

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 BILLY J. "B.J." PINTER, ET AL., :
4 Petitioners, :
5 v. :
6 MAURICE DAHL, ET AL. :
7 -----x

No. 86-805

8 Washington, D.C.

9 Wednesday, December 9, 1987

10 The above-entitled matter came on for oral argument
11 before the Supreme Court of the United States at 10:00 a.m.

12 APPEARANCES:

13 BRADEN W. SPARKS, ESQ., Dallas, Texas; on behalf
14 of the Petitioners.

15 RICHARD G. TARANTO, ESQ., Assistant to the Solicitor General,
16 Department of Justice, Washington, D.C.; as amicus curiae,
17 supporting Petitioners.

18 JOHN A. SPINUZZI, Denton, Texas; on behalf of the
19 Respondents.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We will hear argument first
3 this morning in No. 86-805, Billy J. "B.J." Pinter v. Maurice
4 Dahl.

5 Mr. Sparks, you may begin whenever you are ready.

6 ORAL ARGUMENT OF BRADEN W. SPARKS, ESQ.

7 ON BEHALF OF PETITIONERS

8 MR. SPARKS: Mr. Chief Justice, and may it please the
9 Court:

10 The case this morning is important because it bears
11 upon the day to day regulation of the securities industry, and
12 it has to do with two issues that concern Section 12(1) of the
13 Securities Act of 1933 which provides for an express private
14 right of action against any person who offers or sells an
15 unregistered security through the use of the mails or the
16 interstate commerce.

17 I would like to state the questions as follows.
18 First of all, whether the long established definition of a
19 Section 12(1) seller under the Securities Act of 1933 and
20 Section 12(1) specifically should be modified to incorporate a
21 new threshold requirement that the seller must be motivated,
22 and I would like to stress that word motivated, by a desire to
23 receive a financial benefit for his efforts in order to be held
24 responsible for his conduct.

25 And secondly, whether or not the common law

1 in pari delicto defense, or perhaps I would prefer to refer to
2 this as the regulatory purpose defense rather than strict
3 in pari delicto defense, is available in a private action for
4 the rescission of the sale of unregistered securities brought
5 under Section 12(1).

6 Just briefly, the statute provides that any person
7 who offers or sells a security in violation of Section 77(e) of
8 this title shall be liable to the person purchasing such
9 security from him, and it goes on to provide for rescission in
10 the common law fashion.

11 To telegraph my position in this case, the Fifth
12 Circuit's addition of a pecuniary benefits test to the settled
13 definition of a seller of unregistered securities is damaging
14 and threatening to the continued regulation of the securities
15 industry in my opinion. And the ruling by the Court of Appeals
16 that the in pari delicto defense does not apply between
17 co-violators of Section 12(1) is in direct conflict with this
18 Court's ruling in the Bateman Eichler case.

19 I think that the facts in this case are extremely
20 important, and I would like to spend a certain amount of time
21 with regard to the facts.

22 Of course, in the trial court, Mr. Pinter was a
23 Defendant, and Mr. Dahl was one of twelve Plaintiffs. Mr. Dahl
24 and the other eleven Plaintiffs sought to recover from Mr.
25 Pinter for the sale of unregistered securities. The complaint

1 detailed a number of misrepresentations, and concealments, and
2 non-disclosures on the part of Mr. Pinter doing business under
3 the various names of his companies.

4 Mr. Dahl, the Trial Court found, was a California or
5 Texas resident, a real estate broker, and a man whose personal
6 wealth exceeded one million dollars, and whose income
7 approached \$250,000 on an annual basis. And he detailed
8 certain abortive efforts, and I am at paragraph 7 on page 31 of
9 the petition, the appendix to the petition for writ of
10 certiorari. The Trial Court detailed certain abortive efforts
11 by Mr. Dahl to become interested in the oil business.

12 I would like to quote from the record. And I want to
13 make it clear that everything that I quote from the record will
14 be either from Mr. Dahl's testimony who I am in opposition to,
15 or from the testimony of Mr. Gottsch who was called on behalf
16 of Mr. Dahl. I am not attempting to support my arguments by
17 any statements made by my client in this case.

18 Mr. Dahl testified at the joint appendix, page 105,
19 that he was interested in being in the drilling business, and
20 that he did not have the money that he needed to become
21 involved in the business, and that he hired Mr. Minor whose
22 position was to "raise money", and that is quote. And that it
23 was his job, and this was Mr. Minor who was hired by Mr. Dahl
24 to work for Puma Petroleum and Wrangle Oil & Gas, it was his
25 job to bring investor money.

1 And Mr. Minor was fired by Mr. Dahl prior to his
2 hiring of a Mr. Kirk when it became known to Mr. Dahl that he
3 had spent \$10,000 to obtain a legal prospective, and he was
4 fired on that basis. And then Mr. Dahl then hired another
5 individual by the name of Mr. Kirk, who was in the Texas and
6 Oklahoma area attempting to acquire leases for Mr. Dahl who was
7 living in California.

8 QUESTION: Mr. Sparks, was the legal prospectus the
9 one that would have pertained to the transaction that gave rise
10 to this suit?

11 MR. SPARKS: The record does not say, Your Honor.

12 QUESTION: Do you contend that it was?

13 MR. SPARKS: Sir?

14 QUESTION: Are we supposed to draw that inference
15 from what you are telling us?

16 MR. SPARKS: The only inference that I would like the
17 Court to draw is that Mr. Dahl was aware of the need to draw a
18 prospectus in becoming involved in the oil and gas business,
19 and had hired Mr. Minor for that purpose, and fired him when he
20 discovered that he had spent \$10,000 in that way.

21 The position of the government, the Attorney General,
22 is that one must be a promoter if one is interested in becoming
23 involved in the business, more a promoter than an investor, and
24 one may be held in pari delicto.

25 And I want to point out that I am trying to isolate

1 in my discussion of the facts those facts which would show that
2 Mr. Dahl was desirous of getting into the oil and gas business,
3 and that it was his intention to not be merely a investor at
4 least initially. I think that the inference that I have
5 explained is all that needs to be drawn from that fact.

6 Mr. Kirk was hired after Mr. Minor was fired. His
7 job, and this is page 108 from the joint appendix, was to
8 locate, acquire and sell leases. And Mr. Kirk introduced Mr.
9 Dahl to Mr. Pinter as a knowledgeable and capable oil man. I
10 would like to point out that Mr. Kirk, of course, was Mr.
11 Dahl's agent in that introduction.

