Revista Electrónica de Derecho Comercial
www.derecho-comercial.com

SECURITIES AND EXCHANGE COMMISSION v. TEXAS GULF SULPHUR CO.

No. 296, Docket 30882.
United States Court of Appeals Second Circuit
Argued March 20, 1967, Submitted to in Banc Court May 2, 1968
Decided Aug. 13, 1968

Before LUMBARD, Chief Judge, and WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS, ANDERSON and FEINBERG, Circuit Judges.

WATERMAN, Circuit Judge:

This action was commenced in the United States District Court for the Southern District of New York by the Securities and Exchange Commission (the SEC) pursuant to Sec. 21(e) of the Securities Exchange Act of 1934 (the Act), 15 U.S.C. § 78u(e), against Texas Gulf Sulphur Company (TGS) and several of its officers, directors and employees, to enjoin certain conduct by TGS and the individual defendants said to violate Section 10(b) of the Act, 15 U.S.C. Section 78j(b), and Rule 10b-5 (17 CFR 240.10b-5) (the Rule), promulgated thereunder, and to compel the rescission by the individual defendants of securities transactions assertedly conducted contrary to law. [FN1] The complaint alleged (1) that defendants Fogarty, Mollison, Darke, Murray, Huntington, O'Neill, Clayton, Crawford, and Coates had either personally or through agents purchased TGS stock or calls thereon from November 12, 1963 through April 16, 1964 on the basis of material inside information concerning the results of TGS drilling in Timmins, Ontario, while such information remained undisclosed to the investing public generally or to the particular sellers; [FN2] (2) that defendants Darke and Coates had divulged such information to others for use in purchasing TGS stock or calls [FN3] or recommended its purchase while the information was undisclosed to the public or to the sellers; [FN4] that defendants Stephens, Fogarty, Mollison, Holyk, and Kline had accepted options to purchase TGS stock on Feb. 20, 1964 without disclosing the material information as to the drilling progress to either the Stock Option Committee or the TGS Board of Directors; and (4) that TGS issued a deceptive press release on April 12, 1964. The case was tried at length before Judge Bonsal of the Southern District of New York, sitting without a jury. Judge Bonsal in a

detailed opinion [FN5] decided, inter alia, that the insider activity prior to April 9, 1964 was not illegal because the drilling results were not 'material' until then; that Clayton and Crawford had traded in violation of law because they traded after that date; that Coates had committed no violation as he did not trade before disclosure was made; and that the issuance of the press release was not unlawful because it was not issued for the purpose of benefiting the corporation, there was no evidence that any insider used the release to his personal advantage and it was not 'misleading, or deceptive on the basis of the facts then known,' 258 F.Supp. 262, at 292- 296 (SDNY 1966). Defendants Clayton and Crawford appeal from that part of the decision below which held that they had violated Sec. 10 (b) and Rule 10b-5 and the SEC appeals from the remainder of the decision which dismissed the complaint against defendants TGS, Fogarty, Mollison, Holyk, Darke, Stephens, Kline, Murray, and Coates. [FN6]

FN1. Pursuant to a stipulation by all parties, the question of the appropriate remedies to be applied was deferred pending a final determination whether the defendants or any of them had violated Section 10(b) and Rule 10b-5 and therefore that question is not now before us.

FN2. The purchases by the parties during this period were:

Purchase Date	Purchaser	Shares Number	Shares Price	Calls Number	Calls Price
Hole K-55-1 Completed November 12, 1963					
1963					
Nov. 12	Fogarty	300	17 3/4-18		
15	Clayton	200	17 3/4		
15	Fogarty	700	17 5/8-17 7/8		
15	Mollison	100	17 7/8		
19	Fogarty	500	18 1/8		
26	Fogarty	200	17 3/4		
29	Holyk (Mrs.)	50	18		
Chemical Assays of Drill Core of K-55-1 Received December 9-13, 1963					
Dec. 10	Holyk (Mrs.)	100	20 3/8		
12	Holyk (or wife)			200	21

13	Mollison	100	21 1/8
30	Fogarty	200	22
31	Fogarty	100	23 1/4

1964

Jan. 6	Holyk (or wife)	100	23 5/8
8	Murray	400	23 1/4
24	Holyk (or wife)	200	22 1/4-22 3/8

Feb. 10	Fogarty	300	22 1/8-22 1/4
20	Darke	300	24 1/8
24	Clayton	400	23 7/8
24	Holyk (or wife)	200	24 1/8
26	Holyk (or wife)	200	23 3/8
26	Huntington	50	23 1/4
27	Darke (Moran as nominee)	1000	22 5/8-22 3/4

Mar. 2	Holyk (Mrs.)	200	22 3/8
3	Clayton	100	22 1/4
16	Huntington	100	22 3/8
16	Holyk (or wife)	300	23 1/4
17	Holyk (Mrs.)	100	23 7/8
23	Darke	1000	24 3/4
26	Clayton	200	25

Land Acquisition Completed March 27, 1964

Mar. 30	Darke	1000	25 1/2
30	Holyk (Mrs.)	100	25 7/8

Core Drilling of Kidd Segment Resumed March 31, 1964

April 1	Clayton	60	26 1/2
1	Fogarty	400	26 1/2
2	Clayton	100	26 7/8
6	Fogarty	400	28 1/8-28 7/8
8	Mollison (Mrs.)	100	28 1/8

First Press Release Issued April 12, 1964

April 15	Clayton	200	29 3/8
16	Crawford (and wife)	600	30 1/8-30 1/4

Second Press Release Issued 10:00-10:10 or 10:15 A.M.,April 16, 1964

April 16 (app. 10:20 A.M.)
Coates
(for family trusts) 2000 31 -31 5/8

FN3. A 'call' is a negotiable option contract by which the bearer has the right to buy from the writer of the contract a certain number of shares of a particular stock at a fixed price on or before a certain agreed-upon date.

FN4. The purchases made by 'tippees' during this period were:

Purchase Date	Purchaser	Shares Number	Shares Price	Calls Number	Calls Price
Chemicals Assays of K-55-1 Received Dec.9-13, 1963					
1963 Dec. 30	Caskey (Darke)			300	22 1/4
1964 Jan. 16	Westreich (Darke)	2000	21 1/4-21 3/4		
Feb. 17	Atkinson (Darke)	50	23 1/4	200	23 1/8
17	Westreich (Darke)	50	23 1/4	1000	23 1/4-23 3/8
24	Miller (Darke)			200	23 3/4
25	Miller (Darke)			300	23 3/8-23 1/2
Mar. 3	E. W. Darke (Darke)			500	22 1/2-22 5/8
17	E. W. Darke (Darke)			200	23 3/8
Land Acquisition Completed Mar. 27, 1964					
Mar. 30	Atkinson (Darke)			400	25 3/4-25 7/8
	Caskey (Darke)	100	25 7/8		
	E. W. Darke (Darke)			1000	25 3/4-25 7/8
	Miller (Darke)			200	25 1/2
	Westreich (Darke)	500	25 3/4		
30-31	Klotz (Darke)			2000	25 1/2-26 1/8
Second Press Release Issued April 16, 1964 (Reported over Dow Jones tape at 10:54 A.M.)					
April 16 (from 10:31 A.M.)	Haemisegger (Coates)	1500	31 1/4-35		

In this connection, we point out that, though several of the Holyk purchases of shares and calls made between November 29, 1963 and March 30, 1964 were in the name of Mrs. Holyk or were in the names of both spouses, we have treated these purchases as if made in the name of defendant Holyk alone.

