12-1168

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

ALFRED S. TEO, SR., AND MAAA TRUST,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of New Jersey

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

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COUNTERSTATEMENT OF THE ISSUES

This is an appeal in a civil law enforcement action brought by the Securities and Exchange Commission for violations of the antifraud and shareholder reporting provisions of the Securities Exchange Act of 1934. A jury found that defendants Alfred Sunghia Teo, Sr. and the MAAA Trust ("the Trust"), the accounts of which Teo controlled, made material misrepresentations in public filings concerning the extent and purpose of Teo's beneficial ownership of shares in Musicland Stores Corporation, and that Teo did so fraudulently.

The issues in this appeal are:

1. Did the Commission engage in misconduct by introducing at trial a document that the district court determined was authentic, where the jury weighed Teo's and the Trust's belated objections to the document's authenticity as well as other evidence?

2. Did the district court abuse its discretion in admitting Teo's allocution testimony that he intentionally committed criminal securities fraud, as probative of Teo's intent to commit a contemporaneous civil fraud, and/or to rebut Teo's testimony that he had broken the law without intent?

3. Was there sufficient evidence for a reasonable jury to conclude that Teo and the Trust violated shareholder reporting provisions where one of the three factual bases for liability was undisputed, and evidence supported the other factual bases for liability?

4. Did the district court abuse its discretion in ordering Teo and the Trust to disgorge the profits they obtained from selling shares Teo acquired and beneficially owned, where appellants materially misstated that Teo did not beneficially own those shares and omitted the requisite disclosure of the extent of Teo's beneficial ownership? Also, did the district court abuse its discretion in ordering Teo and the Trust to pay prejudgment interest on those ill-gotten gains?

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. The only related case, *United States v. Teo et al.*, Crim. No. 04-583 (D.N.J.) ("Crim.Dkt."), was terminated after Teo completed his sentence for criminal securities fraud. *See* Crim.Dkt.212.

COUNTERSTATEMENT OF THE CASE

I. Nature of the Case

A jury found that both Teo and the Trust violated shareholder reporting provisions of the Exchange Act, and that Teo violated the Exchange Act's antifraud provisions. JA1921-1922.[1] The district court enjoined Teo and the Trust from committing further violations, ordered them jointly and severally liable for the disgorgement of their illegally obtained profits plus prejudgment interest, and imposed civil penalties. JA3-8.

II. Statutory Framework

Section 13(d), 15 U.S.C. 78m(d), and Section 16(a), 15 U.S.C. 78p(a), are shareholder reporting provisions that require a person, or persons acting as a group, who "beneficially own" a substantial amount of securities issued by a company—meaning they have the power to buy, sell, or vote those securities

[1] "JA" refers to the Joint Appendix. "SA" refers to the Supplemental Appendix.

(17 C.F.R. 240.13d–3)—to disclose the extent of their beneficial ownership, plans or proposals they have for the company, and material changes to either. These "disclosure provisions are intended to protect investors, and to enable them to receive the facts necessary for informed investment decisions." *Chromalloy Am. Corp. v. Sun Chem. Corp.*, 611 F.2d 240, 248 (8th Cir. 1979). For example, the Section 13(d) provisions "alert the marketplace to every large, rapid aggregation or accumulation of securities, regardless of technique employed." *IBS Fin. Corp. v. Seidman & Assocs., L.L.C.*, 136 F.3d 940, 945-46 (3d Cir. 1998).

Under Section 13(d), a person who beneficially owns more than 5% of a class of a company's equity securities must publicly file a disclosure statement disclosing the "identity" of the shares' beneficial owner and the "number of shares" he beneficially owns. These disclosures are required by Rule 13d-1(a), 17 C.F.R. 240.13d-1(a), to be made on Schedule 13D, 17 C.F.R. 240.13d-101. A person who beneficially owns more than 10% of a company is required under Section 16(a) to make similar disclosures. *See* Form 3, 17 C.F.R. 249.103; Form 4, 17 C.F.R. 249.104.

Also, a person who beneficially own more than 5% must disclose "any plans or proposals" that "relate to or would result in": "any change in the present board of directors," "[a]n extraordinary corporate transaction" (Schedule 13D Item 4(b), (d)),

or “any other major change in its business or corporate structure” (Section 13(d)(1)(C), Schedule 13D Item 4(f)).

Any “material change” to prior disclosures must appear in an amended disclosure statement. Section13(d)(2), *infra* at 52n.8. *See, e.g.*, Rule 13d-2, 17 C.F.R. 240.13d-2(a) (each 1% increase in beneficial ownership is “deemed ‘material’”); Arnold S. Jacobs, *The Williams Act - Tender Offers and Stock Accumulations* § 2:82 (Jan. 2012) (“[s]mall additions” to beneficial ownership “also could be material when a reporting person crosses a threshold, such as buying sufficient shares to activate a poison pill”).

“[T]he SEC need not prove scienter to establish a violation” of these provisions. *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1167 (D.C. Cir. 1978). But a violation made with scienter may also violate the antifraud provisions of Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R.240.10b-5. *See SEC v. Bilzerian*, 29 F.3d 689, 693-94 (D.C. Cir. 1994).

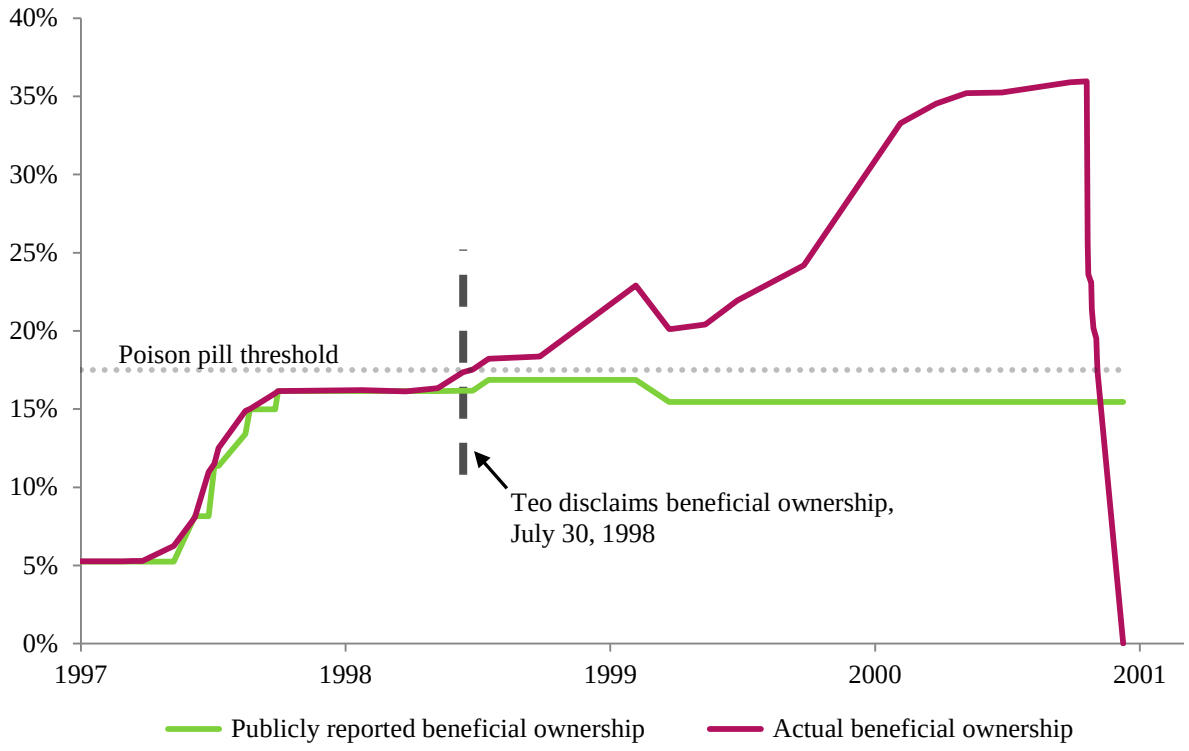
III. Facts

A. Teo and the Trust that he controlled misrepresented Teo's beneficial ownership of the Trust's shares.

Teo, a senior officer and member of the board of directors of several companies (JA857-860), over a three-year period amassed millions of shares of the publicly traded common stock of Musicland, a retailer that sold prerecorded music (JA184:5-15). As Teo accumulated close to 17.5% of Musicland's outstanding shares in the 28 accounts he controlled (JA1790-1791, JA447:7-449:15), including the Trust's accounts (JA527:7-528:15), Teo and the Trust properly disclosed that Teo was the beneficial owner of all these shares. But Teo believed that disclosing additional purchases would trigger Musicland's shareholder rights plan—known as a "poison pill"—and dilute his holdings. So on July 30, 1998, Teo publicly disclaimed his beneficial ownership of the Trust's shares, giving the false appearance that the percentage of shares under his control had been reduced.

The public disclaimer was a ruse. Teo resumed making large acquisitions of Musicland stock in the Trust's accounts, which neither Teo nor the Trust disclosed. Teo also resumed buying shares in his other accounts, but failed to disclose these

additional purchases. Teo's publicly reported percentage of beneficial ownership of Musicland's total shares thus diverged from Teo's actual beneficial ownership:



(This chart is derived from spreadsheets at JA1667-1707 and SA12, and charts at SA11 and JA1767.) Teo and the Trust always publicly reported that Teo beneficially owned less than 17.5% of Musicland's shares (the chart's green line), thereby avoiding the poison pill, even as Teo's actual beneficial ownership exceeded 35% (the red line).

1. As Teo and the Trust were acquiring less than 17.5% of Musicland's shares, Teo and the Trust disclosed that Teo was the beneficial owner of these shares.

Teo began amassing Musicland shares in September 1996 (JA1667), believing they were "undervalued." JA539:24-540:6, JA181:15-21. By November 1997, Teo beneficially owned over 16% of Musicland's common stock. JA1105-1121. By July 30, 1998, Teo acquired 5.9 million Musicland shares at a cost of over $25 million. JA1938. In their initial Schedule 13D (JA851-868), and six successive amendments filed during this time (JA869-897, JA898-922, JA980-1004, JA1025-1054, JA1055-1076, JA1105-1121), Teo and the Trust properly disclosed that Teo was the beneficial owner of the Trust's Musicland shares: "Teo holds an authorization to trade securities on behalf of MAAA Trust and may therefore direct the disposition of the shares of the issuer held by this Trust." JA863; *see also* JA953-956 (Form 3), JA1015-1024 (Form 4).

Teo testified that at the time he authorized these filings, he understood that he had beneficial ownership of the Trust's shares. SA61:23-62:11, SA60:5-22. Although Teo "arrived in the United States over forty years ago with $70 in his pocket and unable to speak a word of English" (Br.6), Teo's colleague testified that Teo has since become a "very savvy businessman" who understands English and legal documents. SA30:14-32:14.

