, the Piper management, in issuing the press release, recklessly and knowingly disregarded its obligations to shareholders.

QUESTION: Do you think that might be a relevant factor in a private suit by a shareholder against Piper?

MR. PENNOYER: Yes, we would not question that in a private suit by a shareholder; it might be. We do not agree that it was a material omission, or that the letters were materially misleading. But certainly it would have more relevance in a suit by a private shareholder.

Now, the district court -- or Chris-Craft, let me say, would infer scienter, and this is the only basis of scienter that I've already mentioned, on the basis of the Piper management's opposition to its tender offer, and to Chris-Craft generally; but we say that our position to Chris-Craft does not equate with intention to deceive.

The district court heard the witnesses, it heard

William Piper, it heard non-Piper family management, director witnesses on the question of the communications.

Chris-Craft stipulated that the letters were prepared by a proxy solicitor and reviewed by counsel, and Piper testified that counsel advised them as to what needed to be said in the press release.

Now, with respect to individual liability, while the whole Piper board --

MR. CHIEF JUSTICE BURGER: You are now moving into the rebuttal time, Mr. Pennoyer.

MR. PENNOYER: Well, then, I will simply close with this statement: that individual liability, a violation of a fiduciary obligation to shareholders, was found on the basis of a single footnote sentence that the Pipers, in sending the letters, acted in their own interest and not in the interest of the shareholders.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Liman.

ORAL ARGUMENT OF ARTHUR L. LIMAN, ESQ.,

ON BEHALF OF CHRIS-CRAFT INDUSTRIES, INC., ET AL.

MR. LIMAN: Mr. Chief Justice, and may it please the Court:

I'm not going to tell you, as my brother said, a colorful tale or talk flavor. But I think it would be of assistance to this Court if I talked facts, the undisputed

facts on which the Court of Appeals decision rested, and I think that you will find that those facts bear little recognition to the presentations that have been made before.

As Mr. Justice Rehnquist observed, the issue of violation was not raised in the petitions, and those are given, and they were serious violations, and they occurred at every stage of this control contest; at every single stage of this control contest there were violations committed by the petitioners to thwart Chris-Craft, violations which brought forth two SEC lawsuits and one proceeding by the New York Stock Exchange.

QUESTION: There were two violations, they could hardly have occurred at every stage. There were two, one involving the Bangor and Aroostook Railroad valuation, and the other a violation of 10b-6; wasn't that it? Two violations.

MR. LIMAN: No, Mr. Justice Stewart, there was a violation in January, at the time Chris-Craft made its tender offer, when the Piper family, to discourage shareholders from accepting that offer, made misrepresentations to them. There were violations when Bangor Punta acquired its shares illegally, in violation of Rule 10b-6. There were violations when it announced its exchange offer. And there were violations when Chris-Craft's exchange offer was competing head-to-head against Bangor Punta's exchange offer.

But I really would like to concentrate on the two violations which Your Honor is referring to, because it is also a given in this case that the control that Bangor Punta has and exercises rests on 14.5 percent of Piper stock, which it acquired illegally. Illegally in these two transactions: one, the acquisition of 7.5 percent for cash; the other, the 7 percent through a misleading exchange offer. And that without those blocks, not only would Bangor Punta not have control of Piper, but, at the end of the exchange offers, Chris-Craft would have been leading by 41 to 31 percent, and that was a lead which all experts, including their own, testified was virtually insurmountable.

And, finally, there's another point that I should address myself to right at the outset, and that is that Chris-Craft didn't come into court for the first time asking for damages, it came into court asking for what my brother Cutler said, a tenderor should ask for; it asked for a preliminary injunction in late July of 1969 to preclude, to enjoin Bangor from having the right to vote the illegally acquired cash shares, and from consummating its exchange offer. It told the court at that time that if Bangor Punta was allowed to consummate the exchange offer, the contest would be over, and Bangor Punta, at that time, opposed it and it said -- and I quote from its memorandum in opposition to that preliminary injunction -- that it should be denied because, even assuming

Chris-Craft can prove the allegations in its' moving papers at a full trial, after Bangor Punta has had the opportunity of properly preparing itself for trial, a money judgment will fully compensate Chris-Craft for any damages.

So when we --

QUESTION: Mr. Liman, could I interrupt you there? The Court of Appeals, when it affirmed the denial of the preliminary injunction, didn't rely on that, as I read it, but rather relied on the fact that you could have received a permanent order of divestiture, at least as to the 10b-6 violation, --

MR. LIMAN: Yes.

QUESTION: -- and thereafter you waived, as I understand the case, you waived any equitable remedies and elected to stand on damages.

MR. LIMAN: That's --

QUESTION: Would not the case have been -- wouldn't this not have been an appropriate case for going forward on an equitable basis after that point; and,if not, why not?

