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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: VIRGINIA BANKSHARES, INC., ET AL.,  
Petitioners V. DORIS I. SANDBERG, ET AL.

CASE NO: 89-1448

PLACE: Washington, D.C.

DATE: October 9, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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VIRGINIA BANKSHARES, INC., :  
ET AL., :  
Petitioners :  
v. : No. 89-1448  
DORIS I. SANDBERG, ET AL. :  
----- X

Washington, D.C.  
Tuesday, October 9, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:18 a.m.

APPEARANCES:

STEPHEN M. SHAPIRO, ESQ., Washington, D.C.; on behalf of the  
Petitioners.

JOSEPH M. HASSETT, ESQ., Washington, D.C.; on behalf of the  
Respondents.

MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor  
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behalf of SEC and FDIC, as amici curiae, in support of  
the Respondents.

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P R O C E E D I N G S

(10:18 a.m.)

1  
2  
3 CHIEF JUSTICE REHNQUIST: We'll hear argument first  
4 this morning in No. 89-1448, Virginia Bankshares v. Doris  
5 I. Sandberg.

6 Mr. Shapiro.

7 ORAL ARGUMENT OF STEPHEN M. SHAPIRO

8 ON BEHALF OF THE PETITIONERS

9 MR. SHAPIRO: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 As this Court has explained on a number of  
12 occasions, expansive interpretation of implied securities  
13 law remedies carries with it a danger, a danger of vexatious  
14 litigation and erosion of basic principles of federalism.  
15 This is a case which raises those same fundamental concerns.

16 This is a merger case in which minority  
17 shareholders received 30 percent more for their shares than  
18 those shares ever traded for, but they nonetheless filed  
19 suit in State court demanding more money. Plaintiffs were  
20 denied an appraisal remedy and an injunction remedy in the  
21 State court, and the State supreme court ultimately denied  
22 review. So they decided to bring their complaint to Federal  
23 court.

24 This shift in forums resulted in a remarkable  
25 improvement in plaintiffs' fortunes. Under the Fourth



1 Circuit's ruling in this case, more than \$13 million may  
2 change hands, based on two alleged defects in the proxy  
3 statement that was used in the merger, even though the  
4 majority shareholder owned enough shares to complete the  
5 merger without the votes of any minority shareholders.  
6 These alleged misleading passages in the proxy statement  
7 were held to be the cause of those millions of dollars in  
8 damages. It is no coincidence that plaintiffs have used  
9 these rulings from the court of appeals to obtain indirectly  
10 the appraisal remedy which the Commonwealth of Virginia has  
11 determined should not be available in bank merger cases of  
12 this kind.

13 I'd like to mention at the outset an important  
14 point of agreement between ourselves and the SEC, something  
15 which is a rarity in securities litigation before this  
16 Court. I can't think of another case in which the SEC has  
17 told this Court that a judgment in favor of securities law  
18 plaintiffs was, quote, "in error." But that is what the SEC  
19 has advised the Court here, and on this point the SEC is  
20 surely right. In simple terms, the jury never found that  
21 the millions of dollars in damages that were awarded here  
22 were in any way caused or brought about by the alleged  
23 defects in the proxy statement. And that is because of the  
24 jury charge.

25 The jury charge described the requirement of

1 causation, but it then proceeded to instruct the jury that  
2 causation was, quote, "sufficiently shown" if the allegedly  
3 misleading proxy statement was an essential link in the  
4 transaction, that is if it was necessary under State law for  
5 the defendants to solicit proxies. The jury also was  
6 instructed that it was no defense that the votes of the  
7 minority shareholders were not needed to approve the  
8 transaction.

9 Now the SEC has explained why these causation  
10 instructions are erroneous. There is no basis for finding  
11 that millions of dollars in damages have been caused simply  
12 because the challenged proxy statement was required by State  
13 law. In a case like Mills against Electric Auto-Lite, where  
14 the plaintiff shareholders had enough votes to make a  
15 difference in the outcome of the shareholder election, a  
16 materially misleading proxy statement disseminated to all  
17 of the shareholders logically supported a finding of  
18 causation. But in this case any alleged errors in the proxy  
19 statement were completely irrelevant to the outcome of the  
20 shareholders' vote --

21 QUESTION: Well, in the Mills case --

22 MR. SHAPIRO: -- a vote which was never in doubt.

23 QUESTION: In the Mills case, counsel, we said  
24 that causation would be shown, didn't we, if the defect had  
25 a significant propensity to mislead?

1 MR. SHAPIRO: Yes, Your Honor, and of course the  
2 Court left open the question of whether causation could be  
3 shown in a situation where the minority shareholders had no  
4 voting power. And that, of course, is this case which is  
5 before the Court today.

6 QUESTION: Leaving it open sort of indicated it  
7 might be a moot question. I mean, arguable at least.

8 MR. SHAPIRO: Arguable at least, but I -- now that  
9 the SEC, I believe, has sided with us on this proposition,  
10 I -- as I understand my brother's arguments, they --

11 QUESTION: But they have never decided it in an  
12 adjudication, have they?

13 MR. SHAPIRO: That is correct.

14 QUESTION: So this might just be appellate  
15 counsel's view of it?

16 MR. SHAPIRO: This may be appellate counsel's view  
17 of it, that's correct.

18 QUESTION: But still right?

19 MR. SHAPIRO: But still correct.

20 (Laughter.)

21 MR. SHAPIRO: Notice my brother has attempted to  
22 jettison this essential link theory that he relied on  
23 exclusively in the courts below, and in this Court he is now  
24 arguing for the first time that actual causation was  
25 established here because the minority shareholder votes were

1 necessary under a conflict of interest statute that's on  
2 the books in the State of Virginia.

3 QUESTION: Were those theories argued to the jury?

4 MR. SHAPIRO: Those theories were not argued to  
5 the jury, Your Honor, and that's a critical point. No such  
6 causation claim was ever presented to the jury, to the  
7 district court, or to the court of appeals. This is an  
8 after thought that has been raised in an attempt to buttress  
9 this judgment.

10 QUESTION: Mr. Shapiro, I didn't understand -- I  
11 didn't understand the SEC to have taken the position in this  
12 case that there can't possibly be the requisite causality  
13 if the votes of the minority shareholders are not needed.  
14 Is that the position you said they have taken? I -- they  
15 have taken the position that causality was not established  
16 here, but I do not understand them to have taken the  
17 position that in order to establish causality you must show  
18 that the votes of the minority shareholders were needed.

19 MR. SHAPIRO: Your Honor, you're correct. What  
20 they have said is that the instructions here are not  
21 defensible, and that the rationale of the court of appeals  
22 is in error.

23 Now this afterthought that plaintiffs have offered  
24 to defend the rulings below, after they set aside the  
25 essential link theory, in addition to being a point that



1 wasn't raised below, is a hopelessly speculative theory.  
2 Although plaintiffs are now arguing in this Court that they  
3 could have set aside this merger under Virginia conflict of  
4 interest law, they haven't cited a single Virginia authority  
5 that suggests that this is so, that a minority shareholder  
6 could upset a merger in this situation. And there is actual  
7 litigation experience in Virginia that directly refutes  
8 their theory.

9 In State court, plaintiffs alleged that the  
10 majority shareholder dominated the bank and had an  
11 interlocking director with a conflict of interest. But they  
12 were denied an injunction or an appraisal on two separate  
13 occasions, and the State supreme court denied review.

14 QUESTION: Mr. Shapiro, how do you think a proper  
15 instruction on causation should read?

16 MR. SHAPIRO: A proper instruction, Your Honor,  
17 would direct the jury to consider the issue of proximate  
18 cause and cause in fact without telling the jury that  
19 causation is established simply because there is an  
20 essential link. That was the mistake here, giving that  
21 preemptive instruction that told the jury that causation was  
22 established simply if the proxy solicitation was required.

23 QUESTION: Well, now, does the Government, the  
24 Solicitor General, take the position of -- that something  
25 -- that for instance, if the practicalities are such that

1 the company wants to get a favorable vote from the  
2 stockholders, whether or not they have the power to stop it,  
3 that that could be causation?