12 QUESTION: You mean he introduced him to his former
13 employee?

14 MR. SPARKS: Mr. Kirk, the new employee, introduced
15 Mr. Dahl, his employer, to Mr. Pinter, an oil man, who was in
16 the Oklahoma oil and gas business.

17 QUESTION: Oh, I misunderstood you. I thought that
18 you were saying that Pinter had previously worked for Dahl.

19 MR. SPARKS: No, sir.

20 QUESTION: I am sorry. I did not follow your
21 statement as well as I should have.

22 MR. SPARKS: Mr. Kirk was working for Mr. Dahl. He
23 found Mr. Pinter in Oklahoma, and introduced Mr. Pinter to Mr.
24 Dahl as a knowledgeable oil and gas man who was working in
25 Oklahoma.

1 Then Mr. Pinter came to Oklahoma and visited the
2 properties, and looked at the geology, the well logs and the
3 other materials which were assembled in the words of the Trial
4 Court by Mr. Pinter. And after conducting his own
5 investigation of the circumstances decided in the Trial Court's
6 words that there "no way that he could lose investing."

7 Now there were two different groups of investments
8 which were made by Mr. Dahl, and I would like to point this out
9 and go into some detail here. Because again it is important,
10 because it deals with Mr. Dahl's involvement and the extent to
11 which he may be considered to be actively involved in seeking
12 oil and gas business opportunities.

13 After deciding that he wanted to invest with Mr.
14 Pinter, he went up to Kansas where he found his friend, a Mr.
15 Gottsch, who testified for him at the time of trial. Mr.
16 Gottsch was in the cattle feeding business, and was an
17 independently wealthy individual. He contacted Mr. Gottsch, in
18 his own words, brought Mr. Gottsch to Oklahoma, and introduced
19 Mr. Gottsch to Mr. Pinter in Oklahoma. And as a result of that
20 introduction, he caused Mr. Gottsch to loan him, Mr. Dahl,
21 \$250,000 and to put \$250,000 of his own money into the initial
22 three well project that the two men got involved in.

23 And they, Mr. Dahl and his friend, Mr. Gottsch from
24 Kansas put up the entire \$500,000 needed to fund the first
25 three of five wells that will be discussed here. They bought

1 all of the available interest money in those three wells.

2 Mr. Dahl put not one penny of his own money into
3 those three wells. He caused Mr. Gottsch to loan him the money
4 and solicited, I believe that it is very fair to say, Mr.
5 Gottsch with regard to that transaction. Mr. Gottsch and Mr.
6 Dahl then went into business with Mr. Pinter in effect drilling
7 the first three wells.

8 Sometime prior to that, Mr. Pinter had begun the
9 process of drilling two additional wells. In the words of Mr.
10 Dahl, he decided that it would be appropriate for him to go to
11 Mr. Pinter and to suggest to Mr. Pinter that he had certain
12 friends and relatives in California who would be very
13 interested in these other two wells, since they seemed like a
14 sure deal as far as he was concerned.

15 And so he went to Mr. Pinter and suggested to Mr.
16 Pinter that he would involve his friends in California. Pinter
17 gave him some investment contracts. He took the investment
18 contracts in hand, some of which were in blank and some of
19 which were made out in the name of Maurice Dahl or assignee.

20 He then took these. They had not been
21 fractionalized. They were simply blank investment contracts.
22 He took them to California, and went to eleven of his friends
23 and sold them interests, and made all representations and all
24 communications to each of the people in California.

25 QUESTION: When you say blank investment contracts,

1 Mr. Sparks, do you mean that the contracts were all written out
2 but unsigned?

3 MR. SPARKS: No, sir. They had blanks in them for
4 the percentage of interest that the investor would buy. They
5 had a blank for the name of the investor. Or in some cases,
6 instead of a blank, they said Maurice Dahl or assignee. So
7 they were blank only in those respects. As to the amount of
8 money, as to the percentage of interest in the various wells,
9 and as to the person who was acquiring the interest.

10 QUESTION: While you are interrupted, Mr. Sparks.

11 MR. SPARKS: Yes, sir.

12 QUESTION: This transaction with Mr. Gottsch, the
13 first half that you described, was Gottsch one of the
14 Plaintiffs?

15 MR. SPARKS: No, sir, he did not sue. He testified
16 on behalf of Mr. Dahl, but he was not a Plaintiff in the
17 action.

18 He testified at trial that he was looking, to put it
19 in his words, and this at 113 in the joint appendix, "I was
20 looking to Maurice. Whoever he was in business with, that was
21 not of merit to me."

22 QUESTION: What does that have to do with the claims
23 of the eleven other people?

24 MR. SPARKS: The only importance that Mr. Gottsch has
25 is that I believe that it is very fair to say that Mr. Dahl

1 solicited Mr. Gottsch.

2 QUESTION: Maybe he solicited a lot of people.

3 But if they are not the people that are involved in
4 the lawsuit, how does that bear on the lawsuit?

5 MR. SPARKS: Well, to me, sir, it is circumstantial
6 evidence of Mr. Dahl's solicitor type behavior. And it seems
7 to me that it is fundamental to Section 12(1) of the Securities
8 Act of 1933, especially when understood on its face and also
9 from the legislative history of that Act, and President
10 Roosevelt's comments when he introduced the bill and asked that
11 it be passed, that the whole idea was to shift the burden of
12 responsibility on the person who made solicitive type of
13 comments or representational activity in connection.

14 QUESTION: Yes. Maybe he did or did not solicit the
15 eleven people involved, but would it prove solicitation of
16 these eleven if he solicited Mr X, Y, Z? I do not follow that.

17 MR. SPARKS: No, sir. But in pari delicto, actually
18 what I referred to as the regulatory purpose defense, the whole
19 issue is to look at what Mr. Dahl did.

20 QUESTION: Supposedly you proved that he committed an
21 egregious violation with respect to Mr. Gottsch, would that be
22 a defense that Mr. Pinter could assert in the claim?

23 MR. SPARKS: It would be evidentiary of his conduct
24 in pari delicto; yes, sir. I might point out, Justice Stevens,
25 that at the Trial Court that Mr. Dahl bore down exceedingly

1 hard in attempting to establish that all of these transactions
2 were integrated.

3 Now on appeal, the position is that these are
4 separate transactions. And I might point out also that the
5 Trial Court found that each of the sales involved from the
6 Defendant to the various Plaintiffs including Mr. Dahl were
7 related. That was the word that the Trial Court used in
8 describing the various oil wells and investments.

9 Now Mr. Gottsch's involvement is simply
10 circumstantial evidence of Mr. Dahl's attempt to solicit others
11 in the offer, sale and delivery of unregistered securities.