MR. LIMAN: Yes, Your Honor. But it --

MR. CHIEF JUSTICE BURGER: Mr. Liman, stay closer to the mike.

MR. LIMAN: Yes, Mr. Justice Stevens, but we did not abandon the request for divestiture immediately. What happened was that after the Court of Appeals found the violations

in Chris-Craft I and remanded to the district court for relief, Bangor Punta, with full knowledge of this, proceeded to change the complexion of Piper, brought in a new chief executive officer, and took other steps which the Court of Appeals in Chris-Craft II recognized made divestiture unfeasible.

But even in Chris-Craft II, we said -- here we first asked for preliminary relief, they say get damages; now in Chris-Craft II they say damages aren't available.

So, if damages aren't available, give us divestiture; and they opposed divestiture there. They have opposed all forms of relief. They want to enjoy the benefits of an illegally gained control.

QUESTION: Did they oppose divestiture on the ground that it was not appropriate relief, or on the ground that they then were disputing the liability issue?

MR. LIMAN: No, they opposed it on the ground that it was not appropriate relief, that Chris-Craft had waived it, and that, in any event -- they also, of course, opposed liability; but they opposed divestiture as relief. And the Court of Appeals, you'll note in Chris-Craft II, said it really was unfeasible, and I could explain the difficulties with it, but they threw up every obstacle to equitable relief, which is what we were really seeking. We were not seeking, as they suggest in their brief, a bail-out. Piper was and still is a most valuable company.

Your Honor, --

QUESTION: Just one -- just so I have it sorted out. When did the case finally become just a damage case? It was after Chris-Craft -- the Court of Appeals second opinion, then?

MR. LIMAN: No, in Chris-Craft -- after Chris-Craft I was decided, and after they proceeded to make the changes in management, we said to the district court: We don't believe that divestiture is practical now, we want damages.

When they then opposed damages, we said: Well, if damages are not available, then we will take divestiture, because an inadequate relief is better than no relief.

They opposed divestiture, and when it was remanded, finally in Chris-Craft II, the Court of Appeals said: Divestiture is impractical and unfeasible; award damages.

Now, in the early stages of the contest, and I don't want to dwell on them, that was the period before Bangor came in, and it was a period when Piper committed these violations, and they tell you that Piper acted in order to oppose Chris-Craft. We never disputed their right to oppose Chris-Craft --

QUESTION: You're talking about the Piper individuals, so-called?

MR. LIMAN: The Piper individuals. We never disputed that. That's a false issue here, but they had to oppose it by lawful means. And the president of Bangor Punta, Wallace, testified at trial that when he met them, to come into the race,

they were espousing a scorched-earth policy against Chris-Craft. Those were his words.

Now, Bangor Punta entered in May. It entered by acquiring the Piper shares, and it announced an exchange offer. Chris-Craft also had a pending exchange offer and registration, and at that time the contest stood at 33 percent Chris-Craft, 31 percent Bangor Punta. So it was nip and tuck.

And Bangor Punta recognized, and the record shows it, that the outcome would turn on certain blocks of stock that were held by large holders, principally the fund of funds, the Cornfeld organization. And Bangor Punta was advised that these shares were leaning toward Chris-Craft, they were emotionally committed to Chris-Craft, and that unless Bangor Punta could take these shares out from under -- and I'm quoting -- out from under Chris-Craft, that Chris-Craft would win and that Bangor Punta's strategy memoranda showed that only by acquiring these shares could it win.

Now, there was one obstacle to the acquisition of these shares, and that was Rule 10b-6 of the SEC, which, as it read and as it was interpreted by the SEC, precluded a company that had announced an exchange offer from buying the stock of the target company for cash.

Now, this was a matter of real concern to the SEC, because in April it called Chris-Craft and its counsel for that down to the SEC and it warned Chris-Craft that if it bought any

of these shares for cash it would consider it a wilful violation subject to criminal penalties. And the counsel for Chris-Craft advised Chris-Craft to comply; Chris-Craft did comply, it cancelled all orders to buy shares for cash and it didn't buy another share for cash while its exchange offer was pending, even though the opportunities were presented.

Now, on the eve of Bangor Punta entering the contest, the SEC published this warning in a release. Bangor Punta stipulated in Chris-Craft II that it read the rlease. And it not only read the release, but it received a warning from its counsel to comply. Bangor Punta said it relied on counsel. Well, no counsel has ever found -- no court here, district court or Court of Appeals, has found that any of these parties relied on counsel in either the 10b-6 violation or the exchange offer.