4 MR. SHAPIRO: Yes, Your Honor. They take the  
5 position that if there has been a commitment by the majority  
6 shareholder to abide by a vote of a majority of the minority  
7 shareholders, then you would arguably have Mills causation.

8 QUESTION: Of if for some reason the shareholders'  
9 rights under State law would be affected.

10 MR. SHAPIRO: That is the position that they have  
11 taken. That is correct.

12 QUESTION: And do you disagree with that?

13 MR. SHAPIRO: Well, we think that those issues  
14 need not be reached here, because causation wasn't decided  
15 --

16 QUESTION: Well, do you disagree with that? We  
17 have to be concerned here with the standard.

18 MR. SHAPIRO: Of course. Your Honor, we do  
19 disagree with these broad theories that are referred to as  
20 sue-fact theories or shame-fact theories. We think that in  
21 addition to being not presented here, that they are far  
22 removed from Congress' concern in passing section 14(a), and  
23 we have argued in our brief that this Court's implied right  
24 of action decisions don't encompass extraneous injuries of  
25 that sort, that are far removed from Congress' core concern.

1 But you need not agree with us --

2 QUESTION: Then why do you say the proxy was  
3 circulated to all the shareholders in this case, proxy  
4 statement?

5 MR. SHAPIRO: In this instance the SEC is right.  
6 It didn't have to be circulated. It was circulated because  
7 corporate counsel believed that, at this annual meeting  
8 where directors were being elected, that proxy should be  
9 solicited under Virginia law. But it wasn't necessary to  
10 approve the merger.

11 QUESTION: It was a mistake of Virginia law that  
12 led to the solicitation?

13 MR. SHAPIRO: It was a permissible act under  
14 Virginia law, but it wasn't required under Virginia law.  
15 But the SEC is absolutely right about that.

16 QUESTION: What if a company board had minority  
17 stockholders but wanted to obtain their consent nonetheless  
18 to a merger and might have hesitated to go ahead with the  
19 merger absent that consent?

20 MR. SHAPIRO: Well, that strikes us on a record  
21 of this kind as being utterly speculative. The majority  
22 here made clear that it intended to go ahead with the merger  
23 and exercise its statutory rights under Virginia law. There  
24 may be other cases where the majority has committed itself  
25 in the merger agreement to abide by the vote of the

1 minority. Now that would present a different case, and we  
2 don't quarrel with the SEC about that.

3 QUESTION: What about the theory that the bank  
4 would not want to have offended its minority shareholders,  
5 some of whom were customers, and that the same thing in fact  
6 had happened in Maryland? Was all this developed in the  
7 record below at the trial?

8 MR. SHAPIRO: None of this was developed. No such  
9 causation theory was ever presented to the jury. But the  
10 reason I say that that is impermissibly speculative, even  
11 if it had been presented, is that we know to a certainty  
12 that the majority shareholder did not blink. It went ahead  
13 with this transaction despite all of the accusations,  
14 despite the litigation, the onslaught of protest. We know  
15 to a factual certainty that the majority shareholder was  
16 determined to exercise its statutory rights here.

17 Now it -- even if this Court in some future case  
18 may take an interest and resolve favorably to the SEC some  
19 of these expansive causation theories that we have been  
20 discussing, it's important to emphasize that, as the SEC  
21 recognizes here, causation wasn't found in this case on any  
22 of these theories. And even in this Court it is quite  
23 telling that no causation theory is asserted on this record  
24 that is anything more than sheer speculation.

25 As I previously mentioned, these plaintiffs were



1 totally unable to block this merger in State court or in the  
2 State supreme court. And although they say that the  
3 majority shareholder might have abandoned this merger under  
4 an onslaught of pressure from the minority, they don't cite  
5 any evidence in support of that either. As I mentioned to  
6 Justice Kennedy, despite vehement protest before the State  
7 corporation commission, before the State courts, before the  
8 Federal courts, the majority shareholder here has insisted  
9 on its statutory rights.

10 QUESTION: Mr. Shapiro, will you just clear up one  
11 thing for me? They claim you didn't preserve your -- this  
12 point well. You objected to the instruction?

13 MR. SHAPIRO: Yes, Justice.

14 QUESTION: And did you tender your own instruction  
15 on this issue that should have been given?

16 MR. SHAPIRO: We objected to the essential links  
17 construction, and we did tender our own proximate cause  
18 instruction. Yes, we did object.

19 QUESTION: Which was not given.

20 MR. SHAPIRO: And we tendered our own, we moved  
21 for summary judgment on this ground. We reincorporated our  
22 summary judgment papers at the directed verdict stage.

23 QUESTION: And the instruction you tendered is in  
24 the record?

25 MR. SHAPIRO: Yes, it is.

1 QUESTION: And it's what you still say is the  
2 proper instruction?

3 MR. SHAPIRO: Yes. It's the proximate cause  
4 instruction. And of course we saw JNOV on this very line  
5 of argument after trial.

6 QUESTION: Mr. Shapiro, what was your objection  
7 to the -- was and is your objection to the so-called  
8 essential link instruction?

9 MR. SHAPIRO: That it improperly presumes  
10 causation simply because a proxy statement was alleged to  
11 be required under State law. And our view is that you can't  
12 simply assume that millions of dollars in damages have been  
13 caused because State law may require --

14 QUESTION: Or even \$5.

15 MR. SHAPIRO: Or even \$5.

16 QUESTION: So you say it should be left as a  
17 question of fact to the jury?

18 MR. SHAPIRO: Yes, Your Honor, under the proximate  
19 cause instruction, without this preemptive instruction the  
20 trial court gave that literally removed the causation issue  
21 from the jury's domain.

22 QUESTION: Well, I thought you really think it's  
23 a question of law as to what the essential link definition  
24 is.

25 MR. SHAPIRO: We do, Your Honor. But we think as

1 a matter of -- under correct instructions we would have been  
2 entitled to a directed verdict here.

3 QUESTION: Right. Well, what was your -- what  
4 instruction did you tender?

5 MR. SHAPIRO: We tendered a proximate cause  
6 instruction.

7 QUESTION: What? What did it say?

8 MR. SHAPIRO: It said that the violation has to  
9 be a substantial factor and a direct cause of the injury  
10 alleged by the plaintiffs. And of course we sought summary  
11 judgment and directed verdict that would have removed this  
12 from the jury's domain, but we also, assuming that the judge  
13 had tendered --

14 QUESTION: Well, isn't your argument here that  
15 because the minority could not block this merger, that there  
16 couldn't be causation?

17 MR. SHAPIRO: Yes, Your Honor. And --

18 QUESTION: Well, that isn't what -- that's a  
19 question of law, then, isn't it?

20 MR. SHAPIRO: That is, Your Honor. And we --

21 QUESTION: Well, why wouldn't you have -- why  
22 didn't you tender an instruction to that effect?

23 MR. SHAPIRO: We sought directed verdict and  
24 summary judgment on that very ground, and when the trial  
25 court insisted on submitting the case to the jury we then

1 submitted, of course, that instruction.

2 QUESTION: I see.

3 MR. SHAPIRO: Before leaving this interesting  
4 issue of causation, I should mention briefly one additional  
5 defect in plaintiffs' new causation theories, and Justice  
6 O'Connor has adverted to this already. That is, these  
7 theories really have no relationship at all to Congress'  
8 purpose in enacting section 14(a).

9 QUESTION: Let me ask you once more, Mr. Shapiro,  
10 about the instruction. You really have two objections to  
11 the causation, to the essential link? One is that it is  
12 not a proper statement of the law because it takes something  
13 away from the jury generally. And the second is, in your  
14 case you don't think that issue should have been submitted  
15 to the jury. Is that right?

16 MR. SHAPIRO: That's correct, Mr. Chief Justice.  
17 That is exactly right. One can read the legislative history  
18 of this provision again and again without finding the  
19 slightest suggestion that Congress meant Federal proxy  
20 regulation to be used as a device to facilitate State court  
21 litigation, as my brother has argued, or to serve any  
22 purpose other than implementing the actual voting rights of  
23 shareholders. In these circumstances we submit that an  
24 award of damages is simply unnecessary to achieve any of  
25 Congress' purposes in enacting this provision. Now --



1           QUESTION: Mr. Shapiro, just so I understand what  
2 your position is, as I understand it you think these cases  
3 would never get to the jury, taking your pure theory that  
4 when minority shareholder approval is not legally needed,  
5 there is no cause of action. It would be always a question  
6 of law.