Defendant Mollison purchased 100 shares on November 15 in his name only and on April 8 100 shares were purchased in the name of Mrs. Mollison. We have made no distinction between those purchases. Defendant Crawford ordered 300 shares about midnight on April 15 and 300 more shares the following morning, to be purchased for himself, and his wife, and these purchases are treated as having been made by the defendant Crawford. In

these particulars we have followed the lead of the court below. See the table at 258 F.Supp. 273-275 and the special references to the Holyk purchases at 273, and the Crawford purchases at 287. It would be unrealistic to include any of these purchases as having been made by other than the defendants, and unrealistic to include them as having been made by members of the general public receiving "tips" from insiders.

FN5. 258 F.Supp. 262 (SDNY 1966).

FN6. Defendant O'Neill did not appear to answer the charge against him; the SEC motion to enter a default judgment against him was denied without prejudice to its renewal upon completion of this appeal. Shortly after the appeal was argued defendant Lamont passed away, and by agreement of the parties an order was entered discontinuing his appeal and directing that the judgment below dismissing the action against him be severed from the judgment as to the other defendants. The SEC does not contest the alternative holding below that Holyk and Mollison, not being members of TGS's top management, had no duty of disclosure prior to acceptance of stock options.

For reasons which appear below, we decide the various issues presented as follows:

(1) As to Clayton and Crawford, as purchasers of stock on April 15 and 16, 1964, we affirm the finding that they violated 15 U.S.C. § 78j(b) and Rule 10b-5 and remand, pursuant to the agreement by all the parties, for a determination of the appropriate remedy.

(2) As to Murray, we affirm the dismissal of the complaint.

(3) As to Mollison and Holyk, as recipients of certain stock options, we affirm the dismissal of the complaint.

(4) As to Stephens and Fogarty, as recipients of stock options, we reverse the dismissal of the complaint and remand for a further determination as to whether an injunction, in the exercise of the trial court's discretion, should issue.

(5) As to Kline, as a recipient of a stock option, we reverse the dismissal of the complaint and remand with directions to issue an order rescinding the option and for a determination of any other appropriate remedy in connection therewith.

(6) As to Fogarty, Mollison, Holyk, Darke, and Huntington, as purchasers of stock or calls thereon between November 12, 1963, and April 9, 1964, we reverse the dismissal of the complaint and find that they violated 15 U.S.C. § 78j(b) and Rule 10b-5, and remand, pursuant to the agreement of all the parties, for a determination of the appropriate remedy.

(7) As to Clayton, although the district judge did not specify that the complaint be dismissed with respect to his purchases of TGS stock before April 9, 1964, such a dismissal is implicit in his treatment of the individual appellees who acted similarly. Consequently, although Clayton is named only as an appellant our decision with respect to the materiality of K- 55-1 renders it necessary to treat him also as an appellee. Thus, as to him, as one who purchased stock between November 12, 1963 and April 9, 1964, we reverse the implicit dismissal of the complaint, find that he violated § 78j(b) and Rule 10b-5, and remand, pursuant to the agreement by all the parties, for a determination of the appropriate remedy.

(8) As to Darke, as one who passed on information to tippees, we reverse the dismissal of the complaint and remand, pursuant to the agreement by all the parties, for a determination of the appropriate remedy.

(9) As to Coates, as one who on April 16th purchased stock and gave information on which his son-in-law broker and the broker's customers purchased shares, we reverse the dismissal of the complaint, find that he violated 15 U.S.C. § 78j(b) and Rule 10b-5, and remand, pursuant to the agreement by all the parties, for a determination of the appropriate remedy.

(10) As to Texas Gulf Sulphur, we reverse the dismissal of the complaint and remand for a further determination by the district judge in the light of the approach taken in this opinion.

The occurrences out of which this litigation arose are not set forth hereafter in as detailed a manner as they are set out in the published opinion of the court below, but are stated sufficiently, we believe, for the exposition of the issues raised by the several appeals to us.

THE FACTUAL SETTING

This action derives from the exploratory activities of TGS begun in 1957 on the Canadian Shield in eastern Canada. In March of 1959, aerial geophysical surveys were conducted over more than 15,000 square miles of this area by a group led by defendant Mollision, a mining engineer and a Vice President of TGS. The group included defendant Holyk, TGS's chief geologist, defendant Clayton, an electrical engineer and geophysicist, and defendant Darke, a geologist. These operations resulted in the detection of numerous anomalies, i.e., extraordinary variations in the conductivity of rocks, one of which was on the Kidd 55 segment of land located near Timmins, Ontario.

On October 29 and 30, 1963, Clayton conducted a ground geophysical survey on the northeast portion of the Kidd 55 segment which confirmed the presence of an anomaly and indicated the necessity of diamond core drilling for further evaluation. Drilling of the initial hole, K-55-1, at the strongest part of the anomaly was commenced on November 8 and terminated on November 12 at a depth of 655 feet. Visual estimates by Holyk of the core of K-55-1 indicated an average copper content of 1.15% And an average zinc content of 8.64% Over a length of 599 feet. This visual estimate convinced TGS that it was desirable to acquire the remainder of the Kidd 55 segment, and in order to facilitate this acquisition TGS President Stephens instructed the exploration group to keep the results of K-55-1 confidential and undisclosed even as to other officers, directors, and employees of TGS. The hole was concealed and a barren core was intentionally drilled off the anomaly. Meanwhile, the core of K-55-1 had been shipped to Utah for chemical assay which,

when received in early December, revealed an average mineral content of 1.18% Copper, 8.26% Zinc, and 3.94% Ounces of silver per ton over a length of 602 feet. These results were so remarkable that neither Clayton, an experienced geophysicist, nor four other TGS expert witnesses, had ever seen or heard of a comparable initial exploratory drill hole in a base metal deposit. So, the trial court concluded, 'There is no doubt that the drill core of K-55-1 was unusually good and that it excited the interest and speculation of those who knew about it.' Id. at 282. By March 27, 1964, TGS decided that the land acquisition program had advanced to such a point that the company might well resume drilling, and drilling was resumed on March 31.

During this period, from November 12, 1963 when K-55-1 was completed, to March 31, 1964 when drilling was resumed, certain of the individual defendants listed in fn. 2, supra, and persons listed in fn. 4, supra, said to have received 'tips' from them, purchased TGS stock or calls thereon. Prior to these transactions these persons had owned 1135 shares of TGS stock and possessed no calls; thereafter they owned a total of 8235 shares and possessed 12,300 calls.

On February 20, 1964, also during this period, TGS issued stock options to 26 of its officers and employees whose salaries exceeded a specified amount, five of whom were the individual defendants Stephens, Fogarty, Mollison, Holyk, and Kline. Of these, only Kline was unaware of the detailed results of K-55-1, but he, too, knew that a hole containing favorable bodies of copper and zinc ore had been drilled in Timmins. At this time, neither the TGS Stock Option Committee nor its Board of Directors had been informed of the results of K-55- 1, presumably because of the pending land acquisition program which required confidentiality. All of the foregoing defendants accepted the options granted them.