But its counsel testified -- and what counts is what he says, not what is said in a brief in this Court -- and he said that while he differed with the SEC's interpretation -- and I'm quoting, and it's in our brief, at page 13 to 14 -- "We felt that under the circumstances we should take a conservative position and therefore what we instructed management, in effect, was, or in substance, that in view of that language we should not involve ourselves in the solicitation of any shares, in other words, we thought that it was proper to buy shares of stock but only if they were unsolicited and not

over an exchange."

And he later went on to testify, in accordance with the wording of that rule, he instructed his management -- "instructed", these are the words -- not to buy shares from broker-dealers.

And, really, what happens here could be summed up in the difference between the way Bangor Punta reacted to the advice of counsel and the way Chris-Craft did. Because Bangor Punta went right out, after these instructions, and it bought, first, 40,000 shares of stock from two broker-dealers, American Securities and Bay Securities. It stipulated in Chris-Craft II that it doesn't even claim an exemption on those purchases under Rule 10b-6, and, in fact, its counsel testified that they didn't tell him about those purchases until after they were made. So much for the reliance of counsel.

More importantly, they went and bought 80,000 shares from Fund of Funds, and there they presented an issue of fact and excuse at trial in Chris-Craft II. They said that these shares were not solicited. And the district court found against them, and it said they solicited them, they actually flew out to the Bahamas to pick them up, and Bangor Punta never even appealed from the finding of the district court that those shares were solicited.

So that, in effect, all 120,000 shares were bought in violation of their counsel's advice and in violation of Rule

10b-6, and it isn't as if Bangor didn't have a remedy if it wanted to contest the SEC's interpretation, the SEC's signals and instructions and directions here. Because Rule 10b-6 contains an exemption provision, which says that if you feel that any particular purchase may not have a manipulative or improper effect, then you go to the SEC and present your case.

Well, if they had done that, and if the SEC had agreed with them, then the SEC would have had to give Chris-Craft notice that it, too, could compete for and buy these shares.

So what did Bangor Punta do? It just simply defied its counsel's advice and went behind the back of the SEC and bought these shares, while Chris-Craft was sitting there like a bunch of Boy Scouts.

Now, to add --

QUESTION: Mr. Liman, may I interrupt you there? You say they went behind the back of the SEC. My recollection of what I read in the briefs is that the SEC had had no communication with Bangor Punta on this issue prior to that time.

MR. LIMAN: No personal --

QUESTION: They issued a release, what --five, three days before?

MR. LIMAN: Yes. It issued a release on May 5, --

QUESTION: Right.

MR. LIMAN: -- which Bangor Punta stipulated that it read before it made any of these purchases.

QUESTION: Yes.

MR. LIMAN: And which its counsel used to instruct them not to do it.

QUESTION: Was that the first indication, publicly, by the SEC of that new interpretation, of the meaning of 10b-6?

MR. LIMAN: Your Honor, I don't know of any other public ones. It was a matter that was brooded about at the bar, and it was of sufficient concern to the SEC that they called Chris-Craft down there and threatened them with a wilful violation if they bought.

But --

QUESTION: Doesn't the record show that Bangor Punta made a public announcement on May 16 that it had made these purchases?

MR. LIMAN: After it had made them.

QUESTION: Yes. Was that going behind the back, in your judgment?

MR. LIMAN: Well, what was going behind the back, Mr. Justice Powell, was that they did not go for an exemption, which is what the orderly procedure was, prescribed by Rule 10b-6. Had they done that, then Chris-Craft would have been in the same position as Bangor Punta if the SEC agreed. What was going behind the back was in bypassing the exemption

procedure that was established by the SEC, and nobody here challenges the SEC's right to have promulgated this rule or to have interpreted it the way it did.

QUESTION: It may possibly be relevant to the issue of intent, might it not?

MR. LIMAN: Well, I think that on the issue of intent, you have a knowing violation here in the sense that they knew of the SEC's direction. They were instructed by their counsel not to buy, and they went out and bought. And I don't know a case in which the facts quite frame it so strongly as that.

QUESTION: Mr. Liman, you refer repeatedly to acting contrary to instructions of counsel. I was under the impression that company counsel at least advised Bangor Punta that it was appropriate for it to make these purchases.

MR. LIMAN: No, Your Honor. I have read from the record the only sections that deal with this, in which his instructions were quite clear: Don't solicit. And he went on to say, don't --

QUESTION: Was this an outside counsel or company counsel?

MR. LIMAN: This was their house counsel. And this was their house counsel after talking with their outside counsel. And there is no court, as I say, that has ever found that they relied on counsel.

Now, they add, really, insult to the injury here, by

saying that all that they did was run a red light while at an empty intersection. Well, Chris-Craft was at that intersection, and it had paid some $44 million to be there, and what had really happened, as I said before, is that while Chris-Craft was stopped at that red light because of the SEC, they went barreling through.