2. Teo paused buying Musicland shares after he and the Trust approached combined holdings of 17.5%, because this was the poison pill threshold that Teo saw as a cap on the number of shares he could acquire.

The combined, disclosed purchases of Musicland shares by Teo and the Trust leveled-off before they reached 17.5% (SA11, JA1673-1675), because Musicland had a poison pill that triggered when any shareholder or shareholders acting as a group announced that they had acquired more than that amount. JA793-850; JA189:8-190:10. If Teo crossed the 17.5% threshold, Musicland had the option of authorizing all other shareholders to buy additional shares at a discounted price, diluting Teo's holdings. JA793-850. If the poison pill was triggered, Musicland had options other than dilution (*id.*), but Musicland adopted the poison pill "to act as a deterrent" to exceeding the 17.5% threshold (JA191:21-192:18). As Teo testified, he was repeatedly warned by his attorney, James McKeon, and by Musicland, that the poison pill acted as a barrier to his acquiring more than 17.5% of Musicland's shares. *See* SA79:10-80:18, JA590:13-592:17 (Teo); JA385:5-386:23 (McKeon); JA947, JA1088-91, SA7-8 ("the [Rights] Agreement will be triggered if you purchase any additional shares after your percentage has reached 17.5%") (Musicland). And in a letter Teo wrote in a failed attempt to get Musicland to raise the threshold (JA296:11-297:15), Teo stated that he understood that when he was

"very close" to "the cap set by the 'Poison Pill'" he was "unable to acquire" additional stock. JA1436; *see also* JA717:11-23.[2]

3. On July 30, 1998, Teo publicly disclaimed beneficial ownership of the Trust's Musicland shares.

In order to circumvent what he saw as a cap on his Musicland holdings, Teo devised a scheme to publicly disclaim his beneficial ownership of the Trust's shares to make it appear that he no longer beneficially owned them. As explained by McKeon, "if the MAAA Trust shares were not included on the [Schedule] 13D, then that would reduce the total holdings below the 17 and a half percent," and Teo could resume purchasing shares in the other accounts he controlled while avoiding the poison pill. SA50:6-51:12, JA422:13-19, SA49:15-18; *see also* JA533:12-21 (Teo admitting that the poison pill was "one of the consideration[s]" for his disclaimer).

To disclaim beneficial ownership, Teo first purportedly revoked his authority to buy or sell any securities on behalf on the Trust. JA1153-1157. Then, on July 30, 1998, Teo authorized the filing of Amendment #7 to the Schedule 13D (JA1280-1294), which stated that "Teo ceased to have investment powers with respect to the Trust," and thereby "disclaim[s] beneficial ownership of shares of the Issuer held by the Trust." JA1289. Teo and McKeon both testified that Teo authorized and understood these documents. *Infra* at 32-33. Indeed, McKeon

[2] All emphasis is added unless otherwise noted.

instructed Teo that, with regard to the Trust's shares, Teo "couldn't vote them, he can't buy them, he can't sell them." SA52:21-53:24, SA54:9-14.

4. After July 30, 1998, Teo resumed purchasing Musicland shares in the Trust's and his other accounts, but neither Teo nor the Trust accurately disclosed their holdings.

Despite his public disclaimer of beneficial ownership of the Trust's shares, Teo admitted that he never stopped trading for the Trust. JA523:13-524:9, JA527:7-528:15, JA536:10-13 ("I always buy and sell securities for the Trust."). Indeed, after July 30, 1998, Teo made millions of dollars of purchases in the Trust's accounts. The Trust's holdings soared from under 2% of Musicland's total shares before July 30, 1998, to over 5% of Musicland's total shares by January 1999, and over 11% by April 2000. JA1730-1749. The Trust filed two Schedule 13Ds that falsely reported that its trustee, Teo's sister-in-law, had the sole power to buy and sell these shares. JA1491, JA1488, JA1514. The Trust also failed to ever disclose that it had obtained over 10% of Musicland's outstanding stock. JA1792.

Aside from the Trust's accounts, during this same period Teo resumed buying shares in the other accounts he controlled. In September 1998, Teo filed an amendment reporting that he beneficially owned 16.9% of Musicland (JA1305-1327), and in May 1999, he filed an amendment reporting 15.5% (JA1411-1433), but, as he was aware, he failed to report that he also beneficially owned the Trust's

Musicland holdings (SA78:16-22). Furthermore, after May 1999, Teo stopped making filings altogether, even though Teo's holdings in accounts he controlled other than the Trust rose to over 18% by August 1999, over 19% by October 1999, and over 22% by May 2000. JA1719-1724. Teo admitted that he knew that he was obligated to file an amendment every time his ownership changed 1% or more. JA586:21-587:23; SA76:22-77:5.[3]

After July 30, 1998, neither Teo nor the Trust publicly reported the total number of shares Teo beneficially owned through the Trust's accounts that he controlled plus Teo's other accounts. Teo's total beneficial ownership exceeded 17.5% after August 1998. JA1675, SA11. Insofar as investors knew, Teo's beneficial ownership remained unchanged from the 15.5% he publicly reported in May 1999 (JA1411-1433)—below the poison pill threshold—but after July 1998, Teo's actual beneficial ownership reached over 35% (JA1675-1706).

[3] Teo also misrepresented his beneficial ownership in communications with Musicland. Teo sent Musicland both the revocation of his authority over the Trust's shares, and his public disclaimer of beneficial ownership. JA1280-1299. Teo admitted that he "never told" Musicland that these documents were false. JA535:18-24, SA56:11-67:6. Musicland's CEO/Chairman testified that Teo told him that "he did not have control" of the Trust's shares. SA36:7-38:14; SA34:11-19. *See also* SA1, SA2-6, SA29:3-17 (Musicland outside counsel concluded that Teo had not exceeded 17.5% beneficial ownership); SA7-8 (Musicland letter to Teo requesting notification if he exceeded 17.5%).

B. Teo and the Trust misrepresented Teo's plans and proposals to change Musicland's board of directors.

Teo's and the Trust's public filings repeatedly stated that they "have no plans or proposals which relate to or would result in any change in the present board of directors," and these disclosures were never amended. JA861, JA1314, JA1420. However, Teo testified that "I have asked to be placed on Musicland's board since the beginning of 2000," and "I continue to ask every month." JA641:11-642:14, JA621:1-16. In December 1998, Teo wrote to Musicland proposing that he be given a position on Musicland's board. JA1328. When the board did not invite him to become a member, he again proposed being added to the board in spring 2000. JA303:10-305:13. And in September 2000, Teo called Musicland's CEO/Chairman and said that "he wants a board seat." JA720:13-22; JA771.

Indeed, Teo testified that he had a "slate of directors for nomination" to the board. JA718:14-719:2, JA769. On February 3, 2000, Teo wrote the CEO/Chairman a letter attaching the résumés of Robert H. Smith and Larry Rosen, proposing that Musicland "add these two fine gentlemen to your board of directors." JA1476-1483. On February 7, 2000, Teo proposed the same for John Tugwell. JA1484-1485. The board ultimately did not invite them to become members, in part because "they would be there representing [Teo's] interests," and directors were

expected "to represent the best interests of each and every shareholder." JA304:4-9.

C. Teo and the Trust misrepresented Teo's plans and proposals to take Musicland private.

Teo and the Trust repeatedly stated in public filings that they had "no plans or proposals which relate to or would result in" an "extraordinary corporate transaction," or "any other material change in the issuer's business or corporate structure"; and these disclosures were never amended. *E.g.*, JA861-62; JA1314, JA1420. However, Teo repeatedly proposed taking Musicland private through a leveraged buy-out of its outstanding publicly traded shares. As Teo testified, "I tried to convince them to take the company private for two years." JA594:8-595:14. Teo believed that a going-private transaction would permit him to "cash out" his Musicland shares at a substantial "30 percent or 40 percent premium," and margin calls on his investments had made him "beyond desperate" to liquidate his Musicland holdings. SA63:20-65:23.

Teo fashioned proposals to take Musicland private with three different investment banks. In January 2000, Goldsmith-Agio-Helms "provid[ed] him a proposal" to "take Musicland private" at a "57% premium" over the existing stock price. JA1434, JA1437-1471. Teo presented this proposal to Musicland's CEO/Chairman. JA596:7-597:11.

When Musicland did not accept this proposal, Trivest Capital in February 2000 proposed "Project Tune," a "management led buyout" of Musicland at a premium, with Teo on the resulting board of directors. JA1496-1498, JA1499-1508. Teo signed a term sheet for this proposal (JA1496-1498), and in March 2000 he presented it to Musicland's CEO/Chairman (JA609:9-23). Although Musicland did not accept this iteration, Teo still persisted with his plans and proposals.

In September 2000, Teo obtained from Financo another going-private proposal (JA1612-1653) as part of Teo's "efforts to effect an advantageous sale of Musicland" at a premium (SA9-10). Teo scheduled a meeting to present this proposal to Musicland's CEO/Chairman, who agreed to attend. JA614:1-615:6. Even after Musicland's CEO/Chairman cancelled his attendance the day before the meeting (*id.*), Teo attended the meeting with Financo to discuss the proposal (JA611:21-614:8). Teo suspended the meeting when he was informed by Musicland that they were in negotiations to sell the company to a third party (JA614:1-616:22), which turned out to be Best Buy Company, Inc. Teo subsequently retained Financo to represent his interests if Best Buy's tender offer did not succeed, to "seek other alternatives for the maximization of the value of [Teo's] shares," including "the sale of the Company." JA1655.

D. When Teo and the Trust sold the shares they had acquired after July 30, 1998, they realized $17.4 million in profits.

When Teo and the Trust sold all of the 6.7 million shares acquired after July 30, 1998, they obtained over $17.4 million in profits. JA4; JA1938; JA1706-1707. They sold over 1.2 million of these shares in the market, and sold over 5.5 million of these shares to Best Buy as part of Best Buy's December 2000-January 2001 tender offer for Musicland. JA1938.

IV. Proceedings Below

The Commission's complaint charged Teo and the Trust with violating the shareholder reporting provisions of Section 13(d) and Section 16(a), and Rule 12b-20, 17 C.F.R. 240.12b-20, Rule 13d-1, Rule 13d-2, and Rule 16a-3, 17 C.F.R. 240.16a-3. The complaint further alleged that Teo and the Trust violated the antifraud provisions of Section 10(b) and Rule 10b-5 by intentionally engaging in conduct that violated the reporting provisions, and that Teo also violated these antifraud provisions and Section 14(e) of the Exchange Act, 15 U.S.C. 78n(e), and Rule 14e-3, 17 C.F.R. 240.14e-3, by engaging in insider trading of Musicland's and C-Cube Microsystems, Inc.'s stock. JA1805-1844.