12 The statute being a strict liability statute, clearly
13 Mr. Pinter is responsible under Section 12(1). It was never
14 contended otherwise. His position is to allow the judgment to
15 be affirmed with regard to the other eleven Plaintiffs. And
16 solely with respect to Mr. Dahl, he is asserting the defense
17 that it would be inappropriate and would not further the
18 statutory purpose of allow Mr. Dahl to recover against him,
19 because Mr. Dahl was fundamentally responsible in the words
20 of -- yes, sir.

21 QUESTION: May I ask, you are only claiming
22 in pari delicto insofar as the claim by Dahl against Pinter?

23 MR. SPARKS: That is correct, Your Honor.

24 QUESTION: You are not claiming that it has any
25 bearing on the claims of the other eleven or right to

1 contribution or anything like that?

2 MR. SPARKS: We did not appeal with regard to
3 12(1) violations as to the others. We do contend that Mr. Dahl
4 should be responsible in contribution along with Mr. Pinter to
5 the other Plaintiffs.

6 QUESTION: What is the statutory basis, or is a state
7 law basis, for your contribution claim?

8 MR. SPARKS: The securities laws, Your Honor, Section
9 11, for example, provides for a right of contribution between
10 joint tort feasons.

11 QUESTION: That is because he is a seller?

12 MR. SPARKS: Yes, sir.

13 QUESTION: You claim that he is a seller, and
14 therefore a joint tort feason with Pinter?

15 MR. SPARKS: That is correct; yes, Your Honor.
16 Equally responsible for the same statutory violation.

17 QUESTION: And the Court of Appeals rejected your
18 claim that he was a seller?

19 MR. SPARKS: Yes, sir. They invoked a pecuniary
20 benefit test to get around, from my position, in order to
21 substantiate the decision that he was not a seller.

22 QUESTION: And both issues are here?

23 MR. SPARKS: Yes, sir. And the Court of Appeals
24 found that his conduct was a substantial factor in the sale of
25 unregistered securities.

1 QUESTION: But what?

2 MR. SPARKS: But that he was not motivated by a
3 desire for pecuniary benefit directly or indirectly, which
4 seems to me to fall right in the face of the Dirks opinion
5 which talks about representational benefit at the very least.
6 And which seems to me on the facts, even the facts as adduced
7 by the Fifth Circuit, to be inappropriate as a conclusion, as a
8 matter of factual conclusion, Your Honor.

9 This was a man who was trying to get into the
10 business and who was also trying in the words of Judge Brown to
11 capitalize his own investment, and thought that it was
12 appropriate to do so by going to California and selling other
13 investors in this very same project.

14 It seems to me to be inappropriate to conclude that
15 he was acting merely gregariously which is what the Fifth
16 Circuit said. I do not believe that this was in the words of
17 Judge Jones happy hour cocktail conversationist type of advice.
18 This was not simply a comment. And in the words of the
19 government, they contend that strongly urging someone to become
20 involved without being motivated by pecuniary benefit
21 constitutes non-seller and non-solicitation conduct.

22 I would respectfully disagree with that position. It
23 seems to me that fundamental to the Securities Act of 1933 is
24 this concept that the burden must be shifted. And I am
25 essentially quoting from the legislative history, House Report

1 85.

2 Every lawyer knows that all facts in control of the
3 Defendant that it is practically impossible for a buyer to
4 prove a state of knowledge or failure to exercise due care on
5 the part of a Defendant.

6 How are you going to show what the motivation was in
7 the mind of someone who is selling a security? That it going
8 to get from the trial lawyer's standpoint and from the
9 litigation standpoint into a swearing match and I think
10 unnecessarily, and it would protract litigation to have a test
11 like that.

12 "Unless responsibility," and I am quoting now from
13 H.R. 85 in 1933, "is to involve paper liability, it is
14 necessary to throw the burden of disproving responsibility for
15 reprehensible acts of omission or commission on those who
16 purport to issue statements."

17 It seems to me that the gravamen of the wrong, if you
18 will, the statutory wrong, is to sell. You cannot go to
19 California with a bunch of investment contracts in your
20 briefcase and sit down with your friends, including your
21 banker, and a man who is in the contracting business with you,
22 and your accountant, and your partner in a business deal, and
23 your employer and employees, and these were the individuals
24 from the record and from Mr. Dahl's testimony were the people
25 purchased and none of whom knew each other in the admission of

1 the Respondent prior to Mr. Dahl's selling them, you cannot go
2 to those people, those kinds of people, sit there with an
3 investment contract and fill out the blanks without assuming
4 some fiduciary responsibility it seems to me to them to tell
5 them the truth.

6 Now Mr. Dahl's position is I am not a seller, and
7 that seems to me to be absurd. He is a seller. And the mere
8 fact that he is not directly receiving some pecuniary benefit
9 does not mean that he is not receiving some pecuniary benefit.
10 Certainly, he is, because he is capitalizing the investment
11 that he is trying to become involved in.

12 QUESTION: Mr. Sparks, I am sorry to interrupt you
13 again. But you told me that you are relying on Section 11 for
14 the right of contribution.

15 Is this not a Section 12 suit?

16 MR. SPARKS: It is a Section 12 lawsuit from the
17 standpoint of the Plaintiffs; yes, sir.

18 QUESTION: Section 11 applies to misstatements in
19 prospectuses, does it not?

20 MR. SPARKS: Section 12.2.

21 QUESTION: Section 12 is where you have no
22 registration at all, is it not?

23 MR. SPARKS: Yes, Your Honor.

24 QUESTION: So the contribution right does not apply
25 to this case, does it?

1 MR. SPARKS: I believe that it does, Your Honor. And
2 I have addressed that in my brief, and I do believe that there
3 is a right of contribution under common law.

4 QUESTION: Has any court so held in a Section 12
5 case?

6 MR. SPARKS: No, Your Honor, no court has so held in
7 a Section 12 case. And I might point out that I do believe
8 that that issue has been perfected. Because I attempted at the
9 time of trial to have Mr. Dahl realigned as a Third Party
10 Defendant from the outset, and the Trial Court refused to
11 realign him as a Third Party Defendant. And I was not able to
12 assert the contribution defense at that time. It was submitted
13 to a magistrate. And I appealed that, and it was overruled by
14 operation of law.

15 QUESTION: Of course, Mr. Sparks, I thought that both
16 the District Court and the Fifth Circuit determined that Mr.
17 Dahl lacked any sort of pecuniary gain motivation.