QUESTION: Mr. Liman, as I understand it, and I think I'm correct, there's no question in this case, no question raised in this case as to the fact of a violation of 10b-6. So we can assume that everything you say is right, that there was a violation of 10b-6, and that your client was injured.

The real question, the preliminary question at least, is, isn't it, whether or not, given those facts, you have a right of action, an implied right of action, a civil right of action under either 10b-6 or 14(e), and that's the big threshold question in the case, assuming everything you tell us is true, isn't it?

MR. LIMAN: That's right, Your Honor.

QUESTION: So let's -- would you come to that?

MR. LIMAN: Yes. Let me turn, then, and I would like to then return to the Bangor and Aroostook Railroad spat, to the whole issue of standing, first under 14(e) and then under 10b-6.

On Section 14(e), the argument here, the premise of their argument is that the Act was passed, the Williams Act

was passed to protect only stockholders and not to establish rules of the game which would be for the protection of the contestants.

I would submit to Your Honors that even if their premise were correct, and I'll show you that it is not, that the only way that that protection of shareholders could be enforced is by permitting the contestants to have a right of action, which is the conclusion that the various courts that have considered this have come to.

And the reason is simple. Congress recognized that these tender offers, always made at a premium above market, were of great benefit, great value to shareholders. Now, who would make a tender offer, who would seek control, if he could be cheated out of it by illegal means?

And we're told here, at least Congress was told by the SEC, that the SEC did not have the means to police these control contests made by tender offers. The SEC said that the time was too short, their resources were too small, there wasn't pre-filing. Senator Williams himself expressed skepticism and pessimism, which I share, about the utility of shareholder actions in keeping these contests honest; and, therefore, if these rules which Congress wanted to lay down to end industrial warfare were to have any teeth and to have any meaning, then the parties who have the stake in the contest, the contestants, really have to have the power to police each other. And --

QUESTION: Was Congress told that?

MR. LIMAN: Yes. Congress -- it was not -- what it was told was what I had said before, that the SEC didn't have the manpower and resources to do it.

Now, what was Congress's -- what was in Congress's mind, because I'd like to address myself to that. In the Blue Chip case, the Court observed that the cause of action under 10b-5 was really implied in the absence of any indication by the SEC or Congress that there would be a private right of action.

Well, here there was a vast difference. First, it was clear from what was said by both the SEC and Senator Williams, that a principal purpose of this Act was to establish ground rules, a code of fair play, which would protect both sides to the contest.

And on the very pages that they cite for the proposition that Congress was concerned only about shareholders, in the Senate hearings, Mr. Cohen said, "I should indicate, however, that the shareholders alone are not the only persons concerned", and noted that if the bill were passed it might serve to help the take-over bidder in certain situations.

QUESTION: Well, how reliable is that, Mr. Liman? You're talking now about the testimony of a witness, admittedly the Chairman of the SEC, before a committee. That isn't a very high-grade legislative history, is it?

MR. LIMAN: Well, I think so, because the SEC proposed Section 14(e) here, it wasn't in the original bill.

But now let me quote Senator Williams, the chairman of the committee. He said, "It is our nation's legitimate businessmen, as well as the more than 20 million American shareholders, who have the most to gain from this legislation." Again --

QUESTION: You cite that remark as supporting the implication of a private cause of action on behalf of one of the tenders?

MR. LIMAN: I cite that remark and others, such as the desire to avoid tipping the balance, the importance in other parts of the legislative history that the statements in the House hearing, that if there were an orderly supervised process of disclosure and if some ground rules were laid down, not only would the investors be better protected, but everyone would know where he stands.

QUESTION: Who was that statement by?

MR. LIMAN: That was Mr. Cohen, the Chairman of the SEC, telling Congress that.

I cite that for the proposition that Congress was not concerned alone and was not insensitive to the fact that by establishing rules of a contest, that you would be offering protection for both sides, just as you have in any contest.

More than that, this was a case in which the Act was

passed after a long history in the courts of causes of action under Borak, under Section 10b-5, and Borak was discussed before Congress. Senator Williams was sophisticated, he knew about it. And the SEC, in a letter to the House, pointed out that the Birnbaum rule was an obstacle to lawsuits against management opposing tender offers, and said that because the new language of the Williams Act was rejecting the "in connection with sale" language, then that obstacle would be removed.

QUESTION: Now, this again, let's see what grade of legislative history this is. This is a letter from the SEC to whom?

MR. LIMAN: To, I think it was Congressman Staggers; and --

QUESTION: And this qualifies as legislative history in your view?

MR. LIMAN: I think it qualifies as legislative history in determining whether there should be an implied cause of action, because Congress acted on it. Section 14(e) --

QUESTION: How do you know Congress acted on it?