7           MR. SHAPIRO: That's a correct --

8           QUESTION: The court would look at it and see  
9 whether minority shareholder approval is needed. If it is  
10 needed, then under Mills it has to send it. If it isn't  
11 needed, then under your assertion it can't send it to the  
12 jury. So it's always going to be a question of law.

13          MR. SHAPIRO: Yes. Where there is no allegation  
14 of voting rights injury, then as a matter of law the case  
15 should be dismissed or summary judgment granted.

16          QUESTION: And when there is, then causation is  
17 automatically established.

18          MR. SHAPIRO: If there's a material misstatement  
19 and --

20          QUESTION: Right. So causation is out of the case  
21 on your pure theory. And then your fallback theory is even  
22 if that isn't right, at least you have to establish genuine  
23 causation and not mere necessity of going through a State  
24 procedure.

25          MR. SHAPIRO: And on this fallback point we argue

1 not only was it not presented to the jury, but in addition  
2 it couldn't have been presented to the jury because there  
3 is no nonspeculative, nonvoting causation theory that has  
4 been argued in this case.

5 This causation theory is a sufficient ground for  
6 reversal here, but there is an additional ground, of course.  
7 The two claims of misrepresentation that are relied on by  
8 the court of appeals are both defective, we submit, as a  
9 matter of law. And with the Court's permission, I'd like  
10 to speak briefly to the misrepresentation issue.

11 The first claim of misrepresentation is that the  
12 proxy statement falsely describes --

13 QUESTION: Before you get to that, Mr. Shapiro,  
14 let me ask you one question. In your view, what purpose  
15 does the proxy statement serve in a case like this?

16 MR. SHAPIRO: In a case like this it wasn't  
17 necessary under State law. It was simply a piece of  
18 information, such as an annual report, given to the  
19 shareholders. It wasn't a required document.

20 QUESTION: So your answer is none.

21 MR. SHAPIRO: Well, it serves a general  
22 informative purpose, but it doesn't serve the purpose --

23 QUESTION: But no legally necessary purpose.

24 MR. SHAPIRO: -- that section 14(a) is aimed at.

25 Now,, the first claim of misrepresentation is that

1 this proxy statement falsely reported that the directors  
2 approved this merger because they believed that the buy-  
3 out price was a high price. The court of appeals held that  
4 the jury might find that the directors were not really  
5 motivated by this \$10 premium, 30 percent premium over prior  
6 market price, and it claimed that they may have been  
7 secretly motivated by a desire to retain their seats on the  
8 board of directors.

9 This claim illustrates as clearly as possible the  
10 need for judicial supervision of speculative securities  
11 fraud claims, which depend not on objective and verifiable  
12 facts, but rather on excursions into the subjective state  
13 of mind of a multi-member board of directors. We have here  
14 a 22-member board of directors, including the president of  
15 George Mason University, a former distinguished congressman,  
16 local government officials, securities professionals, an  
17 accountant, lawyers, and a group of businessmen.

18 These directors met on four occasions over a  
19 month's period of time to discuss the buy-out, and they  
20 questioned the investment banker for over 2 hours on the  
21 issue of fair price. There are contemporaneous meeting  
22 notes which show that the directors focused on "the high  
23 premium, 30 percent." That's joint appendix page 455.  
24 There is simply no rational objective basis for inferring  
25 that these directors didn't really believe that this \$10

1 premium was a high price.

2 QUESTION: Mr. Shapiro, are you arguing that as  
3 a matter of law that statement could never be actionable or  
4 never misleading, or are you arguing that on this record the  
5 facts don't support the finding that it was misleading?

6 MR. SHAPIRO: We are presenting these as  
7 alternative points, Your Honor. There is a line of cases  
8 --

9 QUESTION: But on the first point is it not clear  
10 that if they all had secret notes that said we think \$60 is  
11 a fair price and then the proxy statement said they thought  
12 \$42 would be a fair price, that that would be misleading?

13 MR. SHAPIRO: What the cases have said, Your  
14 Honor, is if there is indeed objective support for a claim  
15 of insincerity, that's another matter. But when it is  
16 merely a speculative hypothesis --

17 QUESTION: But that's a question of fact. That's  
18 a question of fact and question of evidence, isn't it?

19 MR. SHAPIRO: Well, the courts have uniformly  
20 refused to tender these claims to juries. Even the cases  
21 the plaintiffs cite, the Berg case in the court of appeals  
22 --

23 QUESTION: This Court hasn't uniformly done that.  
24 And I am just interested in why a statement that Mr. X  
25 believes \$42 is a fair price could not be a misleading



1 statement of fact if he in fact thought the price ought to  
2 be \$90.

3 MR. SHAPIRO: The danger, Your Honor --

4 QUESTION: I know the dangers, but you're saying  
5 that as a matter of law that can never be a misleading  
6 statement?

7 MR. SHAPIRO: Unless there is an objectively  
8 verifiable basis for that assertion of securities fraud.

9 QUESTION: Unless there is evidence to show it's  
10 a false statement.

11 MR. SHAPIRO: If there is a document, if there is  
12 testimonial evidence. But here it is simply an excursion  
13 into the state of mind of these 22 individuals.

14 QUESTION: You don't think, then, that we should  
15 take the word of the SEC on this point?

16 MR. SHAPIRO: No, Your Honor, I don't.

17 (Laughter.)

18 MR. SHAPIRO: I don't at all.

19 QUESTION: I don't understand what your position  
20 is on this. I mean, I -- there is a general rule of common  
21 law. We don't need some special SEC rule that if there's  
22 no evidence to support it, of course the court has to throw  
23 it out. But what is it that you require beyond this? I  
24 mean, let's assume that he can put the directors on the  
25 stand, and they admit that indeed they thought that -- they

1 didn't think it was a fair price. Is that enough evidence?

2 MR. SHAPIRO: That would be enough evidence. The  
3 cases recognize that if you do have direct evidence of  
4 insincerity, then a case of this sort could go to a jury.  
5 But here --

6 QUESTION: Well, what kind of evidence is not  
7 direct evidence, that would satisfy the normal rule that you  
8 can't let it go to the jury without evidence, but will not  
9 satisfy the rule you are urging on us?

10 MR. SHAPIRO: This is close to being the normal  
11 rule, but with special emphasis on the Blue Chip Stamps  
12 policy analysis of the dangers of vexatious litigation in  
13 this category of case, where the Court has been particularly  
14 cautious about speculative inferences on subjective issues.

15 QUESTION: Such as what? Give me an example of  
16 evidence that would not suffice, or that would suffice under  
17 the common law rule and would not suffice under what you  
18 urge upon us?

19 MR. SHAPIRO: Well, I think under a correct  
20 application of the common law rule, or the antitrust rule  
21 in Matsushida, that speculative inferences are forbidden  
22 across the board. It is just there is a special need for  
23 that kind of judicial scrutiny which was not given --

24 QUESTION: Is that all you're saying? Be really  
25 strict about applying -- be careful about applying the

1 common law rule in this case?

2 MR. SHAPIRO: The traditional rule, the same rule,  
3 Your Honor, that the Court applies in the antitrust  
4 proceedings, and indeed in the Galloway case the plaintiff  
5 cited. The rule against speculation, where there is no  
6 objectively demonstrable basis for inferring insincerity.  
7 Now here --

8 QUESTION: The common law, though, is full of what  
9 you call excursions into people's minds when you are dealing  
10 with fraud.

11 MR. SHAPIRO: That is one matter, Your Honor, when  
12 you are talking about the state of mind of an individual  
13 broker or an accountant, but we are talking about a 22-  
14 member board of directors here. You are alleging that they  
15 are insincere in stating that a price is a fair price. Then  
16 you are truly entering into the domain of psychoanalysis and  
17 not into inferences of fact.