Before trial, the district court granted the Commission's motion for summary judgment against Teo on its Section 16(a) and Rule 12b-20 and Rule 16a-3 claims.

JA1883-84, JA1890. Appellants do not challenge this ruling. Also prior to the trial, Teo settled the insider trading charges. SA119-128**.**

After a two-week trial, a jury found that Teo violated Section 10(b) and Rule 10b-5. JA1921-22. The jury also found that both defendants violated Section 13(d), and Rule 12b-20, Rule13d-1, and Rule 13d-2, and that the Trust violated Section 16(a) and Rule 16a-3. *Id.*

After the trial, the district court denied Teo's and the Trust's motion for a new trial and judgment as a matter of law. JA9-31. The district court enjoined Teo and the Trust from future violations of the relevant securities law provisions, and held Teo and the Trust jointly and severally liable for paying a $17.4 million civil penalty. JA3-8. The district court also held Teo and the Trust jointly and severally liable for the disgorgement of their illegally obtained profits of $17.4 million ($21 million in profits, minus $182,000 already disgorged as profits on Teo's insider trading, minus $3.5 million in margin interest on defendants' trades), and $14.6 million in prejudgment interest on those profits. JA4. On appeal, Teo and the Trust, although challenging the jury verdict, do not otherwise challenge the injunction, the civil penalty, or the district court's decision to hold Teo and the Trust jointly and severally liable because of "the history of entanglement of transactions and funds between the two." JA21.

SUMMARY OF ARGUMENT

After a jury verdict finding that both Teo and the Trust made materially false statements in publicly filed shareholder reports regarding Teo's beneficial ownership of the Trust's Musicland shares, and that Teo's misstatements were fraudulent, the district court ordered disgorgement of their ill-gotten profits. All of appellants' challenges to the jury verdict and disgorgement order are without merit.

1. The Commission did not engage in misconduct by introducing a certain fax as a trial exhibit. The Commission did not create this fax, alter it, or omit any of its pages. Before it was shown to the jury, the district court heard appellants' objections to the fax's authenticity, but determined that it was *prima facie* authentic, and that the jury would ultimately decide its authenticity. Teo then testified that he received this fax. In any event, nothing turns on whether Teo received this particular fax, which was introduced as evidence of Teo's scienter, because abundant other evidence establishes his scienter.

2. The district court acted within its discretion in admitting Teo's allocution to criminal securities fraud. Teo's allocution testimony that he intentionally committed a contemporaneous criminal securities fraud was probative here of his intent to commit civil securities fraud. The allocution was also properly admitted to refute Teo's statement that he had never broken any law intentionally.

3. The district court did not err in determining that there was sufficient evidence for a reasonable jury to conclude that Teo and the Trust violated shareholder reporting provisions. Appellants do not dispute that they misrepresented the extent of Teo's beneficial ownership of the Trust's shares, and the verdict can be sustained on that basis alone. Based on the record, a reasonable jury could also conclude that appellants misrepresented Teo's plans and proposals to change Musicland's board of directors and to take Musicland private.

4. The district court acted within its discretion in ordering Teo and the Trust to disgorge the profits they made from selling the 6.7 million Musicland shares they acquired after July 30, 1998, the start of their continuous and never corrected material misrepresentations and omissions regarding the extent of their share holdings. Disgorgement is not punitive, but rather restores appellants to the *status quo* that existed prior to their violations. The $17.4 million in profits appellants obtained from selling these shares is not a matter of speculation; it is the actual amount of profit they obtained from selling these shares. That appellants sold 5.5 million of those shares to Best Buy in a tender offer does not sever the connection between appellants' violations and their profits because Teo acquired and beneficially owned these shares after appellants falsely stated that Teo did not beneficially own these shares and then omitted the requisite disclosure of the extent

of Teo's beneficial ownership. Furthermore, Teo expected to profit by selling these shares in a corporate control transaction. Finally, awarding prejudgment interest was within the district court's discretion because it likewise restores appellants to the *status quo* that existed before their violations.

STANDARD OF REVIEW

A jury verdict will be upheld where there was evidence upon which a reasonable jury could find the defendant liable, even if it is possible that "conflicting evidence" could lead to a different finding. *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976). The denial of a motion for a new trial is reviewed for abuse of discretion, and granted only where the jury's verdict was "against the great weight of the evidence." *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1076 (3d Cir. 1996) (*en banc*). A district court's determination to admit evidence is reviewed for abuse of discretion, and reversed only where "no reasonable person would adopt the district court's view," and the error was not harmless. *United States v. Green*, 617 F.3d 233, 239 (3d Cir. 2010). This Court reviews *de novo* the denial of a motion for judgment as a matter of law, but "must expose the evidence to the strongest light favorable to the party against whom the motion is made and give him the advantage of every fair and reasonable inference."

Fireman's Fund, 540 F.2d at 1178. Disgorgement is reviewed for abuse of discretion. *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997).

ARGUMENT

I. The district court acted within its discretion in denying appellants' motion for a new trial and properly denied appellants' motion for judgment as a matter of law.

A. There was no misconduct relating to the introduction of trial exhibit PX103.

There is no merit to appellants' charge that the Commission's trial counsel "knowingly used false evidence" by introducing trial exhibit PX103 (JA1254-1271) as evidence supporting Teo's knowledge that he had disclaimed beneficial ownership of the Trust's Musicland shares. Br.11-14, 43-51. This document consists of (i) the fax cover sheet of a fax sent from McKeon to Teo regarding proposed "Amendment #7 to Schedule 13D," instructing Teo to "[p]lease review and approve before I file this," and (ii) the body of a fax, which is a draft of this amendment containing handwritten revisions that disclaim Teo's beneficial ownership of the Trust's Musicland shares. JA1254-71. Appellants contend (Br.12-13, 44) that a new trial is warranted because, they claim, Commission counsel knew that the body of the fax was not appended to the preceding fax cover page.

Appellants fail to show that Commission counsel presented "known false evidence." *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *accord United States ex rel. Dale v. Williams*, 459 F.2d 763, 763-64 (3d Cir. 1972). Appellants make no claim that Commission counsel fabricated or altered this document. They point to an omitted page, but fail to tell this Court that they were responsible for this omission. Moreover, Teo testified at trial that he received this document. Appellants do not dispute that Teo received both the fax cover sheet (Br.12, JA1926) and the typed version of the amendment that incorporated all of the handwritten revisions indicated in the body of the fax (JA1280-94).

In any event, even if this document were improperly admitted, no new trial is warranted because there is no "reasonable likelihood" that the document "affected the judgment of the jury." *Giglio*, 405 U.S. at 153-54; *accord Dale*, 459 F.2d at 763-66. Whether the cover sheet matches the body of this particular fax was not determinative of Teo's scienter because other abundant evidence showed that Teo knew that he had disclaimed beneficial ownership of the Trust's Musicland shares. Also, the appellants' contention that the cover sheet did not match the body of the fax was fully aired before the jury. Finally, appellants waived their objections to this document by never suggesting that the document was false prior to trial or during the first six days of trial. *See* JA15-17, JA28-29.

1. Appellants fail to show that Commission counsel presented known false evidence.

a. The Commission did not create or alter the document that was introduced below as exhibit PX103.

The Commission did not generate this document. As part of Teo's prosecution for criminal securities fraud that occurred prior to this civil proceeding (*supra* at 3), the U.S. Attorney's office subpoenaed McKeon's correspondence with Teo, McKeon provided such correspondence to Teo's criminal defense counsel, and then Teo's lawyers produced such correspondence to the U.S. Attorney's office. *See* Crim.Dkt.163 at 5&n.1 (letter brief from USAO, attaching PX103 at Crim.Dkt.163-3 (SA221-238)); Crim.Dkt.170 at 2-3&n.1 (letter brief from Teo's counsel); Crim.Dkt.173 at 3&n.2 (letter brief from USAO). (These letter briefs were made part of the record below. *See* SA140-176.)

Based on this production, in June 2006 the U.S. Attorney's office electronically filed in the criminal case a document that was identical to the one the Commission introduced below as PX103. *Compare* SA221-238 (Crim.Dkt.163-3) *with* JA1254-71 (PX103). The U.S. Attorney's office described this document in the same manner the Commission did at trial, as "a July 23, 1998 fax from McKeon to Teo specifically indicating the key changes to be made to the upcoming Amendment No. 7 to his Musicland Schedule 13D in which Teo's beneficial

ownership of the MAAA Trust was to be disclaimed." Crim.Dkt.163 at 5n.1 (SA144). At no point in the criminal proceeding did Teo challenge this characterization, or the authenticity of the document.

The Commission obtained this document from the electronic docket in the criminal proceedings and made it part of this case without any alteration. The Commission explained where it had obtained the document, and attached the document as part of an affidavit to its opposition to defendants' motion to quash the use of certain documents produced by McKeon, including this document. *See* SA92-93 (attaching JA1254-71 (PX103) as a "Fax from James McKeon to Teo filed on PACER as DE 163 by USAO").

b. Teo and the Trust omitted a page from the document.

Appellants note that the document submitted to the jury "omits" a page that is Bates-stamped "DAT 42" (JA1929). Br.12-13. (The fax cover sheet is page DAT 41, and the body of the fax spans pages DAT 43-59.) However, Teo's attorneys had possession of page DAT 42 throughout these proceedings, yet they did not provide this page to the Commission until after the trial.

Appellants contend that this omitted page was the "most telling of all" discrepancies with this document for two reasons. Br.12-13. They argue that this page includes a note written by McKeon to his secretary instructing her to "type &

fax draft to Al Teo for his approval before filing" (JA1929)—but the body of the fax includes handwritten notes that were not yet typed. In addition, they argue that the note from McKeon to his secretary says "fax him Form 4" (JA1929)—but the body of the fax does not include a Form 4. SA209, SA216:15-217:5 (*in camera* hearing redacted in part after trial).

However, as noted, Teo's attorneys—not the Commission—had possession of page DAT 42 throughout these proceedings. Page DAT 42 was not included on the electronic docket in the criminal proceedings, from which the Commission obtained the document. *See* Crim.Dkt.163-3 (SA221-238). Appellants successfully shielded this page from production during the civil proceedings below based on the attorney-client privilege. Page DAT 42 remained in appellants' possession, but they re-stamped it as "PJMCK0372" and listed it on their privilege log. SA94-96, SA101-102. After conducting an *in camera* hearing outside the presence of Commission counsel, Magistrate Judge Arleo accepted appellants' assertion of the attorney-client privilege. *See* SA104-105 (redacted magistrate opinion); SA209-220 (*in camera* hearing unredacted in part after trial); JA91-92 (magistrate opinion unredacted after trial). The Commission cannot be charged with knowledge of a withheld page.