MR. LIMAN: Because -- I know because Section 14(e), unlike Section 10b-5, does not contain the Birnbaum-Blue Chip language about "in connection with a sale"; it contains language of a much broader nature, and it contains that language after Congress was told that the effect of the language would be to eliminate the Birnbaum obstacle.

QUESTION: Well, that might mean -- that might mean, theoretically, that in some future case somebody might sue in litigation like this, who said, "I was deterred from buying Piper Aircraft stock" or I -- "And, therefore, in this kind of a case I'm not barred by the Blue Chip-Birnbaum rule." That's the most that that could mean.

MR. LIMAN: No, it could --

QUESTION: Even your submission.

MR. LIMAN: No, it could mean that, and it could go beyond that, because -- and say that anybody who is in the target area has a right to sue. Because the cases that were coming up in the courts at that time involved the protagonists to these contests.

QUESTION: Well, Mr. Liman, so long as you're relying on Mr. Cohen, as Chairman of the SEC, when did he use the language that we find in this legislative history, or in the reports, I should say, "We are concerned with the investor who today is just a pawn in a form of industrial warfare, the investor is lost somewhere in the shuffle."

MR. LIMAN: He used that on the same page, Mr. Chief Justice, as where he said that the investor is not the only party who's concerned.

QUESTION: Well, then, he said also, the only thing -- "the only thing the bill is designed to do is to make effective the purpose of the bill, so that the information which is to be

provided to the investor does in fact get to him."

MR. LIMAN: Yes. But he said that the way of making sure that the investor was not going to be lost in the shuffle was by establishing rules of fair play, which would be binding on both sides, and which would constitute codes of conduct on which they could rely. And, page for page, I think the Court will find in the legislative history there was more concern expressed about conduct by management than conduct by the tenderor.

Now, the commentators at the time, --

QUESTION: Mr. Liman, before you move on to the commentators, also Chairman Cohen, on the same occasion, testified, as I understand it, that the Williams Act is not designed to assist the offeror, nor designed to assist the management in resisting any plans put forward by the offeror. It is essentially based on the concept that the investor should have the information so he can arrive at a proper decision.

Now, the part you rely on is sandwiched between the portion the Chief Justice quoted and --

MR. LIMAN: Well, I don't think that it's inconsistent. I think, as in the proxy contest, that the only way the investor can get protected is if the parties to the contest can police each other's conduct.

Now, when Congress had the bill before it, with this broad language removing Birnbaum, there were commentaries,

including in the Business Lawyer, all of which construed the fact that this bill was being enacted with this legislative history, would confer standing. The SEC, the principal draftsman, --

QUESTION: Would confer standing on who?

MR. LIMAN: On the tenderor as well as the target.

The SEC, which was the principal draftsman, and, as such, this Court has usually said its views are entitled in those circumstances to great weight, went right into court, within a matter of months after the passage of this Act, and said it confers standing on both sides.

And, most important, Congress, in 1970, amended this Act. It amended the Act after there had been four celebrated cases which said that there was standing for both tenderor and for management --

QUESTION: To collect money damages? Four cases?

MR. LIMAN: Four cases. One of them, Crane, was a money damage case, Your Honor. And the Congress did nothing to circumscribe these interpretations, it did nothing to diminish this right of action. In fact, acting at the SEC's request, it strengthened the Act by giving the SEC more rule-making power.

Now, Crane was decided on pre-Williams Act grounds, giving the tenderor standing; but the Court said squarely that this issue will no longer be with us, because Section 14(e)

gives the standing now.

Now, the concessions that my friends make --

QUESTION: Mr. Liman, before you leave the 14(e) standing issue, would you respond to their argument that, even assuming you might have standing in an equity case and so forth, when you get standing in a damage suit, the recovery adversely affects the people who are the principal beneficiaries of the legislation, namely, the shareholders of exchange.

MR. LIMAN: Yes. I think that argument that they make, first, has no applicability to this case, because we did go in for an injunction and they opposed it; and the rule has always been, I think, clear, that where you -- even if you have a right only to equity, if equity cannot be done, then you can get equity damages; and they certainly did everything to frustrate the grant of relief.

QUESTION: But, on the facts of this case, apparently there are some Bangor Punta shareholders who exchange Chris-Craft stock, and the value of whose shares will be declined because of the $35 million judgment.

MR. LIMAN: Yes. Now I want to address myself to that.

At the time, that rule constituted four percent of the shareholders of Bangor Punta, and when the rescission offer order was being worked out, in the district court, Bangor Punta made a big issue of the fact that many of these people

had sold, and that, therefore, they shouldn't get the benefit of the rescission offer. So that there's no indication in this record that there's a single one left.

But the argument really proves too much, because what it would say is that it would immunize a party who gains control illegally by making an exchange offer, if he had two percent, three percent of the shareholders were former shareholders of the target.