18 QUESTION: So you say although they could have  
19 entered into this what you regard as speculative if they  
20 were talking only about one person, they can't do it the  
21 same way if you are talking about a multi-member board?

22 MR. SHAPIRO: This is an additional reason for  
23 caution, as the courts have held. And I think this is  
24 right.

25 QUESTION: Well, can't you -- I suppose the

1 board's responsible for the proxy statement, isn't it?

2 MR. SHAPIRO: The board is, here it was signed by  
3 the chief executive officer and the chairman of the board,  
4 who was responsible for it, yes. And the claim is that the  
5 board, 22 members, didn't sincerely believe that this was  
6 a high price. And our proposition is that there is no  
7 objective foundation for that assertion.

8 QUESTION: I'm not sure that their claim is that  
9 it's not sincerely believed. Their claim is that this was  
10 not the basis for the board of directors' action. The board  
11 of directors act for reasons, and their discussion is that  
12 this was not the reason that was given in the board room.

13 MR. SHAPIRO: Unhappily for that theory, this is  
14 the reason that was given in the board room. This was the  
15 reason that was discussed --

16 QUESTION: Well, but that's a question of fact.  
17 You're saying that this cannot be actionable.

18 MR. SHAPIRO: The lower courts --

19 QUESTION: And their theory is that the board acts  
20 for a reason, and that this reason was not the reason that  
21 prompted the board to act. It's not subjective.

22 MR. SHAPIRO: It's completely subjective, Your  
23 Honor. There is no objective evidence that these people  
24 didn't believe --

25 QUESTION: Well, do boards of directors always act



1 for subjective reasons? They never give a stated purpose  
2 for board action?

3 MR. SHAPIRO: Often there is an objective memorial  
4 of reasons. Here there was, in fact, a memorandum prepared  
5 by the general counsel which said that they did focus on the  
6 high premium, 30 percent. They all testified that that was  
7 their conviction and their basis for making this decision.

8 Now, it's important in assessing this claim to  
9 keep in mind that now the SEC requires directors to state  
10 their opinion on the issue of fairness in every merger of  
11 this kind. And if claims of director insincerity or  
12 ulterior motivation could be brought into Federal court  
13 without the kind of objective supporting evidence that I'm  
14 talking about, every State appraisal grievance would be  
15 brought into Federal court in disregard of this Court's  
16 decision in Green v. Santa Fe, and in disregard of the  
17 principles that this Court articulated in Blue Chip Stamps.

18 The Court warned in Blue Chip Stamps against  
19 conjectural and speculative inquiries into subjective  
20 issues, as opposed to, quote, "objectively demonstrable  
21 fact." And the lower Federal courts, as I have mentioned,  
22 consistently have held -- there isn't a single case that we  
23 were able to find where a claim like this of director  
24 insincerity that didn't have specific supporting objective  
25 evidence was permitted to go to a jury. If the Court

1 affirms here, this will be the first case, and it will truly  
2 open up a Pandora's box where appraisal remedies are brought  
3 into Federal court simply by pleading that they didn't  
4 really believe, or they didn't sincerely believe that this  
5 price was high. That would overrule Green v. Santa Fe  
6 effectively and truly burden the Federal courts with an  
7 outpouring of new, and I believe vexatious, litigation.

8 Now, the last claim of misrepresentation is, I  
9 must say, almost impossible for me to understand. The sin  
10 here apparently was that the proxy statement described one  
11 of the Nation's top investment banking firms as being  
12 independent, and said that it passed on financial fairness.  
13 Well, it was independent. It was an outside, unaffiliated,  
14 autonomous investment banking firm. And as the SEC explains  
15 in its brief, liability cannot be predicated on the theory  
16 that it wasn't independent.

17 And in addition, this investment banker did pass  
18 on financial fairness. It reviewed a variety of financial  
19 data, and it applied a variety of analytical techniques.  
20 And of course at the end of the process it issued an opinion  
21 on the issue of financial fairness. Now, plaintiffs may  
22 disagree with that opinion, and plaintiffs may dislike its  
23 methodology, but they can't deny that this opinion was  
24 actually rendered on the issue of financial fairness.

25 QUESTION: But this group did not propose that

1 price, did it? They passed on the price which had been  
2 suggested by someone else.

3 MR. SHAPIRO: They originated the \$42 price.

4 QUESTION: They originated the \$42 price?

5 MR. SHAPIRO: The investment banking firm did.

6 QUESTION: Does your opponent agree with that  
7 construction of the evidence?

8 MR. SHAPIRO: Opponent doesn't agree with that.  
9 Our point is, Your Honor, that the proxy statement made no  
10 representation about who originated --

11 QUESTION: So your position would be the same even  
12 if they did not originate the price?

13 MR. SHAPIRO: That is quite right.

14 If the Court please, we would reserve the balance  
15 of our time for rebuttal.

16 QUESTION: Very well, Mr. Shapiro.

17 Mr. Hassett.

18 ORAL ARGUMENT OF JOSEPH M. HASSETT

19 ON BEHALF OF THE RESPONDENTS

20 MR. HASSETT: Mr. Chief Justice, and may it please  
21 the Court:

22 Your Honor, if I may, first let me clear up a  
23 couple of points. One, counsel says this morning that the  
24 reason the bank engaged in the solicitation was a mistake.  
25 But there was no evidence to the jury that that was the

1 reason for the solicitation. In fact, as recently as the  
2 reply brief, on page 4 at note 5, the petitioners were  
3 representing that the reason for the solicitation was that  
4 State law in fact required it.

5 There was plenty of evidence on the other hand,  
6 Your Honor, as to the reason for the solicitation before the  
7 jury. We've summarized it in our brief, and I don't want  
8 to dwell on it here, but there was plenty of evidence as to  
9 the reason -- the reasons that have been adverted to in some  
10 of the questions. And in any event, petitioners made no  
11 motion for a directed verdict on grounds it lacked  
12 sufficient proof to prove causation.

13 Now also, counsel now says that the petitioners  
14 did tender a different instruction of their own on  
15 causation, and that they did object to the pertinent  
16 causation instructions. But that is not so. The proximate  
17 cause instruction that counsel refers to was one that was  
18 tendered by both sides, and one that Judge Bryan gave at the  
19 trial. Petitioners, at page 81 and 82 and page 92 of the  
20 joint appendix, you will see where petitioners submitted  
21 their own instruction to the jury, telling Judge Bryan here  
22 is how it should be instructed.

23 And that instruction provides that if the jury  
24 finds that the -- it was phrased in this way: that there  
25 is no requirement that the plaintiff prove reliance if she



1 proves that the proxy solicitation was an essential link in  
2 accomplishing the transaction. And so, Your Honor, the very  
3 instruction that petitioners say now was error is exactly  
4 the instruction that they asked Judge Bryan --

5 QUESTION: But prior to that time didn't they move  
6 for summary judgment on the ground that there was no  
7 essential link?

8 MR. HASSETT: Well, Your Honor, both -- there are  
9 two --

10 QUESTION: Can't you answer that yes or no?

11 MR. HASSETT: I believe no, Your Honor, and let  
12 me explain why. There were two sets of separately  
13 represented parties in the district court. One were the  
14 directors. The directors don't claim to have made any such  
15 motion. The other separately represented party was  
16 Bankshares, the holding company. They say, and it's at  
17 around page 79, I think, of the appendix, but it's in the  
18 appendix, they say that an argument that they made there in  
19 two pages of a long, long brief constituted raising this  
20 essential link transaction.

21 QUESTION: Was it a brief on a question -- on a  
22 motion for summary judgment?

23 MR. HASSETT: Yes it was, Your Honor. And, but  
24 the argument heading is that the plaintiff can't recover  
25 because there was no reliance. And there is a reference to

1 Mills footnote 7 in the argument, but there is -- the  
2 argument is that there was no reliance.

3 QUESTION: Did they raise this issue in the court  
4 of appeals?

5 MR. HASSETT: No, Your Honor, they didn't. There  
6 was not one word about it, and they don't contest the  
7 representation in our brief that there was not one word  
8 about it in their fore briefs in the court of appeals. They  
9 never even cited --

10 QUESTION: So you think below they conceded this  
11 was an essential link?

12 MR. HASSETT: I think, Your Honor, that they  
13 conceded that the correct instructions on which the case was  
14 to be submitted to the jury was that the test was essential  
15 link. It's exactly the instruction they asked for.