In addition to McKeon's "most telling of all" note to his secretary regarding the amendment, page DAT 42 also includes another note—written by McKeon's secretary—about electronically filing documents that has no bearing on the contents of the fax. *See* JA1929, SA216:15-218:25; JA91-92. After the *in camera* hearing, appellants produced to the Commission a page that had the "DAT 42" stamp removed, omitted the "most telling of all" note that had been written by McKeon, and included only the secretary's irrelevant note. *See* SA215:25-219:15.

Later, on the seventh day of trial, appellants' counsel challenged the PX103 document for the first time before District Judge Wigenton—who did not preside over the *in camera* hearing about the privileged nature of page DAT 42—and emphasized that "it's even missing a page, as far as I can tell." JA503:8-19. This statement by appellants' counsel to the court was disingenuous because they failed to tell Judge Wigenton that appellants were the cause of that omission. Not until after the trial did the Commission receive page DAT 42. The Commission did not receive this page, and McKeon's "most telling of all" note, until Teo and the Trust attached the unredacted page, labeled "DAT 42," to their motion for a new trial. JA1927-1929.

c. Before this document was introduced, the district court determined that it was *prima facie* authentic.

Contrary to appellants' repeated assertion that both the district court and the Commission could not account for the authenticity of this document (Br.13, 27, 51), before this document was introduced, the district court determined that it was *prima facie* authentic. *See Threadgill v. Armstrong World Industries, Inc.*, 928 F.2d 1366, 1375-76 (3d Cir. 1991) (*prima facie* showing of authenticity is made to the judge, then the jury ultimately decides authenticity and weight of the evidence). At the start of the trial, the district court found the document admissible as a statement by Teo's agent (McKeon), and determined with regard to this document that "there's no issue as to [its] authenticity." SA22:23-27:12. Later, before the document was introduced, the district court conducted what appellants agree was "an extensive colloquy" regarding all of their objections to this document (Br.47), at the end of which the district court reiterated that the document was *prima facie* authentic. *See* JA33:1-39:24. The district court gave two independent bases for its determination.

First, the district court found the document *prima facie* authentic because it was "received in response to a [criminal] subpoena, and obviously kept in the ordinary course of [ ] Mr. McKeon's business." JA505:7-506:20. This circuit agrees that the fact that a document is produced "pursuant to discovery requests" is a "sufficient foundation for a jury to determine that this document is what it is

purported to be." *Lexington Ins. Co. v. W. Pennsylvania Hosp.*, 423 F.3d 318, 328-330 (3d Cir. 2005) (collecting cases). Specifically, the production of documents to the government in a related proceeding supports the conclusion that the documents "are what the government claims they are." *United States v. Reilly*, 33 F.3d 1396, 1405 (3d Cir. 1994).

Second, the district court concluded that appellants waived their objections to this document because "this is not the first time you [have] seen these documents," rather they "were produced for some time during the course of this litigation." JA506:13-24. Waiver is amply supported by appellants' failure, despite opportunities to do so over many years, to point out any purported inconsistencies in the document until the seventh day of trial.[4]

Appellants fail to grapple with either basis for the district court's authenticity determination. They challenge the court's merits determination (that the document

[4] Appellants did not question the integrity of this document when it was attached to the Commission's affidavit in support of its opposition to defendants' motion to quash the use of this document based on the attorney-client privilege (SA92-93, July 9, 2008); or in the final pretrial order which states that "unless set forth herein, objections to authenticity are deemed waived" (SA132, SA135, January 18, 2011); or when it was listed in proposed stipulations on admissibility (SA208, April 3, 2011); or at the hearing where appellants' counsel stated with regard to this document and others that, subject to privilege concerns, "we don't take issue of the fact that they're admissible" (JA60:14-61:20, April 5, 2011); or when at the outset of the trial the district court determined that "there's no issue as to [its] authenticity" (SA24:16-27:12, May 11, 2011).

was *prima facie* authentic) only by groundlessly asserting that this determination was somehow "disavowed" when the district court's denial of their motion for a new trial emphasized waiver. Br.19, 48. Appellants challenge the district court's finding of waiver only by making the inconsistent assertion that the district court could "not reverse course" once "the court itself had previously resolved" the authenticity of the document "on the merits." Br.47; *see also* Br.20, 27. Both bases were sound exercises of the district court's discretion, and this Court "can affirm on any basis appearing in the record." *Curay-Cramer v. Ursuline Acad. of Wilmington*, 450 F.3d 130, 133 (3d Cir. 2006).

Whatever the basis for the district court's authenticity determination, it is absurd to maintain that the Commission knowingly presented a false document where, prior to its introduction, the district court heard all of appellants' objections to the document, and then determined that the document was *prima facie* authentic. *See United States v. Mojica*, 746 F.2d 242, 245 (5th Cir. 1984). The cases appellants cite (Br.43-51) do not involve such a prior authenticity determination.

d. Teo testified that he received this document.

Before the document was admitted, the district court invited appellants' counsel to obtain testimony from Teo, such as "he never received" the document, or he "do[es]n't know what this pertains to and what it relates to, you can do that."

JA505:19-22. Indeed, appellants' counsel had vowed to "have Mr. Teo identify with each document whether or not he received it." SA25:8-20. The Commission did not object to this course.

When the document was placed in front of Teo at trial, Teo did not testify that he could not identify the document, or that he never received it, or that he had not received the body of the fax. JA558:23-562:16. Rather, when Commission counsel asked Teo if this document was sent to him, Teo replied "That's what it say is what it is, yeah." JA558:23-562:16. And when asked if he had reviewed and approved the body of the fax as requested in the fax cover sheet, Teo answered "I don't recall at this time" but "I must have, yes." JA562:11-16. Teo's testimony independently established the document's authenticity. *See* Fed.R.Evid. 901(b)(1). The cases appellants cite (Br.43-51) do not involve such authenticating testimony. *See, e.g.*, *United States v. Weinstein*, 762 F.2d 1522, 1534-35 (11th Cir. 1985) ("no testimony or other evidence" linked a letter to an envelope). Notably, in their subsequent examination of Teo, appellants' counsel did not ask him any questions about the authenticity of this document, or about Teo's above testimony.

Appellants assert that "the SEC did not even attempt to lay a proper foundation for the authenticity of PX103" (Br.44), but neglect to mention Teo's testimony. They also complain that McKeon did not testify about the document at

trial (Br.13, 44), but McKeon was unavailable to testify at trial because he asserted the Fifth Amendment privilege against self-incrimination (SA17:24-21:2). While McKeon's prior testimony from Teo's criminal trial was read into the trial record, during his civil deposition McKeon invoked the Fifth Amendment when asked any question of substance (SA177-191), including with regard to Teo's disclaiming of beneficial ownership (SA185-186 at 32:4-33:7).

In any event, where a defendant's sworn testimony confirms, and certainly does not refute, that the document is what it says it is, it is preposterous to conclude that the Commission knew that the document was false, or was barred from submitting it to the jury.

2. Even if exhibit PX103 were improperly admitted, the district court acted within its discretion in denying a new trial.

a. Other abundant evidence establishes that Teo reviewed this amendment before it was filed, and that Teo knew he was disclaiming beneficial ownership.

A new trial is not warranted where there is no reasonable likelihood that the document affected the verdict. *See Dale*, 459 F.2d at 763-67. Even if the body of this fax were inadmissible because it did not match the fax cover sheet, the body of this fax "was merely corroborative, and not essential to the government's case." *Dale*, 459 F.2d at 768, *compare with Giglio*, 405 U.S. at 154 ("the Government's case depended almost entirely" on the false evidence; "without it" there would have

been "no evidence to carry the case to the jury"). This document was only one of many examples of evidence that Teo knew he had publicly disclaimed beneficial ownership of the shares held by the Trust. *Supra* at 6-12. Indeed, appellants make no challenge to the sufficiency of this evidence. Br.51-57.

For example, the revocation of Teo's trading authority over the Trust's shares (JA1153-1157, *supra* at 10) is a document that Teo testified he "[m]ust have" seen and he understood "[w]hen this document was filed," which independently establishes that Teo knew he was disclaiming beneficial ownership. SA67:18-72:8; SA58:11-59:5. McKeon likewise testified that Teo told him to prepare the revocation, and that he explained the revocation to Teo. SA39:9-46:6, JA420:10-421:2, SA52:21-53:24, SA54:9-14.

More specifically, evidence other than the body of this fax demonstrates that Teo reviewed this particular amendment before it was filed. The fax cover sheet alone demonstrates that McKeon sent "Amendment #7" to Teo, instructing Teo to "[p]lease review and approve before I file this." JA1254. Appellants admit that this fax cover sheet was sent to Teo. *See* Br.12; JA1926; *see also* SA73:7-9 (Teo testifying that the fax number on the cover sheet is "my personal fax"). McKeon also testified that "we decoupled Musicland": "I prepared the 13D and then, you know, Mr. Teo reviewed it." JA389:9-25. And had the jury seen DAT 42, that

page would confirm that McKeon had his secretary "type & fax draft to Al Teo for his approval before filing." JA1929.

Indeed, it is beyond dispute that Teo received the typed version of this document for Teo's review and approval, and the typed version incorporated all of the handwritten edits that appear in the challenged version of the document. *See* JA1280-1294 (typed version, copying Teo at JA1281) *compare with* PX103 (JA1254-71, handwritten edits). When McKeon was asked if he had sent the typed version of Amendment 7 "to Mr. Teo for his review before he filed it?" McKeon answered, "Amendment 7, yes, I did." JA403:19-404:4; *see also* SA47:24-48:24 (McKeon testified that "of course, yes" he advised Teo about filing Amendment 7, and that Teo authorized him to make that filing). Teo also testified that he "understood" at the time the typed version of this amendment was filed that he was thereby disclaiming his beneficial ownership of the Trust's shares. SA85:4-86:18; *see also* JA712:10-12.

b. The jury weighed the objections to this document.

No new trial is warranted, even if this document were improperly admitted, because Teo and the Trust availed themselves of the opportunity to argue to the jury, as discussed in *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 930 (3d Cir. 1985), that "the documents are not genuine, or that they are somehow not worthy of

great weight in the jury's deliberations." *See also Threadgill*, 928 F.2d at 1376 (factfinder ultimately resolves issues regarding a document's "completeness" and genuineness). At the start of their closing argument, Teo and the Trust distributed a copy of this document to each juror, asked them "to look at this document carefully," extensively outlined to the jury their contentions that this document was a "trick" and lacked "integrity," invited the jury "to be like a forensic document specialist like you sometimes see on television," and told them "you're going to conclude pretty easily that there's something wrong with this document." JA733:9-735:24.

c. Finding waiver was within the district court's discretion.