Now, look at Chris-Craft. Chris-Craft had more shareholders of Piper accept its exchange offer. Nobody on the other side of the table expresses any concern for them. Their only means of getting any form of restitution and compensation in this case for the injury done is if Chris-Craft has standing to sue. At least to --

QUESTION: Mr. Liman, in responding to Justice Stevens' question, you referred to Bangor Punta as having gained control illegally. Is there any finding of fact, either in the district court or the Court of Appeals, that the violations on the part of Bangor Punta were causally and factually connected to their gaining control?

MR. LIMAN: Yes. The Court of Appeals said, and I think it's a matter of mathematics, Mr. Justice Rehnquist, that without each of these blocks it would not have control. It needed both for control.

Their argument on causation is that, even assuming they

had not acquired these shares illegally, then perhaps they may have, on some other day and by some other means, acquired them legally. They speculate on that.

QUESTION: There is a factual finding that in the record by one of the courts that there was a factual causal connection between the violations and the ultimate acquisition of control?

MR. LIMAN: Yes. The Court of Appeals emphatically states that, and it's a matter of mathematics that their control rests on these illegally acquired blocks.

Now, the -- as I say, their argument is that this Court should indulge in the speculation that maybe they -- if they hadn't preempted the shares illegally, maybe they could have gotten them legally.

Well, ever since Chief Justice Stone's opinion in the Bigelow case, I really think that that argument has not been heard.

They also make arguments on --

QUESTION: Well, do you think the Court of Appeals also found or had to find that without the control Bangor Punta -- that Chris-Craft would have obtained it?

MR. LIMAN: No, the Court of Appeals distinctly did not find that, and it really refused to engage in that kind of speculation.

It did find in Chris-Craft III that Chris-Craft's

plurality, which would have been 41 to 31, would have commanded a premium, which suggests the value of it. And, as I say, the experts all testified -- I think Bangor Punta's expert said that with 41 to 31, he doesn't see how Bangor Punta could have overtaken Chris-Craft.

But I think that the problem is that -- it's one that was alluded to by Mr. Justice Harlan, as a former trial lawyer: the problem of trying to prove what somebody would have done years after the event, when, actually, he never was faced with the decision because his shares were obtained illegally. It's an impossible burden of proof, and the Court was content here to base its holding on the fact that without those illegal blocks, Chris-Craft would have enjoyed a rather substantial lead.

Now, as I say, their concessions to legislative history, including the '70 amendments, are to say that we, that Chris-Craft should have the power to seek injunctive relief. Well, Borak, I thought, ruled out the distinction between injunctive and legal relief; but, in any event, we did seek it. They stopped us.

And, second, they say, well, maybe management or the target company should have the right to sue, because all of the courts have agreed that the target company has the right to sue. And if you give the target company the right to sue, but not the tenderor, --

QUESTION: That is, the courts have agreed that the

target company has the right to try to get an injunction.

MR. LIMAN: Yes. And if you give the target company the right to come into court, then, what would tip the balance more, contrary to congressional intent, than not to permit the tenderor to come into court?

I would like to address myself to the 10b-6 standing issue.

The district court and the Court of Appeals found, on 10b-6, that there was standing under Birnbaum. In the 1973 petition, Bangor didn't even raise that, in fact, it didn't even raise Birnbaum as an obstacle in Chris-Craft II; and there was a good reason why the courts found that there was standing, because Chris-Craft wasn't the bystander of the Blue Chip case. Chris-Craft was a buyer, it was bidding for the very shares that were illegally preempted here, and it had invested --

QUESTION: When you refer to standing, you're referring to standing as whether you -- whether Chris-Craft has a cause of action.

MR. LIMAN: That's right. And, you know, here's a case in which we invested $44 million and were bidding for these shares, and they went and preempted them illegally.

The Solicitor General, in his amicus brief on cert, at page 17, notes that since Section 14(e) proscribes manipulative and deceptive conduct, that clearly an act that violates a manipulation rule gives standing under Section 14(e). And if

you really contemplate it, I think an analogy suggests itself to all of us, this was if, in a football game the referee blew the whistle and one player goes while everybody else has stopped play, runs to the unprotected goal, comes back and says it should count, because the referee really shouldn't have blown his whistle. Well, you'd have anarchy if you'd permit that kind of argument; and you'd have anarchy if that kind of argument could be made where somebody really wilfully violates a rule of the SEC.

QUESTION: Mr. Liman, --

QUESTION: Mr. Liman, that the shareholders ultimately pay the bill for these things strongly is supportive of what Senator Kuchel said when he introduced the bill, and what Senator Williams said, and what other witnesses said, that their concern was for the shareholders and no one else.