18 MR. SPARKS: No, Your Honor, that is not correct.
19 What the Trial Court found was that Mr. Dahl did not receive a
20 commission from the sale of unregistered securities. The Trial
21 Court did not enter a finding with respect to direct or
22 indirect pecuniary benefit. And the Fifth Circuit decided that
23 he was merely gregarious.

24 I would like to reserve the rest of my time, Your
25 Honor.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sparks.

2 We will hear from you now, Mr. Taranto.

3 ORAL ARGUMENT OF RICHARD G. TARANTO, ESQ.

4 AS AMICUS CURIAE SUPPORTING PETITIONERS

5 MR. TARANTO: Chief Justice Rehnquist, and may it
6 please the Court:

7 On the in pari delicto question in this case, the
8 Securities and Exchange Commission thinks that the Court of
9 Appeals was wrong to the extent that it ruled that the
10 in pari delicto defense is never available in an action brought
11 under Section 12(1).

12 As I propose to explain in more detail in a moment,
13 and I want to present our views in a manner slightly different
14 from our presentation in our brief, we think that the
15 in pari delicto should be available in certain narrowly defined
16 circumstances.

17 On the second question in the case, we think that the
18 Court of Appeals was right in ruling that a person who solicits
19 a securities purchase may be liable under Section 12(1) along
20 with the person who passed title, but only if the solicitor had
21 some motivation in promoting the purchase other than a friendly
22 desire to further the interests of the buyer. Because only
23 then can he fairly be aligned on the selling side of the
24 transaction. We do not take a position in this case on whether
25 contribution may be available in a Section 12 action.

1 QUESTION: Mr. Taranto, suppose the primary
2 Defendant here, suppose Mr. Pinter, were a philanthropist, and
3 it were shown that he really did not expect to make any profit
4 from this stock, but just to benefit his friends and associates
5 that he was selling their interests in the wells, would that be
6 enough to exempt him from liability under 12(1)?

7 MR. TARANTO: No, I do not think so. Not when the
8 issuer is actually the person passing title to the security.

9 QUESTION: No, but he comes under the same language.
10 I mean he sells or offers.

11 Why should that be a necessity for the
12 in pari delicto but not a necessity for the substantive
13 liability in the first place?

14 MR. TARANTO: Well, the financial interest test does
15 not go to the in pari delicto defense, but it goes only to
16 whether a person other than the person passing title can also
17 be a seller, and therefore conceivably liable to the other
18 people that he solicits.

19 QUESTION: I understand that, but that is the first
20 step to establishing the in pari delicto defense.

21 Why should it be that the issuer need not have that
22 kind of motivation, but that someone else in order to be liable
23 must?

24 MR. TARANTO: We think that Section 12 is firmly
25 rooted in the common law remedy of rescission where financial

1 interest does not play a role as to the person who passes
2 title. The history of the development of Section 12, and its
3 amendment in 1954, and its judicial history prior to that seems
4 to us to make it clear that liability can extend somewhat
5 beyond the person who owned the security before the sale.

6 The question then is what kind of limits have to be
7 placed on the extension of liability beyond the person who
8 passed title. Solicitation, we think, is part of the statute,
9 but there is an important distinction which we think that the
10 Court of Appeals rightly captured between somebody who simply
11 urges somebody else to get in on a good deal and on the other
12 hand somebody who because of his own interests is properly
13 aligned on the selling side of the transaction.

14 We do not think that financial benefit is a -- we do
15 not mean by that something terribly precise or limited in that
16 indirect financial interests can align the individual on the
17 selling side of the transaction just as a commission can.

18 QUESTION: But that it not necessary, you say, to
19 align Pinter on the selling side?

20 MR. TARANTO: No. It seems to me that there are
21 always two people, one person on each of the two sides of a
22 sale, the person who passed title and the person who then owns
23 the security after that transaction. And what we are trying to
24 do is establish some limits on the extension of the seller
25 class beyond the person who is unquestionably in that class,

1 namely the person who passed title.

2 QUESTION: That is the key then. If you have title
3 and pass it, it does not matter whether your motivation is
4 beneficent or proper. Whereas if you did not pass title and
5 you are looking only at someone who participated in the
6 offering somehow, you need the motivation.

7 MR. TARANTO: Yes, I think that is right.

8 QUESTION: Even if you are an agent of somebody else?

9 MR. TARANTO: If you are an agent for the seller,
10 there is very likely to be some kind of interest of your own,
11 presumably a continuing relationship with the seller, if you
12 are carrying on the activities for the seller.

13 QUESTION: Supposing the person holding title is an
14 agent of someone else just for the purpose of holding title,
15 and he passes it when he is told to by his principal?

16 MR. TARANTO: It sounds to me as though -- I am
17 somewhat confused by who exactly is passing title in the course
18 of that transaction.

19 QUESTION: Whoever is holding title passes title, and
20 supposing that the person holding title is an agent for that
21 purpose for somebody else?

22 MR. TARANTO: I think that anybody who is the holder
23 of title before --

24 QUESTION: Who passes title is the seller.

25 MR. TARANTO: -- is a seller, that is right. Let me

1 try to --

2 QUESTION: If I can ask one other question about the
3 seller.

4 Is it necessary to be a seller in order to -- I mean
5 is it not possible that Dahl could not be a seller and
6 nevertheless the defense of in pari delicto would be available?

7 MR. TARANTO: Oh, yes, absolutely.

8 QUESTION: And is it also not possible that he could
9 be a seller and nevertheless the claim of contribution would
10 fail?

11 MR. TARANTO: Yes.

12 QUESTION: So it may be true that we do not have to
13 decide the seller issue?

14 MR. TARANTO: That is right. The Court of Appeals
15 did not decide the underlying legal question whether
16 contribution can ever be available in Section 12. It found it
17 unnecessary to do that, because it thought contribution should
18 not be available in this case even if it could be available in
19 some other Section 12 case.

20 QUESTION: Do you also think, Mr. Taranto, that the
21 District Court and the Fifth Circuit did not make the necessary
22 determination about the pecuniary interests that Dahl might
23 have had?

24 MR. TARANTO: Yes, we do. We think that the District
25 Court did note that Dahl did not receive any commissions, but

1 did not address whether there was some indirect financial
2 interest. In particular, whether Dahl would have needed these
3 particular purchases in order to make his investment
4 profitable, and whether there were other potential purchasers
5 who might have taken the place of these.