In any event, the district court acted within its discretion in denying a new trial based on its determination that appellants had waived their objections to this document. *See* JA16, JA28-29. The district court supported this determination by cataloging the numerous occasions prior to the trial when appellants could have objected to this document, but failed to do so. *See* JA16; *see also supra* at 28n.4.

B. The district court had discretion to admit Teo's allocution.

In June 2006, Teo pleaded guilty to a criminal violation of Section 10(b) for engaging in insider trading. In this civil action alleging another violation of Section 10(b), the district court admitted, under Rule 404(b) and Rule 609(a) of the Federal Rules of Evidence, the judgment of conviction against Teo (JA1784-1788) and Teo's redacted allocution (JA1771-1783). *See* JA57:25-60:9, JA642:18-643:9.[5]

Below, appellants challenged the admission of both the judgment and the allocution. SA137-139. Appellants now concede that admitting Teo's judgment of conviction was a proper exercise of the district court's discretion. Br.32, 39. But they contend that the district court was without discretion to admit Teo's allocution. Br.29-43. As discussed below, also admitting the allocution was permissible.

1. Under Rule 404(b), the district court had discretion to admit Teo's allocution to show Teo's intent.

The district court acted within its discretion in concluding that Teo's allocution to intentionally committing criminal securities fraud was properly admitted under Fed.R.Evid. 404(b). *See* JA58:25-60:9, JA498:3-499:1.

[5] The allocution is admissible if it satisfies any grounds for admission, and is not rendered inadmissible if it fails to satisfy another. *See Paoletto v. Beech Aircraft Corp.*, 464 F.2d 976, 982&n.16 (3d Cir. 1972).

Courts of appeals affirm the admission under Rule 404(b) of a defendant's allocution to similar acts. In *United States v. Pettiford*, 517 F.3d 584, 588-91 (D.C. Cir. 2008), the court of appeals affirmed the admission under Rule 404(b) of the defendant's allocution to an intentional narcotics felony as evidence of his intent to commit another narcotics felony. *United States v. Kalish*, 403 Fed.Appx. 541, 546-47 (2d Cir. 2010), concluded that the defendant's allocution to mail fraud was admissible under Rule 404(b) to show his intent to commit another mail fraud, and explained that "[t]he broad discretion we afford trial judges on evidentiary rulings makes what was a relatively close call at trial an easy affirmance on appeal."

Here, the allocution was evidence of Teo's similar acts that was (i) permitted to show Teo's intent; (ii) relevant to rebut Teo's testimony that he never knowingly violated the securities laws; (iii) probative of Teo's intent beyond the probity of the judgment of conviction to an extent that was not substantially outweighed by any prejudicial effect exceeding any prejudicial effect of the judgment of conviction; and (iv) accompanied by a limiting instruction that appellants did not contest below. *See Huddleston v. United States*, 485 U.S. 681, 691-92 (1988); *Green*, 617 F.3d at 249-50.

Permitted use and relevance. The district court acted within its discretion in concluding (JA58:25-60:9) that the allocution was admissible for the expressly

"permitted uses" of showing Teo's "knowledge," "intent," and "absence of mistake." Fed.R.Evid. 404(b)(2). A district court has discretion to admit evidence that a defendant engaged in similar deceptive conduct because that "suggest[s] intent," and "tends to undermine defendant's innocent explanation for his or her act." 2 *Weinstein's Federal Evidence* § 404.22[1][a] (2d ed. 2012). This Court in *Saada* held that "the evidence of [defendant]'s involvement in another fraud was admissible because it showed his intent to defraud, knowledge of the fraudulent nature of the water damage claim, and financial motive to commit insurance fraud." *United States v. Saada*, 212 F.3d 210, 223-24 (3d Cir. 2000); *accord United States v. Console*, 13 F.3d 641, 659 (3d Cir. 1993); *United States v. Kellogg*, 510 F.3d 188, 197-202 (3d Cir. 2007); *SEC v. Happ*, 392 F.3d 12, 29-30 (1st Cir. 2004) (securities fraud).

The district court here found the allocution was "clearly relevant" (JA59:25-60:1) because Teo's intent was a contested issue. Before the allocution was introduced, Teo testified: "I would never file any *** incorrect 13D knowingly." SA74:14-18. He also testified: "I never intentionally break the law, any law," "[i]ncluding 13D law." SA75:5-17. Appellants' opening statement asserted that there were mere "mistakes" in their filings that were not intended to "trick or mislead anyone." SA14:14-17, SA15:1-15. However, Teo's

allocution—his prior sworn testimony (*Crawford v. Washington*, 541 U.S. 36, 64-65 (2004))—rebutted these assertions because in it Teo admitted that he acted "willfully, knowingly, and with the intent to defraud." JA1782:7-12. Teo also allocuted to "know[ing]" that his "actions were in violation of the federal securities laws." JA1782:17-19.

Teo's criminal insider trading and his misconduct here were similar. *See* JA49:18-50:18; SA193-196; SA198-199. The allocution relates that in violation of Teo's duty to keep confidential the information Musicland provided to him regarding Best Buy's tender offer, Teo knowingly traded on the information. Appellants recognize that the "connection" between Teo's insider trading and his misconduct here is that "they both implicated the securities laws and involved Musicland." Br.35. Moreover, Teo allocuted to intentionally violating his duty to disclose his trading on material, nonpublic information or abstain from trading. *See* JA1777:7-1778:17; *United States v. O'Hagan*, 521 U.S. 642, 660-62 (1997). In this case, Teo likewise intentionally violated his duty to disclose his trading that materially changed his beneficial ownership.

Also, Teo's insider trading in Musicland stock was contemporaneous with his violations here, contrary to appellants' assertion that it occurred "nearly three years" afterward. Br.14-16, 33-35. Teo engaged in insider trading in Musicland stock

between September and December 2000 (JA1784-1788, JA1771-1783), and appellants made false filings beginning in July 1998, which they never amended as required, even after December 2000. *Supra* at 11-12. In any event, as appellants concede (Br.33-34), this Court recently confirmed that "subsequent act evidence may be properly admitted under Rule 404(b)." *United States v. Bergrin*, 682 F.3d 261, 281n.25 (3d Cir. 2012).[6]

Probative value outweighed prejudice. The district court's determination in both its *in limine* ruling and trial ruling that "I don't believe that the prejudicial effect substantially outweighs the probative value" (JA59:25-60:9, *see also* JA499:17-21), is afforded "great deference" (*Bergrin*, 682 F.3d at 279-80). Appellants criticize the district court's determination as "conclusory" (Br.36), but extensive briefing apprised the district court regarding this balance. In any event, this Court can "undertake to perform the balance" (*Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 525 (3d Cir. 2003)), especially because the balance has changed given that appellants no longer challenge admission of the judgment of conviction.

With regard to prejudice, appellants suggest that the allocution "branded [Teo] as a bad actor with a propensity to violate the securities laws" (Br.39), but the

[6] Teo's allocution to intentionally engaging in insider trading in C-Cube stock (JA1771-1783) subsequent to his insider trading in Musicland stock (Br.14-15) was also properly admitted.

judgment of conviction—whose admission they no longer contest—informed the jury that Teo is a "convicted criminal" (Br.36-37). According to appellants, the judgment of conviction includes a "description of the five counts of insider trading (including the names of the companies at issue) and the details of his criminal sentence: a 30-month prison term, a $1 million fine, and a two-year term of supervised release" (Br.15). *See* JA1784-1788. As the court of appeals similarly noted in *United States v. Rodriguez*, "any prejudicial effect" from additional testimony about Rodriguez's conviction was "minimal because the jury was already aware of Rodriguez's burglary conviction." 43 F.3d 117, 125 (5th Cir. 1995); *see also United States v. Hearn*, 549 F.3d 680, 683 (7th Cir. 2008).

There is no support for appellants' assertion that the allocution created some special, unfair prejudice. Br.37-38. In *Pettiford*, the court of appeals affirmed the admission of an allocution over the defendant's objection that it was "particularly prejudicial." 517 F.3d at 588-91; *accord Kalish*, 403 Fed.Appx. at 546-47. It is unexceptional for this Court to affirm the admission under Rule 404(b) of a defendant's confession or admission to similar criminal activity. *See, e.g.*, *Bronshtein v. Horn*, 404 F.3d 700, 703, 730-31 (3d Cir. 2005); *United States v. Pitt*, 193 F.3d 751, 762 (3d Cir. 1999). Furthermore, Teo's insider trading was not a

violent crime, and evidence of a similar fraud is not "inflammatory." *United States v. Johnson*, 463 F.3d 803, 809 (8th Cir. 2006).

On the other side of the balance, the allocution is probative of Teo's intent beyond the probity of the judgment of conviction. As the appellants point out, only the allocution contained admissions "addressing every element of Mr. Teo's insider trading offenses," including that he acted "knowingly" and in "violation of a duty of trust and confidence" to shareholders. Br.15. Accordingly, this is part of the "chain of logical inferences" (Br.33) between Teo's insider trading and his misrepresentation of beneficial ownership. *See Green*, 617 F.3d at 247.

Limiting instruction. Before this evidence was introduced, and also before their deliberations, jurors were instructed that they "may not use this evidence to conclude that because Mr. Teo was convicted of insider trading, he must have also committed the acts charged in this case," or as "proof that Mr. Teo has a criminal personality or bad character." JA642:18-643:9, JA1798. "[A]ny risk of unfair prejudice was minimized" by these instructions. *Green*, 617 F.3d at 252; *accord United States v. Givan*, 320 F.3d 452, 462 (3d Cir. 2003). Appellants agreed to these instructions, and cannot explain how the instructions, although minimizing unfair prejudice flowing from the judgment of conviction, did not also do so for the allocution.

* * * * *

The cases on which appellants primarily rely are inapposite. Br.32-39. In *United States v. Cook*, 538 F.2d 1000 (3d Cir. 1976), the defendant's sodomy conviction obviously had no bearing on his trial for bank robbery. In *United States v. Morley*, 199 F.3d 129, 130-34 (3d Cir. 1999), an uncharged forgery was inadmissible to suggest intent because there was no evidence the defendant knew about the forgery. In *United States v. Sampson*, 980 F.2d 883, 886-89&n.1 (3d Cir. 1992), the district court did not delineate which use under Rule 404(b) was applicable, or conduct any Rule 403 balancing, and the prosecutor impugned the defendant's character by telling the jury he was the "type of man" to possess drugs. In *Becker v. ARCO Chem. Co.*, 207 F.3d 176 (3d Cir. 2000), the district court did not perform any balancing before admitting an employer's fabrication of customer complaints about one employee to suggest its discriminatory intent to fire another. In *United States v. Murray*, 103 F.3d 310, 317-18 (3d Cir. 1997), testimony about an uncharged murder had no bearing on the defendant's alleged involvement in a continuing criminal enterprise. Finally, unlike the prosecutors in *Murray*, 103 F.3d at 320, and *Sampson*, 980 F.2d at 886n.1, the Commission did not refer to Teo's allocution or conviction in its closing arguments.