How do you protect the shareholders by putting a burden on them of millions of dollars of the judgment?

MR. LIMAN: You have two groups of shareholders, of course, here. You have the Chris-Craft shareholders, who have lost what Bangor Punta is being asked to pay; and, therefore, it's not a matter of shareholder versus some other character, it's a matter of shareholders versus shareholders.

Now, Bangor Punta shareholders have remedies against their own directors. Directors can get, and in almost all cases do get, liability insurance. And, really, the whole

purpose of the Williams Act was to have prevented what happened here, was to have prevented people from going through red lights to get control, and then later coming in and saying, "Well, there should be no remedy, we should be able to keep this illegally obtained control; our victims should have no recourse."

I really wonder whether, in the light of what has happened, even with this judgment, but considering the injury that Chris-Craft had, whether I would have given the advice that Cravathdid, which is to abide by the law; maybe the soundest advice in these contests is: get control by whatever means you can, and worry about it later.

And that's what they pursued here.

Now, on the BAR --

QUESTION: Mr. Liman, let me go back to the 10b-6 standing. I'm just not quite sure I understand your position.

Do you contend that Chris-Craft was a purchaser within the meaning of the Birnbaum rule, or that the Birnbaum rule does not apply to 10b-6?

MR. LIMAN: I would contend both, that -- because the burden -- because 10b-6 does not have the "in connection with" language, that Birnbaum should not be applied to it.

But I contend, more than that, that Section 14(e) gives us that standing and that, in any event, Chris-Craft was not only a buyer here to the tune of $44 million, it was a

bidder for the very stock which they illegally preempted.

Now, --

QUESTION: I don't understand the relevance of 14(e) to the 10b-6 standing issue.

MR. LIMAN: Well, it's because, I think, that the 10b-6 violation has to be viewed in the context of a tender contest, and Section 14(e) was adopted for the regulation of conduct of tenders --

QUESTION: Oh, I see what you're saying.

MR. LIMAN: -- and it does contain language that you shouldn't engage in deceptive conduct. And I contend that what happened here violates that, too.

Going beyond that, on scienter, the Court of Appeals has been made out here to have applied some standards that were pre-Hochfelder, and that didn't really conform with Hochfelder.

Well, in the first place, the violations here were knowing violations; the violation of Rule 10b-6 was a knowing violation. The violations by the Pipers were knowing violations, characterized by a scorched-earth policy. And the violation on the BAR, and I didn't get into the facts, though they are set forth in our brief, couldn't have been more knowing, it had to be judged in the context of competing exchange offers which were perceived by the public to be identical.

Chris-Craft got 112,000 shares, they got 111,600 shares. And here they had an asset, and in answer to a question

from the Bench, this railroad in the first two of the last five years had earned one-third of Bangor Punta's income, they had an asset which was being proffered to the public as having a value of 18 million on a market price evaluation in a section of their prospectus which was updated to September 1968, and the district court said that no director of Bangor Punta could have believed that it had that value, and the reason that they couldn't have believed it is that on May 22 the board had received a recommendation, unanimously from its committee, to sell this railroad for five million. The only dissenting voice was that it should be sold at seven million.

They now come into this Court and say, Well, of course, we never believed that it had this $18 million market value, and we never contended otherwise. They did, in fact, contend otherwise in the Court of Appeals, and if I had the time I could quote from their brief there.

The fact is that they presented this railroad as having an $18 million value, it had a $5 million value. When they did not warn or even hint in their prospectus that this railroad was on the block, and that this kind of loss could be incurred. The loss would have wiped out the earnings, and you would have, therefore, had a red number in their prospectus going against a black number in the Chris-Craft prospectus. It would have wiped out 36 percent of the --

QUESTION: Mr. Liman, I had understood that the

district court found that there had been no agreement on the part of Bangor Punta to sell the BAR railroad stock at the time the prospectus was issued. And that actually the sale occurred, as I recall, in October, a good many months later.

MR. LIMAN: Right. The district court found that there had been no agreement to sell. It found that no director could have believed that it had the value, and, in fact, the -- it found, also, that the head of the negotiating committee, Hutchins, had reached what he believed to be a conclusive agreement with the buyer, which was memorialized in a memorandum of the buyer, which is set forth in our brief, and which said that the sale would take place two months after the exchange offer was completed. And it occurred exactly then.

But the important thing was that the district court said they couldn't have believed that it had this inflated value.

Now, they say that the Court of Appeals applied improper standards of scienter. Well, Judge Mansfield said that their conduct here was -- I'm sorry, Judge Gurfein said that their conduct was recklessness equivalent to wilful fraud.

Judge Mansfield said, citing Texas Gulf Sulphur, that they ignored red flags and warning signals. Judge Timber said that their conduct was worse, and their scienter arguments were dismissed in Chris-Craft III, where they said it was just

negligence and it wasn't reckless, as being frivolous.