When drilling was resumed on March 31, hole K-55-3 was commenced 510 feet west of K-55-1 and was drilled easterly at a 45 degrees angle so as to cross K-55-1 in a vertical plane. Daily progress reports of the drilling of this hole K-55-3 and of all subsequently drilled holes were sent to defendants Stephens and Fogarty (President and Executive Vice President of TGS) by Holyk and Mollison. Visual estimates of K-55-3 revealed an average mineral content of 1.12% Copper and

7.93% Zinc over 641 of the hole's 876-foot length. On April 7, drilling of a third hole, K-55-4, 200 feet south of and parallel to K-55-1 and westerly at a 45 degrees angle, was commenced and mineralization was encountered over 366 of its 579-foot length. Visual estimates indicated an average content of 1.14% Copper and 8.24% Zinc. Like K-55-1, both K-55-3 and K-55-4 established substantial copper mineralization on the eastern edge of the anomaly. On the basis of these findings relative to the foregoing drilling results, the trial court concluded that the vertical plane created by the intersection of K-55-1 and K-55-3, which measured at least 350 feet wide by 500 feet deep extended southward 200 feet to its intersection with K-55-4, and that 'There was real evidence that a body of commercially mineable ore might exist.' Id. at 281- 82.

On April 8 TGS began with a second drill rig to drill another hole, K-55-6, 300 feet easterly of K-55-1. This hole was drilled westerly at an angle of 60 degrees and was intended to explore mineralization beneath K-55-1. While no visual estimates of its core were immediately available, it was readily apparent by the evening of April 10 that substantial copper mineralization had been encountered over the last 127 feet of the hole's 569-foot length. On April 10, a third drill rig commenced drilling yet another hole, K-55-5, 200 feet north of K-55-1, parallel to the prior holes, and slanted westerly at a 45 degrees angle. By the evening of April 10 in this hole, too, substantial copper mineralization had been encountered over the last 42 feet of its 97-foot length.

Meanwhile, rumors that a major ore strike was in the making had been circulating throughout Canada. On the morning of Saturday, April 11, Stephens at his home in Greenwich, Conn. read in the New York Herald Tribune and in the New York Times unauthorized reports of the TGS drilling which seemed to infer a rich strike from the fact that the drill cores had been flown to the United States for chemical assay. Stephens immediately contacted Fogarty at his home in Rye, N.Y., who in turn telephoned and later that day visited Mollison at Mollison's home in Greenwich to obtain a current report and evaluation of the drilling progress. [FN7] The following morning, Sunday, Fogarty again telephoned Mollison, inquiring whether Mollison had any further information and told him to return to Timmins with Holyk, the TGS Chief Geologist, as soon as possible 'to move things along.' With the aid of one

Carroll, a public relations consultant, Fogarty drafted a press release designed to quell the rumors, which release, after having been channeled through Stephens and Huntington, a TGS attorney, was issued at 3:00 P.M. on Sunday, April 12, and which appeared in the morning newspapers of general circulation on Monday, April 13. It read in pertinent part as follows:

> FN7. Mollison had returned to the United States for the weekend. Friday morning, April 10, he had been on the Kidd tract 'and had been advised by defendant Holyk as to the drilling results to 7:00 p.m. on April 10. At that time drill holes K-55-1, K-55-3 and K-55-4 had been completed; drilling of K-55-5 had started on Section 2200 S and had been drilled to 97 feet, encountering mineralization on the last 42 feet; and drilling of K- 55-6 had been started on Section 2400 S and had been drilled to 569 feet, encountering mineralization over the last 127 feet.' Id. at 294.

NEW YORK, April 12-- The following statement was made today by Dr. Charles F. Fogarty, executive vice president of Texas Gulf Sulphur Company, in regard to the company's drilling operations near Timmins, Ontario, Canada. Dr. Fogarty said:

> 'During the past few days, the exploration activities of Texas Gulf Sulphur in the area of Timmins, Ontario, have been widely reported in the press, coupled with rumors of a substantial copper discovery there. These reports exaggerate the scale of operations, and mention plans and statistics of size and grade of ore that are without factual basis and have evidently originated by speculation of people not connected with TGS.
>
> 'The facts are as follows. TGS has been exploring in the Timmins area for six years as part of its overall search in Canada and elsewhere for various minerals-- lead, copper, zinc, etc. During the course of this work, in Timmins as well as in Eastern Canada, TGS has conducted exploration entirely on its own, without the participation by others. Numerous prospects have been investigated by geophysical means and a large number of selected ones have been core-drilled. These cores are sent to the United States for assay and detailed examination as a matter of routine and on advice of expert

Canadian legal counsel. No inferences as to grade can be drawn from this procedure.

'Most of the areas drilled in Eastern Canada have revealed either barren pyrite or graphite without value; a few have resulted in discoveries of small or marginal sulphide ore bodies.

'Recent drilling on one property near Timmins has led to preliminary indications that more drilling would be required for proper evaluation of this prospect. The drilling done to date has not been conclusive, but the statements made by many outside quarters are unreliable and include information and figures that are not available to TGS.

'The work done to date has not been sufficient to reach definite conclusions and any statement as to size and grade of ore would be premature and possibly misleading. When we have progressed to the point where reasonable and logical conclusions can be made, TGS will issue a definite statement to its stockholders and to the public in order to clarify the Timmins project.'

The release purported to give the Timmins drilling results as of the release date, April 12. From Mollison Fogarty had been told of the developments through 7:00 P.M. on April 10, and of the remarkable discoveries made up to that time, detailed supra, which discoveries, according to the calculations of the experts who testified for the SEC at the hearing, demonstrated that TGS had already discovered 6.2 to 8.3 million tons of proven ore having gross assay values from $26 to $29 per ton. TGS experts, on the other hand, denied at the hearing that proven or probable ore could have been calculated on April 11 or 12 because there was then no assurance of continuity in the mineralized zone.

The evidence as to the effect of this release on the investing public was equivocal and less than abundant. On April 13 the New York Herald Tribune in an article head-noted 'Copper Rumor Deflated' quoted from the TGS release of April 12 and backtracked from its original April 11 report of a major strike but nevertheless

inferred from the TGS release that 'recent mineral exploratory activity near Timmins, Ontario, has provided preliminary favorable results, sufficient at least to require a step-up in drilling operations.' Some witnesses who testified at the hearing stated that they found the release encouraging. On the other hand, a Canadian mining security specialist, Roche, stated that 'earlier in the week (before April 16) we had a Dow Jones saying that they (TGS) didn't have anything basically' and a TGS stock specialist for the Midwest Stock Exchange became concerned about his long position in the stock after reading the release. The trial court stated only that 'While, in retrospect, the press release may appear gloomy or incomplete, this does not make it misleading or deceptive on the basis of the facts then known.' Id. at 296.

Meanwhile, drilling operations continued. By morning of April 13, in K-55-5, the fifth drill hole, substantial copper mineralization had been encountered to the 580 foot mark, and the hole was subsequently drilled to a length of 757 feet without further results. Visual estimates revealed an average content of 0.82% Copper and 4.2% Zinc over a 525-foot section. Also by 7:00 A.M. on April 13, K-55-6 had found mineralization to the 946-foot mark. On April 12 a fourth drill rig began to drill K-55-7, which was drilled westerly at a 45 degrees angle, at the eastern edge of the anomaly. The next morning the 137 foot mark had been reached, fifty feet of which showed mineralization. By 7:00 P.M. on April 15, the hole had been completed to a length of 707 feet but had only encountered additional mineralization during a 26-foot length between the 425 and 451-foot marks. A mill test hole, K-55-8, had been drilled and was complete by the evening of April 13 but its mineralization had not been reported upon prior to April 16. K-55-10 was drilled westerly at a 45 degrees angle commencing April 14 and had encountered mineralization over 231 of its 249-foot length by the evening of April 15. It, too, was drilled at the anomaly's eastern edge.