2. The district court had discretion to admit Teo's allocution under Rule 609(a) as "evidence of a criminal conviction."

The district court also had discretion to admit Teo's allocution under Fed.R.Evid. 609(a)(2) as "evidence of a criminal conviction." JA57:25-58:24, JA642:18-643:9. *See United States v. Bogers*, 635 F.2d 749, 749-51 (8th Cir. 1980) (affirming admission under Rule 609(a) of defendant's testimony concerning a prior conviction); *United States v. Tracy*, 36 F.3d 187, 192-94 (1st Cir. 1994) (same). Although they assert that the district court lacked discretion to admit under Rule 609 any "details" of the crime (Br.31-32), appellants concede that the judgment of conviction's detailed "description of the five counts of insider trading" (Br.15) was properly admitted. *See* JA1784-88. Moreover, *Bogers* affirmed the admissibility under Rule 609(a) of defendant's testimony "delving into specific facts about the underlying crime," including "the fact that a shotgun was involved in the assault." 635 F.2d at 749-51.

3. The district court had discretion to admit details of the allocution because Teo tried to explain away his conviction.

Because Teo attempted to "explain away" his prior conviction by giving his own version of events, Teo "open[ed] the door" for the Commission "to inquire extensively concerning some details of the prior conviction[]." *United States v.*

Amahia, 825 F.2d 177, 179-80 (8th Cir. 1987); *see also United States v. Eaton*, 808 F.2d 72, 75-76 (D.C. Cir. 1987).

During the Commission's direct examination—and before the Commission offered the allocution—Teo's testimony included the statement: "I never intentionally break the law, any law." SA75:5-17. At the close of the Commission's direct examination, the district court permitted, with a cautionary instruction, the introduction of the judgment of conviction and the allocution. JA642:15-653:12.[7]

Teo then attempted to explain away his insider trading conviction during his attorney's questioning. Teo testified that he did not buy Musicland stock based on inside information about a tender offer for Musicland. JA699:12-701:3. The Commission told the court that Teo "seemed to be retracting part of his plea allocution, or trying to get around it, and I'm going to have to cross him on that." SA83:17-20. The district court agreed (SA83:17-22), and appellants did not object.

When the Commission then re-examined Teo regarding his allocution, Teo continued to maintain that he had not traded on inside information. JA722:4-728:4. Teo contended that the details in his allocution supported his version of the facts.

[7] Introducing the allocution at the "end of the SEC's direct examination of Mr. Teo" (Br.40) was proper (*see United States v. Chrzanowski*, 502 F.2d 573, 576 (3d Cir. 1974)), and Teo and the Trust never objected below to the timing of the allocution's introduction.

Referring to his allocution as his "plea," Teo repeatedly invited the jury to "read the plea carefully," "read the plea yourself," "read it, let the jury see them." JA723:1-724:4. Teo should not now be heard to complain that the jury saw this evidence.

4. Any error in admitting the allocution was harmless.

Any error in admitting the allocution was harmless given other overwhelming evidence of Teo's scienter. *See supra* at 6-15; *United States v. Gricco*, 277 F.3d 339, 353-54 (3d Cir. 2002). Appellants have it backward: if the plea allocution was "needlessly cumulative" (Br.38), that would indicate that its admission, if erroneous, was harmless. *See United States v. Casoni*, 950 F.2d 893, 915-18 (3d Cir. 1991); *Pettiford*, 517 F.3d at 588-89. Appellants' other arguments do no more than recapitulate their erroneous contentions regarding prejudice. Br.39-43.

C. Sufficient evidence supports the jury verdict that Teo and the Trust violated Section 13(d).

The jury answered "Yes" when asked, did Teo and the Trust "violate Section 13(d) of the Securities Exchange Act and Exchange Act Rule 13d-1, Rule 13d-2, and/or Rule 12b-20?" JA1921. Appellants do not dispute (*see* Br.51-57) that there is a "sufficient evidentiary basis" (Fed.R.Civ.P. 50(a)) that they materially misrepresented Teo's beneficial ownership, and this Court can affirm on that basis alone. In any event, a jury could find that appellants also made material

misrepresentations and omitted material facts about Teo's proposals to change Musicland's board of directors and to take Musicland private. *See* JA24-27, JA29 (district court denying motion for judgment as a matter of law).

1. The jury's Section 13(d) verdict can be sustained based solely on appellants' undisputed misrepresentation of Teo's beneficial ownership.

Appellants do not dispute that a reasonable jury could conclude that they violated Section 13(d) and the rules thereunder by making material misrepresentations and omissions regarding Teo's beneficial ownership of Musicland shares. Appellants likewise did not dispute the sufficiency of this evidence in the motion for a judgment as a matter of law at the close of evidence (SA87:10-89:9), or in their post-trial motion (SA201-207). Indeed, as described *supra* at 6-12, the jury's conclusion is supported by overwhelming evidence.

A judgment as a matter of law "must be denied if there is evidence reasonably tending to support the recovery by plaintiff as to any of its theories of liability." *Hofkin v. Provident Life & Accident Ins. Co.*, 81 F.3d 365, 369 (3d Cir. 1996); *accord Tait v. Armor Elevator Co.*, 958 F.2d 563, 569 (3d Cir. 1992). Furthermore, because the "weight of evidence and argument" supports this basis for the verdict, the verdict should be upheld even if it were "factually impossible that liability could

appropriately be found" on another basis. *Hurley v. Atl. City Police Dept.*, 174 F.3d 95, 120-22 (3d Cir. 1999).

Appellants cite cases (Br.57) where a verdict was set aside because one of several bases was tainted by an erroneous legal standard that the jury was required to accept. *See Wilburn v. Maritrans GP Inc.*, 139 F.3d 350, 360-61 (3d Cir. 1998) (one basis was not "legally sound"); *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1001-02 (3d Cir. 1988) (one basis was established by double hearsay). Such cases are inapposite here because appellants challenge only the sufficiency of evidence regarding the bases for the jury's Section 13(d) verdict. Because the jury is competent to find facts, this Court presumes that the jury decided on a factually supported basis, and that any factually unsupported basis was "discounted" by the jury such that "any error was harmless." *Hurley*, 174 F.3d at 120-22; *see also Sandberg v. Va. Bankshares, Inc.*, 891 F.2d 1112, 1122 (4th Cir. 1989), *rev'd on other grounds*, 501 U.S. 1083 (1991).

Appellants contend that a special verdict form should have been used (Br.57, 20n.3), but appellants agreed to the general verdict form after the Commission's complaint (JA1824-28) and summary judgment motion (SA107-108, SA113-118) put them on notice of three bases for their liability. *See* SA129-130 ("Parties' Proposed Verdict Form"); JA1892-93 (pretrial order). Accordingly, appellants not

only waived their special verdict request (*see Ely v. Reading Co.*, 424 F.2d 758, 763 (3d Cir. 1970)), but also waived any argument about the purported indeterminacy of the general verdict (*see McCord v. Maguire*, 873 F.2d 1271, 1274 (9th Cir. 1989), *amended*, 885 F.2d 650 (9th Cir. 1989)). When the appellants attempted to "take back [their] agreement" midway through the trial (JA636:15-637:9), the district court exercised its broad discretion to use the previously agreed-upon general verdict (JA627:9-25, JA729:10-731:12). *See Kazan v. Wolinski*, 721 F.2d 911, 915 (3d Cir. 1983).

2. A reasonable jury could also conclude that appellants misrepresented Teo's plans and proposals.

a. A reasonable jury could conclude that appellants misrepresented proposals to change Musicland's board of directors.

The district court correctly concluded that there was "sufficient evidence" for the jury to conclude that "Teo's plans would have resulted in a change to the board of directors, thus requiring that they be disclosed." JA27. Without fail, appellants' public filings stated that they "have no plans or proposals which relate to or would result in any change in the present board of directors." JA861, JA1314, JA1420. A reasonable jury could find that these statements were false because Teo waged a two-year campaign to place himself, as well as three other persons representing Teo's interests, on Musicland's board. As explained *supra* at 13-14,

Teo's proposals to change the board were evidenced not by Teo's "thoughts" (Br.55-56), but by Teo's letters and testimony, including his testimony that "I have asked to be placed on Musicland's board since the beginning of 2000," and "I continue to ask every month." JA641:11-642:14.

There is no support for appellants' position that Schedule 13D requires disclosure only where there is (i) a formal proxy to nominate a candidate for the board, and (ii) a vacancy on the board. Br.55-56, 22. Schedule 13D requires disclosure of "any plans or proposals" which "relate to or would result in any change in the present board of directors or management of the issuer, including"—but not limited to—plans or proposals to "fill any existing vacancies on the board," or to nominate a director. 17 C.F.R. 240.13d-101, Item 4(d). *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1158, 1161 (9th Cir. 1992), held that Schedule 13D "expressly require[s] the statement of purpose to include any plans for any change in the Board of Directors." *Cf. Todd Shipyards Corp. v. Madison Fund, Inc.*, 547 F.Supp. 1383, 1386, 1390 (S.D.N.Y. 1982) (reporting person properly disclosed intent to seek representation on the board).

b. A reasonable jury could conclude that appellants misrepresented proposals to take Musicland private.

The district court correctly concluded that there was "sufficient evidence" for the jury to conclude that "Teo's plans and proposals regarding Musicland would

have resulted in an extraordinary corporate transaction requiring disclosure." JA26. Appellants were obligated to amend their disclosure regarding "any plans or proposals" which "relate to or would result in [a]n extraordinary corporate transaction" (17 C.F.R. 240.13d-101 Item 4(b), (f)), or "any other major change in its business or corporate structure." (15 U.S.C. 78m(d)(1)(C)). In their public filings, appellants steadfastly stated that they had "no plans or proposals which relate to or would result in" an "extraordinary corporate transaction," or "any other material change in the issuer's business or corporate structure." JA861-62, JA314, JA1420.