16 QUESTION: Counsel, you referred us to their  
17 proposed jury charge on the second element, namely reliance  
18 materiality. But they also, on page 83 of the joint  
19 appendix, proposed a charge on the fourth element,  
20 causation. And that doesn't just say essential link. It  
21 says, "In order to satisfy this element, plaintiff need not  
22 prove that defendant's conduct was the only cause of the  
23 plaintiff's injury. It is sufficient if you find that the  
24 accounts of defendants were a substantial and significant  
25 contributing cause to the injury which plaintiff suffered."

1 That's a little more than essential link.

2 MR. HASSETT: Well, Your Honor, that is exactly  
3 the instruction that Judge Bryan gave, and it appears at  
4 page 424 of the joint appendix.

5 QUESTION: Well, but the petitioners say that what  
6 he gave in the proximate cause instruction he later took  
7 away by saying that I instruct you that in this case it is  
8 sufficient if it was an essential link. In other words he  
9 takes the essential link as a way to define compliance with  
10 the causation instruction.

11 MR. HASSETT: Well, Your Honor, I think the other  
12 instruction to which you refer, which is at 426, is one that  
13 begins with it is not necessary for plaintiff to establish  
14 a separate showing of reliance if she shows it's an  
15 essential link. And this, having these two instructions  
16 grew out of the fact that the only contention that  
17 petitioners were making in the trial court in this regard  
18 was the contention that plaintiff was barred because she  
19 didn't rely on the proxy statement.

20 And in connection with that, both parties proposed  
21 an instruction -- theirs I just referred to in 81-82 and 92,  
22 reliance needn't be shown if it was an essential link, and  
23 we proposed one, and Judge Bryan gave one, that said you  
24 don't have to show reliance if there is an essential link.  
25 Now, it's quite true that in the course of giving that Judge

1 Bryan also said that if you find it was an essential link,  
2 if you find it was necessary to solicit proxies from  
3 minority stockholders --

4 QUESTION: We have shifted a little bit, haven't  
5 we, Mr. Hassett? We started out talking about instructions  
6 on causation, and now we are talking about instruction on  
7 reliance.

8 MR. HASSETT: Well, Your Honor, I think that the  
9 two concepts of course get murkily involved with each other.  
10 But I think that the instructions given were quite correct.  
11 That number one, the jury had to find that petitioners'  
12 conduct with respect to the proxy solicitation -- under the  
13 proximate cause they are required to find that that conduct  
14 caused our injury, caused the respondents' injury. In the  
15 no reliance necessary, the instruction says no reliance is  
16 necessary if the proxy solicitation was an essential link.  
17 And that of course is exactly what the Court held in Mills.

18 QUESTION: But did they -- did the court leave it  
19 to the jury to decide whether -- the essential link  
20 question?

21 MR. HASSETT: He instructed them in the  
22 instruction at 426, Your Honor, that if they found it was  
23 necessary to solicit proxies from minority stockholders,  
24 they may find that it was an essential link.

25 QUESTION: Well, how did -- and did he tell them



1 that it was or wasn't necessary to solicit?

2 MR. HASSETT: No, he did not, Your Honor.

3 QUESTION: Well, what evidence -- how would the  
4 jury know whether it was necessary or not?

5 MR. HASSETT: Well, the evidence -- there was  
6 evidence in two regards before the jury, Your Honor. First  
7 was the evidence that -- and petitioners admitted before the  
8 jury, that the participation of the holding company director  
9 on the board of the subsidiary bank created a conflict of  
10 interest.

11 QUESTION: Yes.

12 MR. HASSETT: And petitioners themselves asked the  
13 jury to find that approval of the merger by the minority  
14 stockholders --

15 QUESTION: What was the other reason?

16 MR. HASSETT: The other reason was that there was  
17 evidence that the holding company had decided and had  
18 represented to the bank that in order to avoid the adverse  
19 consequences of forcing this down upon the minority  
20 stockholders against their will, that -- and the testimony  
21 was, I think at page 202 of the joint appendix, the chairman  
22 of the bank testified that the representation was made to  
23 him by the holding company that before this could happen,  
24 this acquisition of the minority stock by the holding  
25 company, the board of the bank would have to approve it, and

1 the chairman of the bank testified that we would have to go  
2 to the stockholders for their approval as well.

3 And it's our contention, Your Honor, that that  
4 representation, in conjunction with the many representations  
5 and all the emphasis by the petitioners before the jury,  
6 Your Honor --

7 QUESTION: Is it your position that the  
8 solicitation was required by Virginia law?

9 MR. HASSETT: No, not at all, Your Honor.

10 QUESTION: And so you don't claim that if it was  
11 that would be, prove the essential link?

12 MR. HASSETT: No, we don't, Your Honor. That  
13 whole -- the confusion there is something of the  
14 petitioners' own making. That is not a contention that  
15 we've made. The evidence was there before the jury as to  
16 why it was necessary, and that -- it was submitted to the  
17 jury under instructions that --

18 QUESTION: So if the jury found for you and they  
19 had to find there was an essential link, the only evidence  
20 that there was relating to the essential link was the  
21 evidence that you just mentioned?

22 MR. HASSETT: That I summarized, and it is set out  
23 in a little more detail in the brief. That is correct, Your  
24 Honor.

25 QUESTION: Mr. Hassett, now I know you have

1 explained this already, but it's not clear to me. The  
2 instruction that was given did tell the jury that it is  
3 enough for them to find material misstatements, and that  
4 that would be a sufficient showing of a causal relation?  
5 That is the instruction on page 426 of the joint appendix.

6 MR. HASSETT: I think, Your Honor, does it go on  
7 and say you must find it's a material misstatement, and that  
8 the solicitation was an essential link?

9 QUESTION: Was an essential link. That's the  
10 shorthand in Mills.

11 MR. HASSETT: Yes, Your Honor.

12 QUESTION: Now, the Solicitor General takes the  
13 position that that's not enough, that that's improper. So  
14 you -- the SEC disagrees with you on this, I take it?

15 MR. HASSETT: Yes, Your Honor. In all other  
16 respects I believe the SEC's reasoning is brilliant and  
17 sound and --

18 (Laughter.)

19 QUESTION: But on this point they are not so  
20 brilliant?

21 MR. HASSETT: As to this -- well, as to this, Your  
22 Honor, actually what I think is that because of the peculiar  
23 way that this case developed, where none of these arguments  
24 were made in the district court, and it is undeniable that  
25 there was -- that petitioners, who were the appellants in

1 the court of appeals, said nothing about it in their briefs  
2 in the court of appeals --

3 QUESTION: Well, but they did argue below that the  
4 instruction of causation that was given on page 424 was  
5 appropriate, that that was the causation instruction that  
6 ought to be given.

7 MR. HASSETT: The petitioners, Your Honor -- there  
8 is three paragraphs -- there's two different instructions  
9 at 424. The directors made no objection to either of them.  
10 The holding company made an objection to the first but not  
11 the second. And the second is one that says it is no  
12 defense that they -- that the holding company had enough  
13 votes --

14 QUESTION: Was an objection made to this  
15 instruction on page 426 about the essential link, the one  
16 that takes away the causation instruction?

17 MR. HASSETT: The -- there's two -- on page 426,  
18 the way that --

19 QUESTION: In the middle of the page.

20 MR. HASSETT: Yes. Starting at "It is not  
21 necessary" --

22 QUESTION: Yes.

23 MR. HASSETT: The next two paragraphs, Your Honor,  
24 were one instruction. The parties knew it as 29.

25 QUESTION: Yes.



1 MR. HASSETT: The directors did not object to 29.  
2 The Bankshares, the holding company, did. The next  
3 sentence, the next paragraph, "If you find," et cetera, it  
4 says there -- no defense that they had enough votes to  
5 approve it themselves. It was not objected to by either  
6 petitioner.