6 QUESTION: So you think that we need to remand on
7 that?

8 MR. TARANTO: Yes, we do.

9 QUESTION: And that means that we have to also
10 address the merits of the contribution issue?

11 MR. TARANTO: Well, it seems to us that that issue
12 has not been briefed. And if on remanding to the Court of
13 Appeals, the Court of Appeals were to address the contribution
14 question and decide that contribution could not be available
15 under Section 12 regardless of the particular financial
16 interest or its absence, that issue would not have to be
17 addressed.

18 But the question of whether Section 12 in any
19 circumstance permits contribution has not been presented or
20 briefed in this case. So that issue would have to be decided
21 on a remand.

22 QUESTION: Mr. Taranto, would you do one more thing
23 because your time is short. Would you be sure to explain to me
24 the difference between the position that you now advocate and
25 the one that you set forth in your brief, because I want to be

1 sure that I get that.

2 MR. TARANTO: The difference I think is really one of
3 emphasis. To the extent that we suggested in the brief that
4 the first part of our test for the in pari delicto defense was
5 that the buyer had to be more a promoter than an investor, the
6 main thing that I wanted to do was to dispel any misimpression
7 that what we meant by that was a simple comparison, how much
8 did the buyer solicit and how much did he purchase, and that
9 that would somehow automatically answer the question.

10 By promoter, we mean something broader than that. We
11 mean simply what role did this buyer play in the offering as a
12 whole. To be a promoter, he might have played an active role
13 in any number of respects, not just soliciting purchases. He
14 might have prepared offering material, and he might have been
15 the instigator.

16 QUESTION: You mean on the whole and not necessarily
17 to these particular Plaintiffs?

18 MR. TARANTO: That is right. What we mean by the
19 promoter part of the test is something that focuses on the
20 buyer's role and the offer as a whole, and we then move on.

21 QUESTION: But you would not say in the colloquy that
22 was going between counsel and Justice Stevens that the offering
23 to someone who was not one of the Plaintiffs here is merely
24 confirmatory or circumstantial evidence of the necessary
25 qualification?

1 MR. TARANTO: We think that that could be evidence
2 of --

3 QUESTION: Direct evidence.

4 MR. TARANTO: Direct evidence of a promoter role.

5 QUESTION: May I ask one more question.

6 If I agree with you that this matter was not found,
7 that is the financial motivation by the District Court, but I
8 think that it was found by the Court of Appeals, would we still
9 have to remand?

10 Your brief says that the Court of Appeals did not
11 find it either, and I happen to disagree with that.

12 What if I think that the Court of Appeals did find no
13 financial motivation, but the District Court did not?

14 MR. TARANTO: I think that without factual findings
15 by the District Court made in the light of a broad enough
16 understanding of what kinds of financial interests can qualify
17 for this test to align him on the selling side of the
18 transaction that further findings should be made.

19 In particular, there seems to be some disagreement
20 between the majority and the dissent in the Court of Appeals
21 about certain kinds of indirect financial interests and whether
22 they would quality.

23 QUESTION: Mr. Taranto, I do take it that you
24 disagree with the Court of Appeals on the standard to be
25 applied in determining the in pari delicto defense?

1 MR. TARANTO: Yes. We read the Court of Appeals to
2 have said that because 12(1) is a strict liability statute that
3 the in pari delicto is never available.

4 QUESTION: Thank you.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Taranto.
6 We will hear now from you, Mr. Spinuzzi.

7 ORAL ARGUMENT OF JOHN A. SPINUZZI, ESQ.

8 ON BEHALF OF RESPONDENTS

9 MR. SPINUZZI: Mr. Chief Justice, and may it please
10 the Court:

11 We have a delicate problem here in dealing with the
12 securities laws. Congress set them up, and this Court has
13 interpreted them, and now we are juggling with those laws and
14 taking them out of balance again. And the premise on which we
15 are trying to take these delicate mechanisms out of balance is
16 that this Court made a ruling in the Bateman Eichler case that
17 under certain circumstances that the defense of in pari delicto
18 may be asserted in a 10(b)(5) fraud case. It is sought here to
19 extend that beyond the fraud activity to an unregistered
20 security activity.

21 Frankly, my first impression was similar, that on a
22 strict liability statute that you could never bring
23 in pari delicto. I do not agree with that now, because
24 equitably it has always been permitted in not only fraudulent
25 conduct but also in illegal conduct. And if there is a illegal

1 act in selling unregistered securities, then I agree with the
2 SEC that in pari delicto should be applicable.

3 However, it is a rare exception, as stated by this
4 Court, that you will permit that defense, because the normal
5 and general rule is that it will not be permitted.

6 Now we have a special problem here. Section 12(1)
7 specifically says that the seller will be liable to his
8 purchaser for selling unregistered securities. There is no
9 defense to that statement. It is absolute liability.

10 In this particular case, Mr. Pinter was the seller of
11 securities, and he admitted it. And the court found that they
12 were not registered, and the court found him liable not only to
13 Mr. Dahl but to Mr. Dahl's friends and associates who also
14 invested.

15 The critical nature of this problem is can an illegal
16 seller of unregistered securities avoid his liability by
17 raising a theory that one of the buyers indirectly or directly
18 assisted him in bringing other investors into the ventures. To
19 me, that is a critical question. It is not quite a
20 tippee-tipper situation. As the Fifth Circuit stated, it was a
21 gregarious act intended to benefit his friends. I am talking
22 about Mr. Dahl's friends.

23 And to show how he tried to benefit, it is critical
24 for this Court to be aware that Mr. Dahl invested a total of
25 \$351,000 roughly in three different ventures. His ten or

1 eleven friends that he brought in invested a total of \$82,000
2 in two ventures.

3 And more importantly, the other Plaintiffs -- we will
4 call them the California investors, because that is essentially
5 what they are except for one person who was Mr. Dahl's
6 fiancée -- the California investors invested in two wells, and
7 those wells and leases had already been fractionated by Mr.
8 Pinter months and months before. He had already drilled two
9 wells on one lease with other investors, and he had already
10 drilled one well on another lease with other investors.

11 He was trying to drill two more wells, and we call
12 them the Doss 3-B and the Doss 2-C well. He had some of his
13 investors drop out. When they dropped out, he approached
14 Mr. Dahl. And he said, Mr. Dahl, some of my investors have
15 fallen out, and I have got room for some more. Dahl said fine,
16 I have some close friends who probably will be interested, let
17 me check, and he did.

18 In the Doss 3-B, there were three investors from
19 these Plaintiffs. One was Mr. Dahl himself, one was his
20 fiancée, and one was his CPA. Those three investors invested
21 little. The CPA invested \$7400, and his fiancée invested
22 \$3500, and Mr. Dahl invested about \$28,000. But the remainder,
23 the several hundred thousand dollars that was raised, was
24 raised by people unknown to Mr. Dahl. And Mr. Pinter, he
25 raised that capital.