A reasonable jury could find these statements false because, as Teo acknowledged, "I tried to convince" Musicland's management "to take the company private for two years." JA594:8-21. As explained *supra* at 14-15, Teo repeatedly proposed taking Musicland private with three different investment banks. This "unswerving" pursuit of a transaction indicates an "intention to achieve a plan." *Otis Elevator Co. v. United Tech. Corp.*, 405 F.Supp. 960, 965-66 (S.D.N.Y. 1975), *compare with Susquehanna Corp. v. Pan Am. Sulphur Co.*, 423 F.2d 1075, 1084-1085 (5th Cir. 1970) (there may be no duty to disclose a plan that "subsisted for a mere two days"). The proposals included a detailed term sheet that Teo approved and signed (JA1497-98), GE Capital's "buyout financing proposal" of

$300 million (JA1467-68), and detailed acquisition and price models (JA1499-1508, JA1448-1465); such documentation supports a finding of a plan or proposal. *See Chromalloy*, 611 F.2d at 246; *Dan River, Inc. v. Unitex Ltd.*, 624 F.2d 1216, 1226 (4th Cir. 1980). Appellants' brief (at 21-22, 53-56) does no more than point to purportedly "conflicting evidence," which is insufficient to overturn the jury's verdict. *Fireman's Fund*, 540 F.2d at 1178.

c. The jury was instructed that Teo's plans and proposals had to be sufficiently definite before their disclosure was required.

Pointing to *Azurite Corp. Ltd. v. Amster & Co.*, 52 F.3d 15, 18 (2d Cir. 1995), as the standard for how definite a proposal must be before its disclosure is required, appellants assert that Teo's proposals were too "preliminary" and "tentative" to be disclosed. Br.51-55, 20-22. However, the jury found appellants liable after being instructed that "Section 13(d) does not require the disclosure of preliminary considerations, exploratory work, or tentative plans or proposals." JA1801-02. This instruction was fashioned to track the standard articulated in *Azurite* (*see* JA622:10-634:24, JA25-26), and appellants agreed to this instruction. JA632:12-634:24 (appellants' attorney stating that this instruction is "Beautiful").

A reasonable jury could find that Teo's proposals to change the board and his proposals to take Musicland private were sufficiently definite and documented.[8]

Contrary to appellants' contention (Br.56-57), it was proper for the jury and the district court to analyze whether Teo had plans or proposals which "would result in" an extraordinary corporate transaction or change in the board of directors (JA1801, JA26-27), because that is the very language of Schedule 13D. 17 C.F.R. 240.13d-101 Item 4. Requiring disclosure of plans only after they are accomplished, or proposals only after they are accepted, would defeat the purpose of informing investors about "any plans or proposals," and nullify those statutory terms. 15 U.S.C. 78m(d). "[A] present inability to accomplish a plan is no defense to concealing it." Jacobs, *The Williams Act - Tender Offers and Stock*

[8] While the jury found appellants liable under the standard articulated in *Azurite*, to the extent *Azurite* requires a plan to be "fixed" (52 F.3d at 18), it overstates how definite plans and proposals need be before their disclosure is required. The Eighth and Fourth circuits are correct that an intended plan must be disclosed "even though this intention has not taken shape as a fixed plan." *Chromalloy*, 611 F.2d at 247; *Dan River*, 624 F.2d at 1226n.9; *see also* Loss, Seligman and Paredes, *The Williams Act and Other Federal Securities Laws*, Chapter 2.b.iii (2011). The proper standard is that any "material" plan or proposal must be disclosed. *United States v. Bilzerian*, 926 F.2d 1285, 1298-99 (2d Cir. 1991) (applying *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)); *SEC v. Savoy*, 587 F.2d at 1165-67 (D.C.) (same). *But see Azurite*, 52 F.3d at 18. Moreover, by statute and rule, appellants were required to disclose "any material change" to their initial Schedule 13D disclosures (15 U.S.C. 78m(d)(2), 17 C.F.R. 240.13d-2, 17 C.F.R. 240.12b-20), and "material" is defined as information "to which there is a substantial likelihood that a reasonable investor would attach importance" (17 C.F.R. 240.12b-2, *see also* Rule 12b-1, 17 C.F.R. 240.12b-1).

Accumulations § 2:47; *see, e.g.*, *Chromalloy*, 611 F.2d at 243-46 (proper disclosure of "unsuccessful attempt to gain representation" on the board); *Elec. Specialty Co. v. Int'l Controls Corp.*, 409 F.2d 937, 942-43 (2d Cir. 1969) (properly disclosing: "will give consideration to a merger").

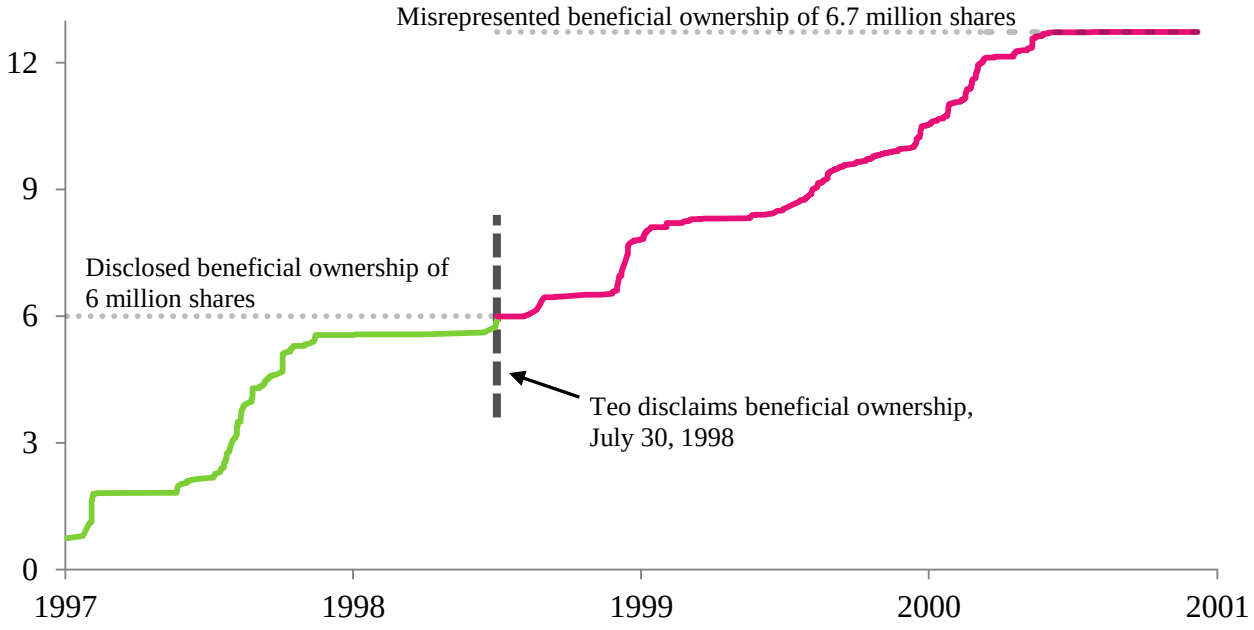
II. The district court acted within its discretion in ordering disgorgement and prejudgment interest.

The district court acted within its discretion in ordering appellants to disgorge the $17.4 million in profits they made from selling the Musicland shares that they acquired after July 30, 1998, as well as the prejudgment interest on those profits. *See* JA10-12, 17-22 (district court opinion); 3-4 (final judgment); JA1930-1938 (accountant's declaration); *SEC v. Hughes*, 124 F.3d at 455. Disgorgement is not "punitive," as appellants claim. Br.28, 71. Rather, disgorgement deprives appellants of their unjust enrichment and restores the *status quo* that existed before their violations. *See Zacharias v. SEC*, 569 F.3d 458, 471 (D.C. Cir. 2009) (*per curiam*).

A. The district court had discretion to require the appellants to disgorge their profits from selling the shares they acquired after July 30, 1998.

Appellants concede that they "made substantial profits" (Br.11), and as they correctly explain, the $17.4 million amount "represented the total profit that Appellants earned on all shares of Musicland purchased subsequent to the first

disclosure violation in July 1998." Br.23&n.4. After July 30, 1998, appellants continuously made material misrepresentations and omissions regarding Teo's beneficial ownership which were never corrected. The red line in the following chart illustrates the Musicland shares that Teo acquired and beneficially owned, where appellants falsely stated that Teo did not beneficially own these shares and failed to disclose the extent of Teo's beneficial ownership and Teo's proposals:



(This chart is derived from spreadsheets at JA1667-1707 and JA1938, except shares purchased based on inside information were removed as per the final judgment, *see* JA4 and JA1816-17 ¶¶56-57.) These are the shares that appellants sold for the $17.4 million in profits. JA3-4, JA10-12, JA20.

The appellants also acquired millions of Musicland shares for which they properly disclosed that Teo was the beneficial owner (the chart's green line), and the district court permitted appellants to keep any profits they obtained from selling these shares, thereby properly "distinguish[ing] between legally and illegally obtained profits." *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989). In addition, the district court reduced the disgorgement amount by the margin interest appellants paid, and by the profits from their insider trading in Musicland shares during this period that were disgorged before trial. JA4.

Appellants nonetheless contend that "the district court could not award even a single dollar of disgorgement." Br.61. But $0 is not a reasonable approximation of appellants' illegal profits. Rather, a reasonable approximation is the $17.4 million profit actually made by appellants. Contrary to appellants' two main arguments, the connection between appellants' violations and such profits is not "speculative" (Br.58-61), and they cannot escape disgorgement on the ground that they sold most of the shares they acquired after July 30, 1998 to Best Buy as part of a tender offer "unrelated" to their violations (Br.61-66).

1. The connection between appellants' violations and profit is not "speculative."

The district court found that the appellants' profit on selling shares they acquired after July 30, 1998 was a "reasonable approximation of profits causally

connected to the violation." JA17-20, JA10-12. The profit appellants obtained from selling these shares is not "speculative" (Br.58-61), as there is no dispute that $17.4 million "represented the total profit that Appellants earned on all shares of Musicland purchased subsequent to the first disclosure violation in July 1998." Br.23&n.4.

Disgorgement is not restricted "to the precise impact of the illegal trading on the market price." *SEC v. First City*, 890 F.2d at 1231-32. Rather, "the government's showing of appellants' actual profits on the tainted transactions at least presumptively satisfied [its] burden" to establish "a reasonable approximation of profits causally connected to the violation." *Id.* at 1231-32; *accord SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010).[9]

Contrary to appellants' contention, the district court never said that the nexus between the violations and profits was "speculat[ive]." Br.6, brackets in brief, purportedly quoting JA19; *see also* Br.60, 23. Rather, the district court appropriately refused to speculate about what would have happened if appellants had made proper disclosures: "This court cannot speculate as to how disclosure would have affected the market for Musicland stock or the poison pill *** [or] as to

[9] For example, where defendants purchase shares based on favorable, material nonpublic information and later sell those shares at a higher price, the defendants are required to disgorge all gains from the sales. *E.g.*, *SEC v. Warde*, 151 F.3d 42, 45-50 (2d Cir. 1998); *SEC v. Tome*, 833 F.2d 1086, 1087-90, 1096 (2d Cir. 1987).

the effect the disclosure would have had on the prices of shares." JA19. Likewise, *SEC v. First City* affirmed disgorgement of all of the violators' profits because their "efforts to hypothesize" about disclosures that would have "complied with section 13(d) and the market reaction to that are impossibly speculative." 890 F.2d at 1231-32.