7 QUESTION: How about, at the risk of repetition  
8 but this seems to be fairly critical, this last sentence on  
9 page 426 in the paragraph where it says "Sandberg has made  
10 a sufficient showing of a causal relation between the  
11 violation and the injury for which she seeks redress if she  
12 proves that the proxy solicitation itself rather than a  
13 particular defect in the solicitation was an essential  
14 link." Now, that does take an element of causation away  
15 from the jury.

16 MR. HASSETT: Yes, Your Honor, provided that in  
17 the next -- you have to read it in conjunction, we submit,  
18 Your Honor, with the next paragraph, which defines essential  
19 link. And we submit, Your Honor, that it needs to be read  
20 in conjunction with the proximate cause instruction.

21 QUESTION: And -- but -- and you say there was no  
22 objection by the -- or there was objection by Bankshares to  
23 the thing I just read?

24 MR. HASSETT: There was by Bankshares, Your Honor,  
25 but not to the directors. Each group were separately

1 represented, they each submitted their own objections. In  
2 the reply they argue, in an effort to save the directors,  
3 they say that something Judge Bryan said on the first  
4 morning of the trial, which is at JA 132, saves the  
5 directors. During the examination on the first morning of  
6 a witness, Judge Bryan said he would assume that the two  
7 separately represented groups joined in each others'  
8 objections unless they said otherwise.

9 QUESTION: Do you agree with that paragraph about  
10 essential link? If you find that it was necessary -- quote,  
11 necessary, unquote -- if the solicitation was necessary,  
12 then it's an essential link. Now what evidence do you say  
13 indicates that it was necessary?

14 MR. HASSETT: Your Honor, the evidence --

15 QUESTION: You mean as a matter of law?

16 MR. HASSETT: No. Your Honor, the way we read  
17 that instruction is it says that it was necessary to solicit  
18 proxies from minority stockholders. And in the context of  
19 this case, where nobody was suggesting in the district court  
20 that there was some State law requirement, and of course  
21 there isn't, that requires --

22 QUESTION: All right, so --

23 MR. HASSETT: Our view, Your Honor, was that it  
24 was necessary to solicit from minority stockholders because  
25 it was necessary to obtain their votes. And the reason it

1 was necessary to obtain their votes is that without them the  
2 merger was voidable because of the conflict of interest, and  
3 because without them the condition that the chairman of the  
4 bank testified to, minority stockholder approval was not  
5 satisfied. And there was no motion made that our evidence  
6 was insufficient to prove that. It went to the jury on that  
7 basis.

8 QUESTION: You argued that to the jury?

9 MR. HASSETT: No, Your Honor, there was no --  
10 there was no argument -- there was no evidence by the other  
11 side that questioned the necessity of soliciting them to get  
12 this approval. The petitioners in the trial court --

13 QUESTION: Did you put in evidence that it was  
14 necessary?

15 MR. HASSETT: Yes, Your Honor, because we proved  
16 that there was a conflict of interest, which they admitted  
17 before the jury. And that's at page --

18 QUESTION: Was the jury advised that this is why  
19 you were putting that evidence in?

20 MR. HASSETT: No, Your Honor. There was no --  
21 1093-94 of the court of appeals' joint appendix, they  
22 admitted the conflict. But they, Your Honor, asked the jury  
23 to find, and Judge Bryan gave the instruction that they  
24 asked for, that the conflict in the board that they admitted  
25 existed would be cured if the jury in this very case found

1 that the minority stockholders had given their approval to  
2 this transaction.

3 So it, they brought home to the jury in the most  
4 graphic kind of a way that the reason they solicited  
5 minority stockholder approval was not because they made some  
6 mistake on this important transaction, where they say that  
7 \$13 million is involved, which I may say is \$13 million  
8 under the jury's finding that the value of the stock that  
9 belonged to the minority stockholders and which petitioner  
10 has unjustly --

11 QUESTION: Mr. Hassett, that's -- surely it's a  
12 question of law and not of fact whether the only way that  
13 this conflict of interest could be cured under Virginia law  
14 is to get the approval of the minority shareholders. They  
15 contest that that is the case, as a matter of Virginia law.  
16 That's not a question for the jury. That's either so or  
17 it's not so.

18 MR. HASSETT: But Your Honor, the question, I  
19 think there are underlying facts, of course, that have to  
20 be found to present that question of law.

21 QUESTION: Like what? I think they are giving you  
22 the conflict. That is the only fact. Given the conflict,  
23 do you need the votes of the minority shareholders to cure  
24 it? That's a question of law.

25 MR. HASSETT: Well, I think that there's another



1 fact there which is was the board so much of a rubber stamp,  
2 as the court of appeals held it was on another aspect of the  
3 case not submitted, but that the board couldn't cure the  
4 conflict. The court of appeals held, and it is not being  
5 reviewed, that this board exercised no judgment  
6 independently whatever with respect to the merger, but  
7 rubber-stamped everything put in front of it. And the jury,  
8 having that evidence and having before it that the --

9 QUESTION: And the jury was instructed the board  
10 could have cured it, but if you find the jury -- the board  
11 was a rubber stamp, it couldn't?

12 MR. HASSETT: No, there was no instruction to that  
13 effect, Your Honor. There was this instruction. And we  
14 submit, Your Honor, that if this instruction was too broad,  
15 then the obligation was on the petitioners to object --

16 QUESTION: Let's assume they had objected to this  
17 instruction on the definition of the essential link. You  
18 say that the instruction is absolutely valid. Of course,  
19 the SEC says that even if it was necessary, it was wrong.  
20 I mean, even if the solicitation was necessary, you  
21 nevertheless lose.

22 MR. HASSETT: Well, Your Honor --

23 QUESTION: Isn't that what their position is?

24 MR. HASSETT: Yes, Your Honor.

25 QUESTION: And that, you certainly disagree with

1 that?

2 MR. HASSETT: I do agree with that, Your Honor.

3 QUESTION: And your answer is that that position  
4 was never pressed or objected to in the district court or  
5 in the court of appeals?

6 MR. HASSETT: That is absolutely our position,  
7 Your Honor. There was one objection made to that  
8 instruction, and that objection was by Bankshares only, and  
9 it said that this instruction wrongly decides the issue left  
10 open --

11 QUESTION: So we could decide this case for you  
12 by just saying that the issue that the petitioners want  
13 decided is -- we just don't decide it, because it wasn't  
14 pressed below, and so we don't decide it.

15 MR. HASSETT: That's exactly right.

16 QUESTION: We leave it open.

17 MR. HASSETT: That's exactly right, Your Honor.  
18 It was not pressed below. The directors --

19 QUESTION: So we don't -- no necessity to reject  
20 the SEC's position?

21 MR. HASSETT: That is correct, Your Honor.

22 QUESTION: Well, now wait, but that wouldn't  
23 dispose of the case. I mean, you don't contest that they  
24 did raise the objection and preserve the objection as to  
25 whether you -- there is any right of action if you in fact,

1 even with the vote of the minority shareholders, could not  
2 have prevented the merger?

3 MR. HASSETT: Oh, we do, Your Honor. They --

4 QUESTION: You say that that is not preserved  
5 either?

6 MR. HASSETT: That is right, Your Honor.

7 QUESTION: I didn't understand that.

8 MR. HASSETT: The directors made no such motion  
9 of any kind. And the Bankshares, as I say, they made the  
10 motion that appears at -- I don't know, page 50-something  
11 I think of the joint appendix.

12 QUESTION: I am puzzled about this notion that  
13 just some of them made the objection, because aren't they  
14 all parties here? Aren't they all petitioners?

15 MR. HASSETT: Oh, yes, they are, Your Honor, but  
16 under --

17 QUESTION: Well, then the question's here, isn't  
18 it? If anyone of them made the objection, then it is here  
19 in this record for us to decide, isn't it?

20 MR. HASSETT: Well, except, Your Honor, that if  
21 the directors, for example, are barred from raising it, then  
22 the judgment should be affirmed as to them.

23 QUESTION: As to them. But we still have to  
24 decide it as to Bankshares, if they did make it. I mean,  
25 I understand your point.