While drilling activity ensued to completion, TGC officials were taking steps toward ultimate disclosure of the discovery. On April 13, a previously-invited reporter for The Northern Miner, a Canadian mining industry journal, visited the drillsite, interviewed Mollison, Holyk and Darke, and prepared an article which confirmed a 10 million ton ore strike. This report, after having been submitted to Mollison and

returned to the reporter unamended on April 15, was published in the April 16 issue. A statement relative to the extent of the discovery, in substantial part drafted by Mollison, was given to the Ontario Minister of Mines for release to the Canadian media. Mollison and Holyk expected it to be released over the airways at 11 P.M. on April 15th, but, for undisclosed reasons, it was not released until 9:40 A.M. on the 16th. An official detailed statement, announcing a strike of at least 25 million tons of ore, based on the drilling data set forth above, was read to representatives of American financial media from 10:00 A.M. to 10:10 or 10:15 A.M. on April 16, and appeared over Merrill Lynch's private wire at 10:29 A.M. and, somewhat later than expected, over the Dow Jones ticker tape at 10:54 A.M.

Between the time the first press release was issued on April 12 and the dissemination of the TGS official announcement on the morning of April 16, the only defendants before us on appeal who engaged in market activity were Clayton and Crawford and TGS director Coates. Clayton ordered 200 shares of TGS stock through his Canadian broker on April 15 and the order was executed that day over the Midwest Stock Exchange. Crawford ordered 300 shares at midnight on the 15th and another 300 shares at 8:30 A.M. the next day, and these orders were executed over the Midwest Exchange in Chicago at its opening on April 16. Coates left the TGS press conference and called his broker son-in-law Haemisegger shortly before 10:20 A.M. on the 16th and ordered 2,000 shares of TGS for family trust accounts of which Coates was a trustee but not a beneficiary; Haemisegger executed this order over the New York and Midwest Exchanges, and he and his customers purchased 1500 additional shares.

During the period of drilling in Timmins, the market price of TGS stock fluctuated but steadily gained overall. On Friday, November 8, when the drilling began, the stock closed at 17 3/8 ; on Friday, November 15, after K- 55-1 had been completed, it closed at 18. After a slight decline to 16 3/8 by Friday, November 22, the price rose to 20 7/8 by December 13, when the chemical assay results of K-55-1 were received, and closed at a high of 24 1/8 on February 21, the day after the stock options had been issued. It had reached a price of 26 by March 31, after the land acquisition program had been completed and drilling had been resumed, and continued to ascend to 30 1/8 by the close of trading on April 10, at which time the

drilling progress up to then was evaluated for the April 12th press release. On April 13, the day on which the April 12 release was disseminated, TGS opened at 30 1/8 , rose immediately to a high of 32 and gradually tapered off to close at 30 7/8 . It closed at 30 1/4 the next day, and at 29 3/8 on April 15. On April 16, the day of the official announcement of the Timmins discovery, the price climbed to a high of 37 and closed at 36 3/8 . By May 15, TGS stock was selling at 58 1/4.

I. THE INDIVIDUAL DEFENDANTS

A. Introductory

Rule 10b-5, 17 CFR 240.10b-5, on which this action is predicated, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
> (1) to employ any device, scheme, or artifice to defraud,
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[1][2][3][4][5] Rule 10b-5 was promulgated pursuant to the grant of authority given the SEC by Congress in Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b). [FN8] By that Act Congress purposed to prevent inequitable and unfair practices and to insure fairness in securities transactions generally, whether conducted face-to-face, over the counter, or on exchanges, see 3 Loss, Securities Regulation 1455-56 (2d ed. 1961). The Act and the Rule apply to the transactions here, all of which were consummated on exchanges. See List v. Fashion Park, Inc., 340 F.2d 457, 461- 62 (2 Cir.), cert. denied, 382 U.S. 811, 86 S.Ct. 23, 15 L.Ed.2d 60 (1965); Cochran v. Channing Corp., 211 F.Supp. 239, 243

(SDNY 1962). Whether predicated on traditional fiduciary concepts, see, e.g., Hotchkiss v. Fisher, 136 Kan. 530, 16 P.2d 531 (Kan.1932), or on the 'special facts' doctrine, see, e.G., Strong v. Repide, 213 U.S. 419, 29 S.Ct. 521, 53 L.Ed. 853 (1909), the Rule is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information, see Cary, Insider Trading in Stocks, 21 Bus.Law. 1009, 1010 (1966), Fleischer, Securities Trading and Corporation Information Practices: The Implications of the Texas Gulf Sulphur Proceeding, 51 Va.L.Rev. 1271, 1278-80 (1965). The essence of the Rule is that anyone who, trading for his own account in the securities of a corporation has 'access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone' may not take 'advantage of such information knowing it is unavailable to those with whom he is dealing,' i.E., the investing public. Matter of Cady, Roberts & Co., 40 SEC 907, 912 (1961). Insiders, as directors or management officers are, of course, by this Rule, precluded from so unfairly dealing, but the Rule is also applicable to one possessing the information who may not be strictly termed an 'insider' within the meaning of Sec. 16(b) of the Act. Cady, Roberts, supra. Thus, anyone in possession of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed. So, it is here no justification for insider activity that disclosure was forbidden by the legitimate corporate objective of acquiring options to purchase the land surrounding the exploration site; if the information was, as the SEC contends, material, [FN9] its possessors should have kept out of the market until disclosure was accomplished. Cady, Roberts, supra at 911.

FN8. 15 U.S.C. § 78j reads in pertinent part as follows:

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

FN9. Congress intended by the Exchange Act to eliminate the idea that the use of inside information for personal advantage was a normal emolument of corporate office. See Sections 2 and 16 of the Act; H.R.Rep.No. 1383, 73rd Cong., 2d Sess. 13 (1934); S.Rep.No. 792, 73rd Cong., 2d Sess. 9 (1934); S.E.C., Tenth Annual Report 50 (1944). See Cady, Roberts, supra at 912.

B. Material Inside Information

[6] An insider is not, of course, always foreclosed from investing in his own company merely because he may be more familiar with company operations than are outside investors. An insider's duty to disclose information or his duty to abstain from dealing in his company's securities arises only in 'those situations which are essentially extraordinary in nature and which are reasonably certain to have a substantial effect on the market price of the security if (the extraordinary situation is) disclosed.' Fleischer, Securities Trading and Corporate Information Practices: The Implications of the Texas Gulf Sulphur Proceeding, 51 Va.L.Rev. 1271, 1289.

[7] Nor is an insider obligated to confer upon outside investors the benefit of his superior financial or other expert analysis by disclosing his educated guesses or predictions. 3 Loss, op. cit. supra at 1463. The only regulatory objective is that access to material information be enjoyed equally, but this objective requires nothing more than the disclosure of basic facts so that outsiders may draw upon their own evaluative expertise in reaching their own investment decisions with knowledge equal to that of the insiders.