1 So the act of selling unregistered securities was
2 already in process by Mr. Pinter, and all he did was get Mr.
3 Dahl to help fill in the void for the last three interests.

4 As to the Antwine 2-C, the same basic idea except a
5 total of nine of Mr. Dahl's friends invested approximately
6 \$7500 in those wells, and the remainder of the funds were
7 raised by other investors by Mr. Pinter in his other efforts.
8 Now the record shows that Mr. Pinter --

9 QUESTION: What did the Court of Appeals find on this
10 point?

11 MR. SPINUZZI: It made no finding whatsoever on that.

12 QUESTION: Did not its opinion assume, it seems to
13 me, did it not appear to assume that he was a substantial
14 factor?

15 MR. SPINUZZI: Yes, sir, it did. And that
16 substantial factor came up under the idea of how do you
17 determine who and what is a seller. The statute does not
18 define a seller.

19 QUESTION: I understand that.

20 So you are challenging the Court of Appeals?

21 MR. SPINUZZI: No, I am not challenging the Court of
22 Appeals, but I am challenging their precedent, yes. Because
23 the majority refused to follow that precedent. They added the
24 other financial benefit test as a threshold requirement. And
25 frankly, I think rightly so, either that one or some other.

1 And let me explain why, sir.

2 We already have a complicated securities law. We now
3 in a strict liability section statute where there is no
4 defense, Section 12(1), we suddenly throw in tort negligence
5 law. And we not only throw in tort negligence law, but we
6 throw in one of the most complicated concepts that they have
7 under that law. That is proximate cause, legal liability. And
8 to determine proximate cause, they now say you must be a
9 substantial factor.

10 And I have cited in my brief what some of the
11 authorities thing of substantial factor. They think that it is
12 good for trying to determine causation and fact. But it has no
13 bearing and it has no relevance, and in fact is a hindrance to
14 determining actual legal liability. That is a policy decision
15 of this Court and of Congress. It is not a decision for the
16 court to be making at this trial level saying that if it is a
17 substantial cause or substantial factor in causing it that then
18 he is liable.

19 It is sort of the old idea of but for you introducing
20 me to him that I never would have met him and I never would
21 have sold him, and therefore you are the substantial cause of
22 my selling him. That is not a good standard. It is already a
23 confusing issue in tort law, and here we are going to try to
24 make it more confusing in the securities law.

25 QUESTION: I do not understand what you are saying.

1 Are you saying that he is liable even if he is not a
2 substantial factor, or that even if he is a substantial factor
3 that he is not liable?

4 MR. SPINUZZI: Mr. Dahl is not liable. Both the
5 Trial Court and the Fifth Circuit found that he was not. Mr.
6 Pinter was, because he was the issuer of the securities.

7 QUESTION: What would make Dahl liable in your view,
8 does he have to be the actual seller who transfers title?

9 MR. SPINUZZI: That would be one. Because by being
10 the actual seller, that would do it.

11 QUESTION: I am sure that would, but what else?

12 MR. SPINUZZI: I think that there are other
13 situations. Let me use an example. If Mr. Dahl knew that
14 these were unregistered securities, which he did, and he knew
15 that there was a private offering exemption being sought to be
16 proven and Mr. Dahl himself knew that he could avoid and ruin
17 the private offering exemption by his own wrongful conduct,
18 then I think that he could be liable.

19 A person who wants to meet the private offering
20 exemption or the non-public offering exemption as it is
21 technically called has certain restrictions. Section 4.2 is
22 the exemption provided by Congress to say all right, if you do
23 not want to sell registered securities, you can sell
24 unregistered securities on condition that you make the proper
25 disclosures.

1 QUESTION: And that is the only thing that the
2 language, offers or sells, that the word offers brings in
3 beyond the transfer of title?

4 MR. SPINUZZI: It does not really quite say that
5 either. Section 12 says, "Whoever offers or sells a security
6 in violation of Section 5 shall be liable to his purchaser."
7 The seller is liable to the purchaser, but it does not say
8 whoever violates the statute.

9 QUESTION: And the offerer is liable to nobody?

10 MR. SPINUZZI: It does not say that specifically in
11 the statute, no. It would be construed, and I think that in
12 many instances that it can. Because the consummation of the
13 sale appears to be the actual damage and not necessarily just
14 the offerer.

15 It is an interesting point. Because at one time the
16 statute in the definition included sale to include an offer.
17 It was later amended about 1958 and removed that provision.
18 But logically speaking, a person who really actively
19 participates in a sale, and I think that a pecuniary benefit
20 test is applicable.

21 Because very frankly, in the Trial Court, the defense
22 was raised that Mr. Dahl agreed to sell in exchange for a
23 commission. That is pecuniary benefit. It was disproved. It
24 was finally admitted by Mr. Pinter that he was wrong, that he
25 did not pay a commission or agree to pay a commission. So that

1 would be one sense.

2 Another sense would be the way that the SEC has taken
3 the position. That if he were a promoter of the enterprise,
4 that if he had a financial interest in the actual business
5 himself, that would be different.

6 We have taken the position that where the purchaser
7 of a security has only an interest in a venture as an investor
8 himself that he cannot be a seller to someone else merely by
9 saying, hey, I have got a good deal, I have checked it out and
10 I think that it is great, you ought to get into it. And that
11 is basically what happened here.

12 Now there was not even any negotiation by Mr. Dahl
13 with these other people. The subscription agreement prepared
14 by Mr. Pinter and given to Mr. Dahl had all of the terms and
15 the conditions of the sale. The only thing that it lacked was
16 the name of the investor, his Social Security number, and his
17 address. And at the very end, it has a form of schedule which
18 says that if you buy a one-sixteenth interest that it costs you
19 X dollars and if you buy three-sixty-fourths that it costs you
20 X dollars, and all you do --

21 QUESTION: Mr. Spinuzzi, what is Mr. Dahl's account
22 of why he did all of this, just to get his friends in on this
23 good deal?

24 MR. SPINUZZI: Yes, sir, it really was. As a matter
25 of fact, to understand why he did, these were all people that

1 he had known for some time. They were his business partners
2 and his banker. He used to be in the construction business.
3 His banker, his insurance man, his fiancée, his own brother.
4 There was not any stranger to him that he was not a close
5 associate with that he did not say, hey, you ought to be in on
6 this. He received nothing, but perhaps except hopefully the
7 friendship was increased. I do not know what else.