1 MR. HASSETT: At that stage I would say as to  
2 Bankshares it would be moot.

3 QUESTION: It doesn't make a great deal of  
4 difference to us whether we're deciding as to one petitioner  
5 or both, if we have to decide the question.

6 MR. HASSETT: I would suggest it is moot if it's  
7 not preserved by the directors. The judgment is joint and  
8 several, and the respondents would be satisfied -- the  
9 directors are being indemnified by the holding company  
10 anyway, so that --

11 QUESTION: Well, we don't encourage a finding of  
12 mootness. We took this case to decide certainly questions  
13 of national importance, and we're not looking for a way to  
14 find it moot.

15 MR. HASSETT: I understand that, Your Honor, but  
16 may I say on behalf of --

17 QUESTION: Your argument really is we should  
18 dismiss it as improvidently granted, because the issue we  
19 want to decide -- the SEC wants us to decide and the  
20 petitioners want to decide, just isn't before us.

21 MR. HASSETT: Well, that is correct, Your Honor.  
22 I am not sure the SEC is asking you to decide.

23 May I just say very quickly that --

24 QUESTION: Your time -- you're using the SEC's  
25 time. There's no law against it.



1 MR. HASSETT: I'll just say very quickly, Your  
2 Honor, that the position taken by the SEC was something that  
3 they briefed before they saw the brief of the petitioners,  
4 and I think that the SEC was saying that the instruction is  
5 faulty because --

6 QUESTION: Well, maybe the SEC would be the best  
7 person to say that.

8 MR. HASSETT: Let me just -- yes, Your Honor.

9 QUESTION: Thank you.

10 Mr. Dreeben.

11 ORAL ARGUMENT OF MICHAEL R. DREEBEN  
12 ON BEHALF OF SEC AND FDIC, AS AMICI  
13 CURIAE, IN SUPPORT OF THE RESPONDENTS

14 MR. DREEBEN: Thank you, Mr. Chief Justice, and  
15 may it please the Court:

16 I would like to focus on the materiality aspect  
17 of the case. The proxy antifraud rules promulgated under  
18 the Federal securities laws apply to false or misleading  
19 statements of reason or characterization, just as they do  
20 to other facts set forth in a proxy statement. There is no  
21 zone of immunity under the proxy rules for directors who  
22 misrepresent such matters.

23 QUESTION: Mr. Dreeben, I mean, I know you want  
24 to talk about the misleading part, but do you have a view  
25 on the causation issue as to whether all that is properly

1 reserved for our review or not?

2 MR. DREEBEN: Justice Stevens, neither the SEC nor  
3 the FDIC has taken a position on the waiver issue in this  
4 case. We have taken the position that the instructions that  
5 were given were not adequate to capture a finding of  
6 causation between the alleged violation and the injury. But  
7 we have not taken a position as to whether that instruct --  
8 whether the objections to those instructions were made  
9 properly and preserved.

10 QUESTION: So you really don't take a position on  
11 the ultimate question of what we should do with this  
12 judgment?

13 MR. DREEBEN: That's correct, Your Honor. We do  
14 take the position that to the extent that the Court reaches  
15 the materiality issues, the Court should affirm the judgment  
16 as to them. There are --

17 QUESTION: You have to take the position of do not  
18 take a position, because you really did say in your brief  
19 accordingly, the judgment, to the extent that it depends on  
20 the validity of those instructions, cannot stand.

21 MR. DREEBEN: That's correct, Justice Scalia. To  
22 the extent that the judgment depends on the validity of the  
23 instructions rather than the waiver of the objection to  
24 those instructions.

25 QUESTION: Oh, I see. I see.

1 MR. DREEBEN: We take that position. We have been  
2 careful --

3 QUESTION: Nice, Mr. Dreeben.

4 (Laughter.)

5 QUESTION: Now what, Mr. Dreeben, what should the  
6 instruction have said to go to the jury on causation?

7 MR. DREEBEN: Justice O'Connor, we think that the  
8 causation instruction in a case when shareholders occupy a  
9 minority position should spell out in some more detail than  
10 here what the causal theory is as to why the misleading  
11 proxy statement caused the injury. For example, it -- the  
12 instructions might say the plaintiffs contend that, absent  
13 minority approval, the holding company was not prepared to  
14 go forward with the transaction. It had established that  
15 as a condition. Or there might be an instruction that if  
16 accurate disclosure had been made, the plaintiffs contend  
17 they would have been able to enjoin the transaction in State  
18 court. Something that guides the jury sufficiently so that  
19 they understand what the causal inquiry here -- what the  
20 causal inquiry really is.

21 In this case the instruction essentially said if  
22 you find it necessary to solicit proxies, that's enough.  
23 It is true that if votes are needed, proxy solicitation will  
24 be needed. But the underlying predicate for why the votes  
25 were needed just simply wasn't presented to the jury.

1           There are three reasons why we believe that false  
2 or misleading statements of reasons or characterization do  
3 fall within the coverage of the proxy antifraud rules.  
4 First, statements of reason may be highly significant to  
5 investors in determining --

6           QUESTION:     Mr. Dreeben, you say it wasn't  
7 presented to the jury.   Maybe the instructions didn't  
8 present those issues, but there was evidence with respect  
9 to other theories of causation.

10          MR. DREEBEN:   There was evidence induced in the  
11 record, Justice White.

12          QUESTION:     And if the jury had to find that that  
13 was necessary, they must have relied on that evidence.

14          MR. DREEBEN:   It isn't precisely clear from the  
15 record --

16          QUESTION:     Well, there was some evidence about  
17 other theories of causation, wasn't there?

18          MR. DREEBEN:   I think there was evidence presented  
19 as to --

20          QUESTION:     Well, like the conflict of interest.

21          MR. DREEBEN:   There was evidence presented as to  
22 the conflict of interest because the petitioners --

23          QUESTION:     Well, and the jury followed their  
24 instructions -- we assume they did -- and found that the  
25 solicitation was necessary. They must have relied on some



1 evidence that was in the record. And one of it, for  
2 example, was the conflict of interest. Isn't that true?

3 MR. DREEBEN: The conflict of interest was  
4 injected into the case because there was a separate breach  
5 of fiduciary duty --

6 QUESTION: Well, what evidence do you suppose the  
7 jury relies on to find -- in this record, to find that the  
8 solicitation was necessary?

9 MR. DREEBEN: I'm not sure, Justice White, but  
10 there was a concession made by the plaintiff -- by the  
11 defendants' attorneys during the trial that it was necessary  
12 to solicit proxies. That was a concession that was made in  
13 open court during examination of a witness, and it was for  
14 the purpose of curtailing further discussion of that issue.

15 QUESTION: Well, I know, but the instruction was  
16 that the jury itself had to find based on the evidence.  
17 And this concession in open court, was that evidence?  
18 They're supposed to rely on the evidence.

19 MR. DREEBEN: Justice White, I can't say whether  
20 it functioned as a stipulation in this case or whether there  
21 was other evidence.

22 I would like to turn to the materiality issues in  
23 the case, because those are of importance both to the  
24 Government and in private actions, since the same concept  
25 --

1           QUESTION: Before you do that -- I know you have  
2 been trying to get there, but also of importance to the  
3 Government and to private actions is whether there is a  
4 private right of action under 14(a) for any effect, any  
5 causality, unless it pertains to the vote for which the  
6 proxy was solicited, 14(a) having been adopted when the --  
7 in an era when the Court was much more ready to find implied  
8 rights of action, and later cases cutting back on that  
9 readiness.

10           Why shouldn't we interpret the 14(a) private right  
11 of action as narrowly as possible, and say that the only  
12 right of action you have is when as a result of the  
13 solicitation you have been misled, either you or other  
14 minority shareholders who could have stopped the merger and  
15 were unable to. Why can't we dispose of the case on that  
16 basis?

17           MR. DREEBEN: Well, I think there are several  
18 reasons, Justice Scalia, why interpreting the causation  
19 element of this recognized cause of action to cover cases  
20 like this one is appropriate. First of all, there can be  
21 direct injury suffered by a shareholder who relies on a  
22 proxy statement and votes in favor of a merger, even if his  
23 votes, combined with all other minority shareholders',  
24 couldn't block the transaction.