[8][9][10] This is not to suggest, however, as did the trial court, the 'the test of materiality must necessarily be a conservative one, particularly since many actions under Section 10(b) are brought on the basis of hindsight,'258 F.Supp. 262 at 280, in the sense that the materiality of facts is to be assessed solely by measuring the effect the knowledge of the facts would have upon prudent or conservative investors. As we stated in List v. Fashion Park, Inc., 340 F.2d 457, 462, 'The basic test of materiality * * * is whether a reasonable man would attach importance * * * in determining his choice of action in the transaction in question. Restatement, Torts § 538(2)(a); accord Prosser, Torts 554-55; I Harper & James, Torts 565-66.' This, of course, encompasses any fact '* * * which in reasonable and objective contemplation might affect the value of the corporation's stock or securities * * *.' List v. Fashion Park, Inc., supra at 462, quoting from Kohler v. Kohler Co., 319 F.2d 634, 642, 7 A.L.R.3d 486 (7 Cir. 1963). Such a fact is a material fact and must be effectively disclosed to the investing public prior to the commencement of insider trading in the corporation's securities. The speculators and chartists of Wall and Bay Streets are also 'reasonable' investors entitled to the same legal protection afforded conservative traders. [FN10] Thus, material facts include not only information disclosing the earnings and distributions of a company but also those facts which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company's securities.

> FN10. The House of Representatives committee that reported out the bill which eventually became the Act did so with the observation that 'no investor, no speculator, can safely buy and sell securities upon exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells.' H.R.Rep.No. 1383, 73d Cong., 2d Sess. (1934), p. 11. (Emphasis supplied.)
>
> Dr. Bellemore, the Texas Gulf defendants' expert witness, has written: 'The intelligent speculator assumes that facts are available for a thorough analysis. The speculator then examines the facts to discover and evaluate the risks that are present. He then balances these risks against the apparent opportunities for capital gains and makes his decision accordingly. He is, to

> the best of his ability, taking calculated risks.' Bellemore, Investments: Principles, Practices and Analysis 4 (2d ed.1962).

[11][12] In each case, then, whether facts are material within Rule 10b-5 when the facts relate to a particular event and are undisclosed by those persons who are knowledgeable thereof will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity. Here, notwithstanding the trial court's conclusion that the results of the first drill core, K-55-1, were 'too 'remote' * * * to have had any significant impact on the market, i.e., to be deemed material,' [FN11] 258 F.Supp. at 283, knowledge of the possibility, which surely was more than marginal, of the existence of a mine of the vast magnitude indicated by the remarkably rich drill core located rather close to the surface (suggesting mineability by the less expensive openpit method) within the confines of a large anomaly (suggesting an extensive region of mineralization) might well have affected the price of TGS stock and would certainly have been an important fact to a reasonable, if speculative, investor in deciding whether he should buy, sell, or hold. After all, this first drill core was 'unusually good and * * * excited the interest and speculation of those who knew about it.' 258 F.Supp. at 282.

> FN11. We are not, of course, bound by the trial court's determination as to materiality unless we find it 'clearly erroneous' for that standard of appellate review is applicable only to issues of basic fact and not to issues of ultimate fact. See Baranow v. Gibraltar Factors Corp., 366 F.2d 584, 587 (2 Cir. 1966); Mamiye Bros. v. Barber S.S. Lines, Inc., 360 F.2d 774, 776-778 (2 Cir.), cert. denied, 385 U.S. 835, 87 S.Ct. 80, 17 L.Ed.2d 70 (1966); see also SEC v. R.A. Holman & Co., 366 F.2d 456, 457-458 (2 Cir. 1966) (by implication).

[13] Our disagreement with the district judge on the issue does not, then, go to his findings of basic fact, as to which the 'clearly erroneous' rule would apply, but to his understanding of the legal standard applicable to them. See Baranow v. Gibralter Factors Corp., 366 F.2d 584, 587-589 (2 Cir. 1966), and cases cited in footnote 11 supra. Our survey of the facts found below conclusively establishes that knowledge of the results of the discovery hole, K-55-1, would have been important to a

reasonable investor and might have affected the price of the stock. [FN12] On April 16, The Northern Miner, a trade publication in wide circulation among mining stock specialists, called K- 55-1, the discovery hole, 'one of the most impressive drill holes completed in modern times.' [FN13] Roche, a Canadian broker whose firm specialized in mining securities, characterized the importance to investors of the results of K-55-1. He stated that the completion of 'the first drill hole' with 'a 600 foot drill core is very very significant * * * anything over 200 feet is considered very significant and 600 feet is just beyond your wildest imagination.' He added, however, that it 'is a natural thing to buy more stock once they give you the first drill hole.' Additional testimony revealed that the prices of stocks of other companies, albeit less diversified, smaller firms, had increased substantially solely on the basis of the discovery of good anomalies or even because of the proximity of their lands to the situs of a potentially major strike.

FN12. We do not suggest that material facts must be disclosed immediately; the timing of disclosure is a matter for the business judgment of the corporate officers entrusted with the management of the corporation within the affirmative disclosure requirements promulgated by the exchanges and by the SEC. Here, a valuable corporate purpose was served by delaying the publication of the K-55-1 discovery. We do intend to convey, however, that where a corporate purpose is thus served by withholding the news of a material fact, those persons who are thus quite properly true to their corporate trust must not during the period of non-disclosure deal personally in the corporation's securities or give to outsiders confidential information not generally available to all the corporations' stockholders and to the public at large.

FN13. The April 16th article in The Northern Miner resulted from the reporter's April 13th visit to the drill site where he interviewed defendants Mollison, Holyk and Darke and looked at records of the drilling to that time. The text of the article was approved by Mollison in Timmins on April 15th. The first five paragraphs read as follows:

Should Make Substantial Open Pit Operation TEXAS GULF SULPHUR COMES UP WITH A 'MAJOR' See Big Tonnages Of Base Metals, Plus Silver

Texas Gulf Sulphur has chalked up a brilliant exploration success in its field program north of the Porcupine area. Following a visit to the discovery property, The Northern Miner can say that a major new zinc- copper-silver mine is definitely in the making, one that has all the earmarks of shaping into a substantial open pit operation.

Only a relative handful of holes has been completed since the discovery hole but on the basis of seven tests either completed or drilling it can be stated that a strike length of 600 ft. minimum has been established, showing an ore width of roughly 300 ft. which has been traced so far to a maximum vertical depth of about 800 ft.

So recent has been the discovery, and so urgent the effort to accelerate the drill program (four machines have been moved in since the discovery hole was completed), that assays have been completed on only the discovery. But this must be recorded as one of the most impressive drill holes completed in modern times.

For a core length of a shade better than 600 ft., the hole averaged in excess of 1% Copper, 8% Zinc and nearly four ounces of silver.

And there are impressive, strong sections within this width which in themselves are quite spectacular. In the upper part of the hole, for example, a core length of 82 ft. ran 7.1% Copper, 9.7% Zinc and 2.4 ozs. silver. This was followed by continuous values of ore tenor--deeper down, a 100-ft. section runs 0.33% Copper, 0.8% Lead, 14.3% Zinc and 4.2 ozs. silver. And still deeper, a strong zinc section of better than 100 ft. averaged out to in excess of seven ounces of silver in addition to ore- grade zinc values.