8 QUESTION: Maybe not.

9 MR. SPINUZZI: You may be right. Now what really
10 bothers me is the attempt here to shift the burden of what I
11 consider to the statute's main function of the disclose of all
12 material information in connection with an investment
13 opportunity. Mr. Pinter says, hey, you should have told him
14 the truth.

15 Now the critical thing that came up in the testimony
16 that really is shocking is Mr. Pinter says that he gave nothing
17 to Mr. Dahl to explain this offering or the three offerings,
18 nothing. He gave him one thing as a kind of geological report,
19 but it has nothing to do with the particular well. He just
20 said that it was to give him an idea of where approximately the
21 wells were located.

22 Well, that does not even meet, of course, the
23 registration requirements, and it certainly does not meet the
24 exemption requirements. And in this regard, Mr. Pinter
25 specifically said in the subscription agreement that these

1 securities are not registered under the Securities Act of 1933.
2 But then it goes on, "In reliance upon Rule 146." And Rule 146
3 is a specific SEC rule providing a safe haven for an offering
4 which is exempt from registration under the non-public offering
5 exemption of Section 4(2).

6 Now if you are going to put the burden on Mr. Dahl
7 and say equitably he is estopped and he is in pari delicto
8 because he knew that the securities were unregistered, then so
9 did everyone else who invested in those wells, because they all
10 signed the subscription agreement and the subscription
11 agreement is very specific that these are not registered.

12 But if you are going to charge him with that burden,
13 then we should always charge him with the other burden it says,
14 "In reliance upon Rule 146," meaning that Mr. Pinter must have
15 complied with Rule 146. But the testimony was just the
16 opposite. And this was interesting. Mr. Dahl received a
17 financial statement.

18 QUESTION: But the others are not responsible for its
19 having failed to be a private offering, and the contention here
20 is that Dahl is in part, because he was one of those who
21 promoted the entire scheme, whether he did it for purposes of
22 friendship or for purposes of profit.

23 MR. SPINUZZI: I disagree for this reason. The
24 scheme, as you call it, had already been laid, and in
25 existence, and in operation. This is basically what the SEC

1 wants to find out, was Dahl personally involved in the scheme
2 as a promoter. It was already in operation. They were selling
3 the interests to other people. He only needed a few more
4 people to fill out and finalize his subscriptions.

5 QUESTION: So you say if someone else has already
6 approached enough other people that the private offering
7 exemption is lost, has already been lost, then someone who
8 comes in at that stage and assists in selling to even more of
9 the public, he is okay, because after all the violation has
10 occurred?

11 MR. SPINUZZI: No, sir.

12 QUESTION: Is that your theory?

13 MR. SPINUZZI: No, sir. If that person comes in as
14 an agent for the seller, and I am talking about the issuer as a
15 seller, he should be liable also. But that is basically held
16 by the courts anyway. Or if he is the agent selling on behalf
17 of the issuer. There is another one that goes that if he is in
18 a control relationship with the issuer, Section 15 I believe it
19 is. There is a specific liability which they can take up. Why
20 do we have to go to in pari delicto?

21 QUESTION: But not if he is doing it for his own
22 financial gain.

23 MR. SPINUZZI: He is not.

24 QUESTION: But what if he is doing it for his own
25 financial gain?

1 MR. SPINUZZI: In that case, I would say that he is
2 going to come under the three categories of either an issuer,
3 or an underwriter, or a dealer in securities. Those
4 definitions are broad enough to catch a person in that
5 position.

6 As a matter of fact, one of the exemptions from
7 registration specifically says if you are not an issuer, and if
8 you are an underwriter, and if you are not a dealer, than you
9 may sell the security. Now normally, that is a secondary
10 trading type exemption, but it could also count for a normal
11 issue.

12 So in those three categories, I think that it would
13 almost always lump them in. And interestingly enough, that
14 came up after the trial in a proposed finding of fact, but it
15 was two weeks after the trial. And it was not ruled on by the
16 court, and I can understand.

17 And there is something else about the Trial Court. I
18 have put in my brief that as far as I am concerned these issues
19 are not even properly before this Court. We do not think that
20 the in pari delicto defense, or the estoppel defense, or the
21 right of contribution were ever raised in the Trial Court in
22 the form in which they are brought here.

23 And the form in which they are brought here is with
24 reference to the sale of unregistered securities. The manner
25 in which it was raised in the Trial Court was under a

1 10(b)(5) fraud theory. Well, excuse me, I will take it back.
2 It was under a common law fraud theory. That Mr. Dahl made
3 material misrepresentations and omissions of fact that caused
4 Mr. Pinter to engage in this wrongful conduct.

5 QUESTION: The Fifth Circuit passed upon the
6 in pari delicto.

7 MR. SPINUZZI: The Fifth Circuit apparently decided
8 that it was of significant enough importance that they would go
9 ahead and rule on it.

10 QUESTION: And estoppel?

11 MR. SPINUZZI: And estoppel. As a matter of fact,
12 estoppel was the main point of Judge Hill. Judge Hill kept
13 saying -- estoppel, of course, here was he knew or did not know
14 that securities were unregistered. Judge Hill said so what,
15 the old case from the Fifth Circuit, Henderson v. Hayden, that
16 they have always applied the standard that you cannot waive
17 your rights under the statute and you cannot be estopped from
18 your rights under the statute even if you have knowledge that
19 they are unregistered.

20 Because in this instance, the great white father,
21 Congress, says we are going to protect you, public, from your
22 own ignorance unless the issuer gives you a complete disclosure
23 of all material information. If he gives you disclosure, then
24 Mr. Investor, it is your tough luck, you take care of yourself.
25 And that is the way that it has been, and really the way that

1 it should be, because the law imparts the fairness of
2 disclosing the investment opportunity.

3 QUESTION: Well, Mr. Spinuzzi, it seems to me that
4 under that approach that it would further Congress' objectives
5 to provide a in pari delicto defense to someone who is a
6 promoter and who gets other people to buy these unregistered
7 securities as a promoter, and I think that is what the SEC is
8 arguing.

9 MR. SPINUZZI: I think that they are trying
10 to -- well, the SEC has policy decisions too, and I agree.
11 And their policy decision here is that they would like to
12 enlarge it to cover a promoter in that sense, and I cannot
13 disagree.

14 QUESTION: And it would seem to further Congress'
15 purposes here?

16 MR. SPINUZZI: Yes.

17 QUESTION: So the question is whether Mr. Dahl is
18 indeed a promoter in that sense.

19 MR. SPINUZZI: I agree.

20 QUESTION: And perhaps the courts below did not have
21 a chance to focus on that, because at least the First Circuit
22 thought that defense was not available at all.