Generally, any "risk of uncertainty" about the market effect of a hypothesized proper disclosure is resolved against the "wrongdoer whose illegal conduct created that uncertainty." *First City*, 890 F.2d at 1232; *accord Hughes*, 124 F.3d at 455. Here, appellants thwarted an analysis of the market effect of disclosure because they never disclosed their true beneficial ownership or proposals, and Teo's true beneficial ownership and proposals were not revealed until after the violations were complete and the Commission brought this action.

Appellants' violations thereby contrast with those in the cases they cite (Br.64-66):

- In *SEC v. First City*, the defendant filed a disclosure statement in a Schedule 13D that accurately disclosed the extent of defendants' beneficial ownership, but filed it twelve days later than required. 890 F.2d at 1217-1221.

- In *SEC v. Bilzerian*, the defendant likewise accurately "disclosed his accumulations" of stock, albeit belatedly. 29 F.3d at 692&n.3. Moreover, Bilzerian violated Section 14, 15 U.S.C. 78n, by affirmatively misrepresenting the funding for those purchases, which is a different type of violation than the ones here. *Id.* at 692&n.4. And unlike appellants, Bilzerian "did not purchase any stock after his alleged misrepresentations." *Id.* at 696-97.

- In *SEC v. UNIOIL*, 951 F.2d 1304, 1307 (D.C. Cir. 1991) (*per curiam*), the court did not require disgorgement of profits obtained "after the fraudulent nature of the [representation] was discovered."

- Similarly, the court in *SEC v. MacDonald*, 699 F.2d 47, 53-55 (1st Cir. 1983) (*en banc*), did not require disgorgement of profits obtained "after the time when all material facts became generally available."

Finally, appellants' reliance on *Wellman v. Dickinson*, 682 F.2d 355 (2d Cir. 1982), is misplaced. Br.58, 61-63. It may be that private plaintiffs seeking damages must show that their "injury" was caused by a securities law violation. *Wellman*, 682 F.2d at 368. But as the district court concluded (JA20), the *Wellman* standard is inapplicable to the Commission's enforcement actions for disgorgement. "Unlike private litigants seeking damages," the Commission is "not required to prove" injury or loss causation, *i.e.*, that "the misrepresentations caused any investor

to lose money." *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir.1985); *accord SEC v. Pirate Investor LLC*, 580 F.3d 233, 239n.10 (4th Cir. 2009) (*per curiam*) (unlike private litigants, the SEC need not prove loss causation). Rather, in Commission actions, "the purpose of disgorgement is not to compensate for losses but to deprive the wrongdoer of his ill-gotten gain." *SEC v. Whittemore*, 659 F.3d 1, 11n.2 (D.C. Cir. 2011).

2. The Best Buy tender offer was not an intervening event that severed the connection between appellants' violations and their $17.4 million in profits.

Appellants assert that none of their profit from selling shares to Best Buy as part of a tender offer can be disgorged because that tender offer was "unrelated" to their violations. Br.61-66. As an initial matter, this ignores the profits appellants made prior to Best Buy's tender offer by selling in the open market over 1.2 million of the Musicland shares they had acquired after July 30, 1998. *Supra* at 16, JA1938. Appellants' profits on these 1.2 million shares must be disgorged irrespective of their arguments regarding Best Buy.

With regard to the 5.5 million shares they tendered to Best Buy (JA1938), the district court properly rejected the contention that the Best Buy tender offer was an "intervening event that broke any causal connection." JA19. Appellants must disgorge their profits on the shares they tendered to Best Buy—and indeed all the

shares they acquired after July 30, 1998—because Teo acquired and beneficially owned these shares while appellants falsely told the market that Teo did not beneficially own them, and failed to tell the market the true extent and purpose of Teo's beneficial ownership. *See SEC v. Sierra Brokerage Servs., Inc.*, 608 F.Supp.2d 923, 969 (S.D. Ohio 2009) (awarding disgorgement of profits made during Section 13(d) violations), *appeal docketed*, No. 10-3546 (6th Cir. April 30, 2010) (disgorgement not challenged on appeal).

Thus, it does not matter to whom appellants sold these shares, or the reason why the resale price was higher, such as a boost from a tender offer, technological advance, or a bull market. Similarly, "a person who fraudulently acquired a house worth $100,000 in 2000 that appreciates to $200,000 by 2010 because of a strong real estate market can't complain when the rightful owner takes the benefit of the $100,000 increase," because "it is simple equity that a wrongdoer should disgorge his fraudulent enrichment." *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 910 (9th Cir. 2010). Consistent with this rationale, the district court's order permits appellants to keep the profits they obtained from selling the shares they acquired before July 30, 1998, irrespective of when or to whom these shares were sold, because appellants properly disclosed that Teo was the beneficial owner of these shares. *See* JA1938; *supra* at 54 (chart's green line).

Furthermore, as explained *supra* 6-12, Teo did not fail to make the required Section 13(d) disclosures and deceptively conceal his true beneficial ownership for no reason. Teo desired to amass and profit from Musicland shares, but he saw the 17.5% poison pill threshold as a cap on the number of Musicland shares he could purchase.[10] Teo fraudulently disclaimed beneficial ownership of the Trust's shares beginning on July 30, 1998 in order to conceal his total holdings while purchasing shares above this threshold. Appellants engaged in this scheme based on their own calculation that they could not obtain such profits on additional shares if they made the disclosure required by the securities laws. Now that appellants' scheme has borne fruit, the district court had discretion to require disgorgement of the profits made by appellants from selling the shares they acquired in Teo's scheme. Disgorgement of appellants' profits on all their post-July 1998 acquisitions would properly restore appellants to the *status quo* that existed before their violations, where appellants' pre-July 30, 1998 holdings amounted to less than 17.5% of Musicland's shares, and appellants believed that they could acquire no more.

[10] And while Musicland may not have been "required" to activate the poison pill (Br.9n.1), even if the poison pill threshold "does not work an immediate dilution," it "acts as an inhibition on alienation or additional purchases." *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1088 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005); *see also Heil v. Morrison Knudsen Corp.*, 863 F.2d 546, 550-51 (7th Cir. 1988) (describing poison pill as a "ceiling" on holdings).

In any event, to the extent it matters that the shares increased in value due to a corporate control transaction, the district court correctly found that the Best Buy tender offer constituted the kind of "market correction that Teo anticipated when he bought what he considered to be undervalued shares." JA20. Teo amassed Musicland shares because he believed they were undervalued, and he expected to profit from selling all of his shares at a premium in a corporate control transaction. *Supra* at 8, 14-15. And in fact, that is exactly what happened here. It makes no difference that the takeover premium was derived from Best Buy rather than from going private, because the district court had discretion to require disgorgement of Teo's profits where the "purpose and effect of the scheme" was to obtain such profits. *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 1996) (*per curiam*).

Moreover, appellants cannot maintain that the tender offer premium paid by Best Buy was attributable to their efforts, and that they are entitled to keep it, given their concession that "Teo played absolutely no role in bringing about the Best Buy tender offer." Br.65. Appellants assert that tendering their shares "help[ed] ensure that the offer was consummated" (Br.62, 10), but Best Buy offered a 60% takeover premium above the price of Musicland shares. *Compare* JA1663 (Best Buy offered $12.55 per share) *with* SA110-111 (pre-tender price of $8.00). A 50% premium is generally sufficient to induce a successful tender offer. *See Litton*

Indus., Inc. v. Lehman Bros., 967 F.2d 742, 749 (2d Cir. 1992). In any event, wielding a block of shares one fraudulently says one does not beneficially own does not constitute a legitimately compensable effort.

Finally, it makes no difference that the Best Buy tender offer occurred 2½ years after appellants' violations began. Br.59, 65-66. Appellants must surrender all of the accretion in value of these shares through the date that the true information reaches the market and the violations are complete. Here, the true information regarding Teo's beneficial ownership and proposals was not revealed until after the Best Buy tender offer was complete, given that appellants never made a proper disclosure regarding their holdings.

B. Awarding prejudgment interest was within the district court's discretion.

"The decision whether to grant prejudgment interest and the rate used" are "matters confided to the district court's broad discretion." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1476-77 (2d Cir. 1996); *see also SEC v. Platforms*, 617 F.3d at 1099-1100. Appellants' challenges (Br.67-71) to the district court's conclusion (JA4, 21-22) that they are liable for $14.6 million in prejudgment interest on the disgorgement award are without merit.

The district court had discretion to measure the prejudgment period from when appellants received their ill-gotten gains by selling shares, rather than from the

filing of the complaint (Br.67-68), to prevent appellants from benefitting from the time value inherent in the use of their ill-gotten gains. *See First Jersey*, 101 F.3d at 1461, 476-77 (over $50 million in prejudgment interest measured from "dates of the gains through the entry of judgment—a period of up to 12+ years").

Any delay in reaching the final judgment (Br.67) was the result of appellants' self-concealing violations. And appellants did not oppose the stays of the case to which they refer. Br.68. In any event, "[e]ven if defendants were correct that the present litigation was protracted through some fault of the SEC, defendants plainly had the use of their unlawful profits for the entire period." *First Jersey*, 101 F.3d at 1477; *accord SEC v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998).

Finally, it was within the district court's discretion to calculate interest (Br.68-71) based on the underpayment rate used by the Internal Revenue Service—which approximates the rate appellants would have to pay as borrowers—rather than the Treasury bill rate—which reflects the rate for lending money to the government. *Platforms*, 617 F.3d at 1099; *First Jersey*, 101 F.3d at 1476-77.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATIONS

I hereby certify that:

1. I am an attorney representing a federal administrative agency. *See* 3d Cir. L.A.R. 28.3(d); http://www.ca3.uscourts.gov/admissio.htm

2. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 13,873 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

4. The electronic version of this brief is identical to the paper copies filed separately with the Clerk of Court. *See* 3d Cir. L.A.R. 31.1(c).

5. Using VirusScan Enterprise and AntiSpyware Enterprise, version 8.7i, DAT Version 6855.0000, updated October 4, 2012, the electronic version of this brief was scanned for viruses and found to contain none. *See* 3d Cir. L.A.R. 31.1(c).

CERTIFICATIONS (CONTINUED)

6. In addition to the electronic submission of this brief and accompanying Supplemental Appendix, 10 paper copies of this brief, and 4 paper copies of the Supplemental Appendix, have been delivered to the Clerk of Court. A single paper copy of each has been mailed to all counsel of record. *See* 3d Cir. L.A.R. 31.1(a).

Dated: October 5, 2012

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