Finally, a major factor in determining whether the K-55-1 discovery was a material fact is the importance attached to the drilling results by those who knew about it. In view of other unrelated recent developments favorably affecting TGS, participation by an informed person in a regular stock-purchase program, or even sporadic trading by an informed person, might lend only nominal support to the inference of the materiality of the K-55-1 discovery; nevertheless, the timing by those who knew of it of their stock purchases and their purchases of short-term calls-- purchases in some cases by individuals who had never before purchased calls or even TGS stock-- virtually compels the inference that the insiders were influenced by the drilling results. This insider trading activity, which surely constitutes highly pertinent evidence and the only truly objective evidence of the materiality of the K-55-1 discovery, was apparently disregarded by the court below in favor of the testimony of defendants' expert witnesses, all of whom 'agreed that one drill core does not establish an ore body, much less a mine,' 258 F.Supp. at 282- 283. Significantly, however, the court below, while relying upon what these defense experts said the defendant insiders ought to have thought about the worth to TGS of the K-55-1 discovery, and finding that from November 12, 1963 to April 6, 1964 Fogarty, Murray, Holyk and Darke spent more than $100,000 in purchasing TGS stock and calls on that stock, made no finding that the insiders were motivated by any factor other than the extraordinary K-55-1 discovery when they bought their stock and their calls. No reason appears why outside investors, perhaps better acquainted with speculative modes of investment and with, in many cases, perhaps more capital at their disposal for intelligent speculation, would have been less influenced, and would not have been similarly motivated to invest if they had known what the insider investors knew about the K-55-1 discovery.

Our decision to expand the limited protection afforded outside investors by the trial court's narrow definition of materiality is not at all shaken by fears that the elimination of insider trading benefits will deplete the ranks of capable corporate managers by taking away an incentive to accept such employment. Such benefits, in essence, are forms of secret corporate compensation, see Cary, Corporate Standards and Legal Rules, 50 Calif.L.Rev. 408, 409-10 (1962), derived at the expense of the uninformed investing public and not at the expense of the corporation which receives the sole benefit from insider incentives. Moreover, adequate incentives for corporate officers may be provided by properly

administered stock options and employee purchase plans of which there are many in existence. In any event, the normal motivation induced by stock ownership, i.e., the identification of an individual with corporate progress, is ill-promoted by condoning the sort of speculative insider activity which occurred here; for example, some of the corporation's stock was sold at market in order to purchase short-term calls upon that tock, calls which would never be exercised to increase a stockholder equity in TGS unless the market price of that stock rose sharply.

[14] The core of Rule 10b-5 is the implementation of the Congressional purpose that all investors should have equal access to the rewards of participation in securities transactions. It was the intent of Congress that all members of the investing public should be subject to identical market risks,-- which market risks include, of course the risk that one's evaluative capacity or one's capital available to put at risk may exceed another's capacity or capital. The insiders here were not trading on an equal footing with the outside investors. They alone were in a position to evaluate the probability and magnitude of what seemed from the outset to be a major ore strike; they alone could invest safely, secure in the expectation that the price of TGS stock would rise substantially in the event such a major strike should materialize, but would decline little, if at all, in the event of failure, for the public, ignorant at the outset of the favorable probabilities would likewise be unaware of the unproductive exploration, and the additional exploration costs would not significantly affect TGS market prices. Such inequities based upon unequal access to knowledge should not be shrugged off as inevitable in our way of life, or, in view of the congressional concern in the area, remain uncorrected.

[15] We hold, therefore, that all transactions in TGS stock or calls by individuals apprised of the drilling results [FN14] of K-55-1 were made in violation of Rule 10b-5. [FN15] Inasmuch as the visual evaluation of that drill core (a generally reliable estimate though less accurate than a chemical assay) constituted material information, those advised of the results of the visual evaluation as well as those informed of the chemical assay traded in violation of law. The geologist Darke possessed undisclosed material information and traded in TGS securities. Therefore we reverse the dismissal of the action as to him and his personal transactions. The trial court also found, 258 F.Supp. at 284, that Darke, after the drilling of K-55-1

had been completed and with detailed knowledge of the results thereof, told certain outside individuals that TGS 'was a good buy.' These individuals thereafter acquired TGS stock and calls. The trial court also found that later, as of March 30, 1964, Darke not only used his material knowledge for his own purchases but that the substantial amounts of TGS stock and calls purchased by these outside individuals on that day, see footnote 4, supra, was 'strong circumstantial evidence that Darke must have passed the word to one or more of his 'tippees' that drilling on the Kidd 55 segment was about to be resumed.' 258 F.Supp. at 284. Obviously if such a resumption were to have any meaning to such 'tippees,' they must have previously been told of K-55-1.

> FN14. The trial court found that defendant Murray 'had no detailed knowledge as to the work' on the Kidd-55 segment. There is no evidence in the record suggesting that Murray purchased his stock on January 8, 1964, on the basis of material undisclosed information, and the disposition below is undisturbed as to him.
>
> FN15. Even if insiders were in fact ignorant of the broad scope of the Rule and acted pursuant to a mistaken belief as to the applicable law such an ignorance does not insulate them from the consequences of their acts. Tager v. SEC, 344 F.2d 5, 8 (2 Cir. 1965).

[16] Unfortunately, however, there was no definitive resolution below of Darke's liability in these premises for the trial court held as to him, as it held as to all the other individual defendants, that this 'undisclosed information' never became material until April 9. As it is our holding that the information acquired after the drilling of K-55-1 was material, we, on the basis of the findings of direct and circumstantial evidence on the issue that the trial court has already expressed, hold that Darke violated Rule 10b-5(3) and Section 10(b) by 'tipping' and we remand, pursuant to the agreement of the parties, for a determination of the appropriate remedy. [FN16] As Darke's 'tippees' are not defendants in this action, we need not decide whether, if they acted with actual or constructive knowledge that the material information was undisclosed, their conduct is as equally violative of the

Rule as the conduct of their insider source, though we note that it certainly could be equally reprehensible.

> FN16. Judges Waterman and Anderson, believing that there had been no definitive finding below as to whether Darke, expressly or by implication, transmitted to these outsiders any indication of the extremely favorable results of the drilling operation in which he was engaged, would remand for a determination on this issue, and if it should be determined that Darke did make such revelations, for a determination of the appropriate remedy.

[17] With reference to Huntington, the trial court found that he 'had no detailed knowledge as to the work' on the Kidd-55 segment, 258 F.Supp. 281. Nevertheless, the evidence shows that he knew about and participated in TGS's land acquisition program which followed the receipt of the K-55-1 drilling results, and that on February 26, 1964 he purchased 50 shares of TGS stock. Later, on March 16, he helped prepare a letter for Dr. Holyk's signature in which TGS made a substantial offer for lands near K-55-1, and on the same day he, who had never before purchased calls on any stock, purchased a call on 100 shares of TGS stock. We are satisfied that these purchases in February and March, coupled with his readily inferable and probably reliable, understanding of the highly favorable nature of preliminary operations on the Kidd segment, demonstrate that Huntington possessed material inside information such as to make his purchase violative of the Rule and the Act.

C. When May Insiders Act?

[18] Appellant Crawford, who ordered [FN17] the purchase of TGS stock shortly before the TGS April 16 official announcement, and defendant Coates, who placed orders with and communicated the news to his broker immediately after the official announcement was read at the TGS-called press conference, concede that they were in possession of material information. They contend, however, that their purchases were not proscribed purchases for the news had already been effectively disclosed. We disagree.