23 MR. SPINUZZI: I do not think that is the reason that
24 they did not focus. The reason is that it was never made an
25 issue in the Trial Court. But more importantly, even if it had

1 been, the record in the Trial Court shows absolutely no
2 evidence to support such a theory.

3 So assuming a remand as an example, there is nothing
4 there in the record for the Court to make a ruling on. There
5 is nothing, absolutely zero, to indicate the Mr. Dahl was a
6 promoter of this, evidentiary-wise or otherwise. That would
7 mean then that we start a trial all over again on issues that
8 in my opinion were never raised.

9 QUESTION: I do not think that you accept the SEC's
10 definition of the in pari delicto defense.

11 MR. SPINUZZI: No.

12 QUESTION: Do you think that it requires Dahl to be a
13 promoter?

14 MR. SPINUZZI: I think that it would. You see, I am
15 afraid to say.

16 QUESTION: Well, that is something different than
17 what we said in the Eichler case.

18 MR. SPINUZZI: Yes, sir.

19 QUESTION: That is an additional element that is not
20 present in Eichler.

21 MR. SPINUZZI: That is correct.

22 QUESTION: But Eichler referred to another section,
23 is that it?

24 MR. SPINUZZI: Eichler was basically talked on the
25 1934 Act which was a 10(b)(5) fraud action, and we are not

1 talking about fraud here. I can understand the exception that
2 this Court made in the Eichler case, and it makes good sense.
3 But in that case, even the Court here did not permit the
4 in pari delicto defense to be used.

5 QUESTION: Exactly.

6 Why do you need any more in this case?

7 MR. SPINUZZI: I do not think that we need any more.
8 You see, the wrongful conduct that they are claiming with Mr.
9 Dahl is that he was also a seller to his friends by giving them
10 a tip.

11 QUESTION: If we say that the in pari delicto defense
12 is available in some circumstances contrary to the Court of
13 Appeals, must we not remand and say, look, here is the right
14 rule, now decide whether it is available on the facts. If
15 there are not enough facts, maybe you have to send it back to
16 the Trial Court.

17 MR. SPINUZZI: I do disagree with the SEC on that
18 part. I do not believe that the Fifth Circuit said that the
19 in pari delicto was never permissible in a Section 12(1) strict
20 liability situation.

21 QUESTION: Well, it said that it was not available
22 here.

23 MR. SPINUZZI: Yes, sir, it did. And the reason that
24 it did is that it said that Dahl was a buyer of all of these
25 securities, and as a buyer you are talking about so-called

1 seller activity which is a matter not related to his own
2 purchases. That is basically what the Court said. That if
3 you are going to use the equitable defense of in pari delicto,
4 it must relate to the same identical matter of which you
5 complain.

6 Mr. Dahl was not complaining about the wrongful sales
7 to his friends. He was complaining about the wrongful sales to
8 him.

9 QUESTION: Absent a showing a Dahl's conduct was
10 offensive to the dictates of natural justice, the unclean
11 hands, the in pari delicto unclean hands are not available.

12 MR. SPINUZZI: I agree. And the only thing that I
13 can figure is that he is going back to the historical call it
14 transition of the equitable doctrine.

15 QUESTION: But did not the Court of Appeals hold in
16 discussing estoppel that to allow the estoppel defense would
17 frustrate the purposes of the Act?

18 MR. SPINUZZI: Yes, sir.

19 QUESTION: And that is one of the requirements also
20 of in pari delicto indirectly, is that not right?

21 MR. SPINUZZI: They have a slightly different
22 wording, sir, and if I may read my note here on it. Under the
23 Eichler case it says, "Preclusion of a suit would not
24 significantly interfere with effective enforcement or
25 protection of the public." The Henderson standards says, "It

1 would further the goals of securities."

2 To me, they are basically the same, but they are
3 slightly different wording. And apparently, Judge Brown in his
4 dissent put some emphasis on that difference.

5 QUESTION: Yes. But the opinion says that it would
6 frustrate the purposes of the Securities Act.

7 MR. SPINUZZI: That is correct.

8 QUESTION: Is that not Eichler, too?

9 MR. SPINUZZI: In my opinion, yes. The wording is
10 slightly different, but I see nothing different whatsoever in
11 substance. And in addition, the Henderson case was really
12 primarily directed in its application by the Fifth Circuit at
13 the estoppel theory, that his knowledge that the securities
14 were unregistered.

15 The court said that in its opinion that the Eichler
16 case still applies to the estoppel theory as to knowledge of
17 unregistered securities. But that in any event, in the
18 majority's view, that even if you applied the Eichler standard
19 that it still would not bar or preclude recovery by Mr. Dahl.

20 I have nothing further, Your Honor. Thank you very
21 much, Justices.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Spinuzzi.

23 Mr. Sparks, you have one minute remaining.

24

25

1 ORAL ARGUMENT OF BRADEN M. SPARKS, ESQ.

2 ON BEHALF OF PETITIONERS - REBUTTAL

3 MR. SPARKS: May it please the Court:

4 I would like to address a couple of questions very
5 quickly. As to the disclosure issue, counsel has argued I
6 submit outside of the record that there were omissions. The
7 Trial Court found that there were no violations of 10(b)(5),
8 no omissions, and that there were no acts that constituted a
9 violation of Section 10(b)(5) in paragraph 25 of the court's
10 findings.

11 Secondly, I would like to point out in response to
12 the questions of Justices Scalia and White that with regard to
13 the in pari delicto test suggested by the government that they
14 suggest that one ought to be a promoter and somehow be involved
15 in the decision not to register, or involved in the conduct
16 that results in the loss of the exemption.

17 And I submit that in a 12(1) context, a strict
18 liability context, that this puts again the burden on
19 establishing a state of mind that a decision was made not to
20 register, and that a decision was made to take the transaction
21 outside the exemptions. I submit that that again flies in the
22 face of the basis of the statute.

23 Secondly, in response to Justice Scalia's questioning
24 concerning the substantial factor test, there is some
25 confusion.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sparks.
2 The case is submitted.

3 (Whereupon, at 10:56 a.m., the case in the
4 above-entitled matter was submitted.)

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REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-805

CASE TITLE: Billy J. "B.J." Pinter, et al., v.
Maurice Dahl, et al.

HEARING DATE: December 9, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence
are contained fully and accurately on the tapes and notes
reported by me at the hearing in the above case before the
United States Supreme Court,
and that this is a true and accurate transcript of the case.

Date: December 9, 1987

Margaret Daly

Official Reporter

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