25           QUESTION: He could have a cause of action under

1 State law for misrepresentation, I assume.

2 MR. DREEBEN: Well, but this is an express Federal  
3 provision under rules promulgated by the SEC and by other  
4 agencies that prohibits false and misleading proxy  
5 statements.

6 QUESTION: In order to protect voting rights.

7 MR. DREEBEN: I think more generally, Justice  
8 Scalia, to protect the State-created processes that function  
9 in the corporate governance context. States don't only  
10 provide the requirement that certain matters be put to  
11 shareholder votes. They provide mechanisms whereby  
12 shareholders can make those rights effective. Those include  
13 appraisal rights if they disagree in certain circumstances.  
14 They also include the right to get an injunction against a  
15 merger.

16 QUESTION: And if they voted for the merger they  
17 couldn't -- they didn't -- couldn't have an appraisal.

18 MR. DREEBEN: That's correct. In all States if  
19 you vote for a merger you are precluded from taking  
20 advantage of the State-created right. So I think in general  
21 the proxy rules have to be read as an overlay to State  
22 policies in the field of corporate governance. And the  
23 requirement of accurate disclosure preserves the  
24 effectiveness of those rights, which might otherwise be lost  
25 because shareholders lack the information --

1           QUESTION: I suppose, but if I think the private  
2 right of action shouldn't have been created in the first  
3 place, is there anything that would be illogical in my  
4 saying that it, having been created, we should narrow it to  
5 -- it having been wrongly created, without overruling prior  
6 decisions, we should narrow it simply to voting rights?

7           MR. DREEBEN: Well, yes, I think it would be  
8 inconsistent with the right of action that was recognized  
9 itself, which required an element of causation. The  
10 question then is how is that element satisfied.

11           It would also be inconsistent with the fact that  
12 this is a private right that has been woven into the fabric  
13 of the securities laws. Congress is well aware of it, and  
14 it has touched on the area of proxy regulation since the  
15 Borak case was decided, and Congress has never disposed of  
16 that private right of action.

17           The proxy misrepresentations in this case went to  
18 the heart of what the proxy solicitation was all about. The  
19 reasons why directors recommend or approve a transaction are  
20 among the most fundamental matters that shareholders  
21 consider in determining how to cast their vote. The reasons  
22 that have been given by the petitioners for excising this  
23 area of statements from the law are not persuasive.

24           Essentially I think petitioners conceded today  
25 that if there is nonspeculative evidence that the stated



1 reasons for the board's action are not the actual reasons  
2 that prompted the board to act, then a private -- then an  
3 action can be brought predicated on such misstatements. We  
4 agree with that. We believe that objective evidence is  
5 required in order to sustain such a claim, but that such  
6 evidence need not only be a direct admission or a smoking-  
7 gun document, but can also be circumstantial evidence that  
8 is frequently used in all areas of the law to determine  
9 whether the thought process that prompted a certain  
10 statement was in fact accurately represented in a document.

11 This is not something new to the law. It pervades  
12 the law of fraud, and it is applicable under other  
13 provisions of the Federal securities laws. We do not see  
14 that there are compliance or enforcement difficulties in a  
15 regime that requires --

16 Thank you, I see that my time is up.

17 QUESTION: Thank you, Mr. Dreeben.

18 Mr. Shapiro, you have 4 minutes remaining.

19 REBUTTAL ARGUMENT OF STEPHEN M. SHAPIRO

20 ON BEHALF OF THE PETITIONERS

21 MR. SHAPIRO: Thank you, Mr. Chief Justice.

22 QUESTION: Mr. Shapiro, I must say that I am  
23 troubled by the argument that the instruction that was  
24 submitted by the defendants at page 91 of the joint appendix  
25 seems to track very closely what the district court in fact

1 instructed, and your -- the submitted instructions break  
2 causality and materiality up the same way. Did all  
3 defendants submit instruction 9?

4 MR. SHAPIRO: A similar instruction was submitted  
5 by the other group of defendants. The important point here,  
6 Your Honor, is that we denied that there was an essential  
7 link under Mills, that -- in other words, we weren't  
8 conceding that the essential link standard had been  
9 satisfied here in the Mills sense, because our view was that  
10 before you have an essential link there has to be voting  
11 power in the minority shareholders. So there was nothing  
12 --

13 QUESTION: You didn't object to that essential  
14 link instruction on page 426.

15 MR. SHAPIRO: We did indeed. We objected in  
16 writing. Both defendants objected in writing specifically  
17 on the Mills point, and in addition we objected orally --

18 QUESTION: To that specific instruction, that  
19 specific paragraph?

20 MR. SHAPIRO: Absolutely, Your Honor. Both  
21 defendants, in writing, and then orally --

22 QUESTION: Where is that in the record, Mr.  
23 Shapiro?

24 MR. SHAPIRO: This is cited on page 9 of, excuse  
25 me, page 3 of our reply brief, the yellow reply brief at the

1 top, where we cite to the places where we objected to that  
2 instruction. And we did it in written objections --  
3 instructions in the district court. There was an oral  
4 objection saying that this misconceives the Mills footnote  
5 7 issue. That was an objection made orally by one group of  
6 defendants, but the district court had previously said that  
7 there was no need to repeat objections, that they'll be  
8 deemed to be made by both. We previously had filed a  
9 summary judgment brief which argued extensively that there  
10 was no causation in this case under the Mills standard.

11 QUESTION: Did you press this in the court of  
12 appeals?

13 MR. SHAPIRO: We did indeed, Your Honor.

14 QUESTION: You did or didn't?

15 MR. SHAPIRO: We did. There were two separate  
16 issues on appeal. Issues 1 and 3.

17 QUESTION: I suppose we could get your briefs and  
18 read what you said?

19 MR. SHAPIRO: Absolutely. If Your Honor will look  
20 at questions 1 and 3, you will see that there is a reliance  
21 question and then there is a causation question. They are  
22 argued in separate portions of the brief, reliance and  
23 causation. They are of course related points, but they are  
24 distinct and they were presented distinctly in the court of  
25 appeals here. There isn't any serious argument of waiver

1 in this situation.

2 We also raised the same arguments in our post-  
3 trial motions at some length when we saw JNOV, and of course  
4 the court of appeals decided this question. So it's ripe  
5 for this Court's decision.

6 Now, the argument was made that the defendants  
7 here had conceded that it is somehow necessary to go to the  
8 shareholders and get shareholder approval. If you look at  
9 that quotation in the appendix, all that it says is that it  
10 is necessary under State law to get two-thirds of the votes  
11 of the shareholders. A two-third vote is necessary to  
12 approve this transaction. There was no suggestion that the  
13 majority here thought that it was necessary to go to the  
14 minority shareholders with hat in hand and ask for their  
15 permission. They had statutory rights here to proceed with  
16 this merger.

17 Now, the argument was also made that we had  
18 presented to the jury the conflict of interest statute, and  
19 that indeed we tendered that causation theory to the jury  
20 ourselves by citing that statute. It had nothing to do with  
21 the causation issue. That statute is a safe harbor. It  
22 merely says that mergers such as this cannot be challenged  
23 in State court if one of three criteria are satisfied. And  
24 we merely pointed out that the individual directors who were  
25 sued under State law couldn't be attacked because of that



1 safe harbor. The idea that this was somehow presented to  
2 the jury as a causation theory is fantastic. It was never  
3 presented to the jury in any such guise.

4 If the Court please, unless there are further  
5 questions, that would conclude our argument.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Shapiro.  
7 The case is submitted.

8 (Whereupon, at 11:18 a.m., the case in the above-  
9 entitled matter was submitted.)

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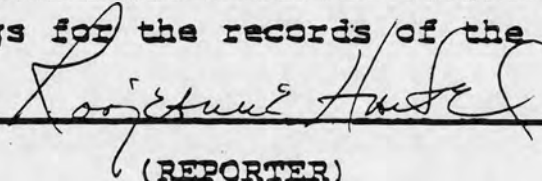
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DORIS I. SANDBERG, ET AL.

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