That's a strong word for the Second Circuit to use unanimously.

There was no finding in this record that they relied on professionals. The only advice they ever got from an accountant was that if they sold this railroad they'd have this enormous loss of $13 million.

I observe that my time is finished. My brief covers the other points.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Liman.

Mr. Cutler, you have about five minutes left.

REBUTTAL ARGUMENT OF LLOYD N. CUTLER, ESQ.,

ON BEHALF OF BANGOR PUNTA CORPORATION

MR. CUTLER: Thank you very much, Mr. Chief Justice.

QUESTION: Mr. Cutler, could I ask you two questions, if you could cover it in your brief time.

MR. CUTLER: Yes.

QUESTION: No. 1, would you agree or disagree that the management would have standing under 14(e)? That's one question.

And the other question, I wanted you to refresh my recollection in, why is the scienter relative to our problems here, in view of the fact that liability is a given?

Just cover them, if you can.

MR. CUTLER: Your second question was the first one

I wanted to take up, Justice Stevens, so, if I could, I'd like to answer that first.

When I said that the issue of violation was not in the case, even as to 14(e), I should have mentioned that as our certiorari petition itself states, and as the questions presented state, we raise the question of whether damages are recoverable under 14(e), absent scienter, in the Hochfelder sense.

So that is an issue in the case.

As to -- could you repeat your first question again, Justice Stevens?

QUESTION: The first question is whether management -- the other contestant would have standing under 14(e), and, of course, logically, you understand.

MR. CUTLER: Yes. Right. We would concede that the corporation, as distinguished from management interested in its purse, its salaries or fees in case it got thrown out, but that the corporation has standing certainly to sue for an injunction to protect the target shareholders, and perhaps even to sue for damages for the corporation, which would protect the target shareholders.

QUESTION: Now, in your counterclaim in the district court, was that the same position you took there? Did Piper -- well, it wasn't yours, but did the Piper individuals take the position, I guess, that they had standing; didn't they?

Was there not a counterclaim?

MR. CUTLER: There was a counterclaim by Bangor Punta, which was a counterclaim once Chris-Craft had sued us; but our answer to Bangor Punta specifically -- it was a stipulated answer -- specifically raised the question of what we've been calling here their standing to sue; whether there was liability for damages.

QUESTION: Well, then, if you should admit that management would have standing in a contest like this, doesn't that make it sort of a one-sided standing rule, that one side has standing but the other does not? That's what troubles me a little bit about this.

MR. CUTLER: I was speaking of the management having standing to sue the --

QUESTION: To sue for the corporation.

MR. CUTLER: -- tender offeror. In this case, of course, we have two tender offerors.

QUESTION: Yes.

MR. CUTLER: But let's say one tender offeror, for an injunction or to recover damages, perhaps, for the benefit of the target shareholders, who are all members of that corporation.

QUESTION: I see.

MR. CUTLER: And perhaps, and I did say in answer to a question from Justice Stewart earlier, that perhaps even a competing tender offeror would have standing to sue for an

injunction to prevent injury to the shareholders.

But the test, as I think the Chief Justice's opinion in Rondeau makes very clear, is: Can you show some injury to the shareholders?

And while I'm on that point, and your further question, Justice Stevens, while it is true, of course, that some of the exchanging Piper shareholders own Chris-Craft stock, it would seem to me, No. 1, that their injury is not an injury of the kind we need consider here, because the principal violation is one relating to the Bangor tender offer, the one they didn't accept. They accepted the other offer.

Moreover, given a case in which some of the target shareholders are on one side of the damage suit and some are on the other side, Congress might very well have left that particular issue alone and said "no damage remedy", just as the district court really did here.

I'd like to come next to the question of whether the 14.5 percent, which Mr. Liman says were involved in the two violations, was decisive.

You have an express finding on that from the district court, that after both of those violations, at the time that the preliminary injunction was denied, that neither party has gained control and both are in a position to do so.

In fact, the Court of Appeals, when it was affirming that finding, said each side had an equal opportunity to gain

control.

What the Court of Appeals did was to misinterpret Mills -- and this is a point I don't have time for now, which will be covered in our brief -- to presume both, that the target shareholders would have rejected the offer, and, of course, Mills invokes no presumptions and turns only on the point that the target shareholders were entitled to a clean and accurate prospectus or proxy, whether or not it would have affected their offer.

And, secondly, he made the presumption, which Mills certainly doesn't authorize, because it said damages should be awarded only to the extent they can be proven, that the violation caused Chris-Craft to lose its opportunity for control.

Is that all the time I have?

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:34 o'clock, a.m., the case in the above-entitled matter was submitted.]

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