FN17. The effective protection of the public from insider exploitation of advance notice of material information requires that the time that an insider places an order, rather than the time of its ultimate execution, be determinative for Rule 10b-5 purposes. Otherwise, insiders would be able to 'beat the news,' cf. Fleischer, supra, 51 Va.L.Rev. at 1291, by requesting in advance that their orders be executed immediately after the dissemination of a major news release but before outsiders could act on the release. Thus it is immaterial whether Crawford's orders were executed before or after the announcement was made in Canada (9:40 A.M., April 16) or in the United States (10:00 A.M.) or whether Coates's order was executed before or after the news appeared over the Merrill Lynch (10:29 A.M.) or Dow Jones (10:54 A.M.) wires.

[19][20][21] Crawford telephoned his orders to his Chicago broker about midnight on April 15 and again at 8:30 in the morning of the 16th, with instructions to buy at the opening of the Midwest Stock Exchange that morning. The trial court's finding that 'he sought to, and did, 'beat the news," 258 F.Supp. at 287, is well documented by the record. The rumors of a major ore strike which had been circulated in Canada and, to a lesser extent, in New York, had been disclaimed by the TGS press release of April 12, which significantly promised the public an official detailed announcement when possibilities had ripened into actualities. The abbreviated announcement to the Canadian press at 9:40 A.M. on the 16th by the Ontario Minister of Mines and the report carried by The Northern Miner, parts of which had sporadically reached New York on the morning of the 16th through reports from Canadian affiliates to a few New York investment firms, are assuredly not the equivalent of the official 10-15 minute announcement which was not released to the American financial press until after 10:00 A.M. Crawford's orders had been placed before that. Before insiders may act upon material information, such information must have been effectively disclosed in a manner sufficient to insure its availibility to the investing public. Particularly here, where a formal announcement to the entire financial news media had been promised in a prior official release known to the media, all insider activity must await dissemination of the promised official announcement.

[22] Coates was absolved by the court below because his telephone order was placed shortly before 10:20 A.M. on April 16, which was after the announcement had been made even though the news could not be considered already a matter of public information. 258 F.Supp. at 288. This result seems to have been predicated upon a misinterpretation of dicta in Cady, Roberts, where the SEC instructed insiders to 'keep out of the market until the established procedures for public release of the information are carried out instead of hastening to execute transactions in advance of, and in frustration of, the objectives of the release,' 40 SEC at 915. The reading of a news release, which prompted Coates into action, is merely the first step in the process of dissemination required for compliance with the regulatory objective of providing all investors with an equal opportunity to make informed investment judgments. Assuming that the contents of the official release could instantaneously be acted upon, [FN18] at the minimum Coates should have waited until the news could reasonably have been expected to appear over the media of widest circulation, the Dow Jones broad tape, rather than hastening to insure an advantage to himself and his broker son-in-law. [FN19]

> FN18. Although the only insider who acted after the news appeared over the Dow Jones broad tape is not an appellant and therefore we need not discuss the necessity of considering the advisability of a 'reasonable waiting period' during which outsiders may absorb and evaluate disclosures, we note in passing that, where the news is of a sort which is not readily translatable into investment action, insiders may not take advantage of their advance opportunity to evaluate the information by acting immediately upon dissemination. In any event, the permissible timing of insider transactions after disclosures of various sorts is one of the many areas of expertise for appropriate exercise of the SEC's rule-making power, which we hope will be utilized in the future to provide some predictability of certainty for the business community.
>
> FN19. The record reveals that news usually appears on the Dow Jones broad tape 2-3 minutes after the reporter completes dictation. Here, assuming that the Dow Jones reporter left the press conference as early as possible, 10:10 A.M., the 10-15 minute release (which took at least that long to dictate)

could not have appeared on the wire before 10:22, and for other reasons unknown to us did not appear until 10:54. Indeed, even the abbreviated version of the release reported by Merrill Lynch over its private wire did not appear until 10:29. Coates, however, placed his call no later than 10:20.

D. Is An Insider's Good Faith A Defense Under 10b-5?

[23] Coates, Crawford and Clayton, who ordered purchases before the news could be deemed disclosed, claim, nevertheless, that they were justified in doing so because they honestly believed that the news of the strike had become public at the time they placed their orders. However, whether the case before us is treated solely as an SEC enforcement proceeding or as a private action, [FN20] proof of a specific intent to defraud is unnecessary. In an enforcement proceeding for equitable or prophylactic relief, the common law standard of deceptive conduct has been modified in the interests of broader protection for the investing public so that negligent insider conduct has become unlawful. See Berko v. SEC, 316 F.2d 137, 141-142 (2 Cir. 1963); SEC v. Capital Gains, etc., Bureau, 375 U.S. 180, 193, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963). A similar standard has been adopted in private actions, see, e.g., Stevens v. Vowell, 343 F.2d 374 (10 Cir. 1965); Ellis v. Carter, 291 F.2d 270 (9 Cir. 1961); Royal Air Properties, Inc. v. Smith, 312 F.2d 210 (9 Cir. 1962); Dack v. Shanman, 227 F.Supp. 26 (SDNY 1964); but see, e.g., Weber v. C.M.P. Corp., 242 F.Supp. 321 (SDNY 1965); Thiele v. Shields, 131 F.Supp. 416 (SDNY 1955), for policy reasons which seem perfectly consistent with the broad Congressional design '* * * to insure the maintenance of fair and honest markets in * * * (securities) transactions.' Sec. 2 of SEC Act, 15 U.S.C. § 78b, see Kohler v. Kohler Co., 319 F.2d 634, 642 (7 Cir. 1963); Note, 32 U.Chi.L.Rev. 824, 839-44 (1965); Note, 63 Mich.L.Rev. 1070, 1079-81 (1965).

FN20. The SEC seeks permanent injunctions restraining future proscribed activity by all the individual defendants and the corporation. The Commission also seeks court orders upon certain of the individual defendants that are essentially remedies of a private, rather than of a regulatory nature, court orders designed to have those individual defendants

disgorge any profits they enjoyed from TGS stock transactions they or their 'tippees' engaged in from November 12, 1963 to April 17, 1964.

[24] Absent any clear indication of a legislative intention to require a showing of specific fraudulent intent, see Note, 63 Mich.L.Rev. 1070, 1075, 1076 n. 29 (1965), the securities laws should be interpreted as an expansion of the common law [FN21] both to effectuate the broad remedial design of Congress, see SEC v. Capital Gains Research Bureau, supra, 375 U.S. at 195,84 S.Ct. 275, and to insure uniformity of enforcement, see Note, 32 U.Chi.L.Rev. 824, 832 n. 36 (1965), citing McClure v. Borne Chemical Co.,292 F.2d 824, 834 (3 Cir. 1961). Moreover, a review of other sections of the Act from which Rule 10b-5 seems to have been drawn suggests that the implementation of a standard of conduct that encompasses negligence as well as active fraud comports with the administrative and the legislative purposes underlying the Rule. [FN22] Finally, we note that this position is not, as asserted by defendants, irreconcilable with previous language in this circuit because 'some form of the traditional scienter requirement,' Barnes v. Osofsky, 373 F.2d 269, 272 (2 Cir. 1967), (emphasis supplied), sometimes defined as 'fraud,' Fischman v. Raytheon Mfg. Co., 9 F.R.D. 707 (SDNY 1949), rev'd on other grounds, 188 F.2d 783, 786 (2 Cir. 1951) is preserved. This requirement, whether it be termed lack of diligence, constructive fraud, or unreasonable or negligent conduct, remains implicit in this standard, a standard that promotes the deterrence objective of the Rule.

FN21. Even at common law, the essentially private remedy of rescission which is sought here does not require more than a showing of negligence and frequently even less than that, see Restatement, Contracts, § 476, comm. b (1932); and the common law concept of constructive fraud still available to private plaintiffs, see Trussell v. United Underwriters, Ltd., 228 F.Supp. 757, 772 (D.Colo. 1964), has been expanded from recklessness, see Prosser, Torts, § 102, pp. 715-17 (3d ed. 1964), to include non-reckless negligent misrepresentations or omissions, see Note, 63 Mich.L.Rev. 1070, 1079.

FN22. Liability under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2), the language of which is strikingly similar to that of 10b-5(2),

attaches from the mere fact of misrepresentation or misleading omission unless defendant proves that 'he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.' The provisions of Sections 17(a)(2) and (3) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(2) and (3), which are virtually identical to the provisions of Rule 10b-5(2) and (3) and were, in fact, the model therefor, see Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2 Cir.), cert. denied, 343 U.S. 956, 72 S.Ct. 1051, 96 L.Ed. 1356 (1952); Hooper v. Mountain States Sec. Corp., 282 F.2d 195, 201 n. 4 (5 Cir. 1960), cert. denied, 365 U.S. 814, 81 S.Ct. 695, 5 L.Ed.2d 693 (1961), apply criminal penalties to sellers only (Rule 10b-5 was promulgated to fill this gap in enforcement, SEC Ann.Rep. 10 (1942)), and have been read, upon close scrutiny of their legislative history, as not requiring specific fraudulent intent, SEC v. Van Horn, 371 F.2d 181, at 184-186 (7 Cir. 1966); United States v. Schaefer, 299 F.2d 625, 629 (7 Cir. 1962) (lack of diligence is all that is required for conviction in a criminal prosecution for violation of § 17(a) of the 1933 Act.)

[25] Thus, the beliefs of Coates, Crawford and Clayton that the news of the ore strike was sufficiently public at the time of their purchase orders are to no avail if those beliefs were not reasonable under the circumstances. Crawford points to the scattered rumors of the discovery which had been circulating for some time before April 15, to the release of the information to The Northern Miner on April 15 to be published by it on the 16th, to the arrangement made by TGS with the Ontario Minister of Mines for the release of an abbreviated report on the evening of the 15th (which did not eventuate until 9:40 A.M., April 16), and to the corporation's official announcement at 10:00 A.M. on the 16th, all of which transpired prior to an anticipated execution of his purchase orders that had been placed by him after trading had closed on the Midwest Exchange on April 15. However, the rumors and casual disclosure through Canadian media, especially in view of the April 12 'gloomy' or incomplete release denying the rumors and promising official confirmation, hardly sufficed to inform traders on American exchanges affected by Crawford's purchases. Moreover, the formal announcement could not reasonably have been expected to be disseminated by the time of the opening of the exchanges on the morning of April 16, when Crawford must have expected his orders would be executed.

Clayton, who was unaware of the April 16 disclosure announcement TGS was to make can, in support of his claim that the favorable news was public, rely only on the rumors and on the phone calls received by TGS prior to the placing of his order from those who seemed to have heard some version or rumors of the news. His awareness of the contents of the April 12 release renders unreasonable any claim that he believed the news was truly public.

Finally, Coates, as we have already indicated in fn. 19, supra, could not reasonably have expected the official release to have been disseminated when he placed his order before 10:20 for immediate execution nor were the Canadian disclosures relied on by Crawford sufficient to render the conduct of Coates permissible under the circumstances. [FN23]

> FN23. Coates's violations encompass not only his own purchases but also the purchases by his son-in-law and the customers of his son-in-law, to whom the material information was passed. See footnote 16, supra.

E. May Insiders Accept Stock Options Without Disclosing Material Information To the Issuer?

[26] On February 20, 1964, defendants Stephens, Fogarty, Mollison, Holyk and Kline accepted stock options issued to them and a number of other top officers of TGS, although not one of them had informed the Stock Option Committee of the Board of Directors or the Board of the results of K-55-1, which information we have held was then material. The SEC sought rescission of these options. The trial court, in addition to finding the knowledge of the results of the K-55 discovery to be immaterial, held that Kline had no detailed knowledge of the drilling progress and that Holyk and Mollison could reasonably assume that their superiors, Stephens and Fogarty, who were directors of the corporation, would report the results if that was advisable; indeed all employees had been instructed not to divulge this information pending completion of the land acquisition program, 258 F.Supp. at 291. Therefore, the court below concluded that only directors Stephens and Fogarty, of the top management, would have violated the Rule by accepting stock options without

disclosure, but it also found that they had not acted improperly as the information in their possession was not material. 258 F.Supp. at 292. In view of our conclusion as to materiality we hold that Stephens and Fogarty violated the Rule by accepting them. However, as they have surrendered the options and the corporation has canceled them, supra at 292, n. 17, we find it unnecessary to order that the injunctions prayed for be actually issued. We point out, nevertheless, that the surrender of these options after the SEC commenced the case is not a satisfaction of the SEC claim, and a determination as to whether the issuance of injunctions against Stephens and Fogarty is advisable in order to prevent or deter future violations of regulatory provisions is remanded for the exercise of discretion by the trial court.

[27] Contrary to the belief of the trial court that Kline had no duty to disclose his knowledge of the Kidd project before accepting the stock option offered him, we believe that he, a vice president, who had become the general counsel of TGS in January 1964, but who had been secretary of the corporation since January 1961, and was present in that capacity when the options were granted, and who was in charge of the mechanics of issuance and acceptance of the options, was a member of top management and under a duty before accepting his option to disclose any material information he may have possessed, and, as he did not disclose such information to the Option Committee we direct rescission of the option he received. [FN24] As to Holyk and Mollison, the SEC has not appealed the holding below that they, not being then members of top management (although Mollison was a vice president) had no duty to disclose their knowledge of the drilling before accepting their options. Therefore, the issue of whether, by accepting, they violated the Act, is not before us, and the holding below is undisturbed.

> FN24. The options granted on February 20, 1964 to Mollison, Holyk, and Kline were ratified by the Texas Gulf directors on July 15, 1965 after there had been, of course, a full disclosure and after this action had been commenced. However, the ratification is irrelevant here, for we would hold with the district court that a member of top management, as was Kline, is required, before accepting a stock option, to disclose material inside information which, if disclosed, might affect the price of the stock during the

period when the accepted option could be exercised. Kline had known since November 1962 that K-55-1 had been drilled, that the drilling had intersected a sulphide body containing copper and zinc, and TGS desired to acquire adjacent property.

Of course, if any of the five knowledgeable defendants had rejected his option there might well have been speculation as to the reason for the rejection. Therefore, in a case where disclosure to the grantors of an option would seriously jeopardize corporate security, it could well be desirable, in order to protect a corporation from selling securities to insiders who are in a position to appreciate their true worth at a price which may not accurately reflect the true value of the securities and at the same time to preserve when necessary the secrecy of corporate activity, not to require that an insider possessed of undisclosed material information reject the offer of a stock option, but only to require that he abstain from exercising it until such time as there shall have been a full disclosure and, after the full disclosure, a ratification such as was voted here. However, as this suggestion was not presented to us, we do not consider it or make any determination with reference to it.

II. THE CORPORATE DEFENDANT

Introductory

At 3:00 P.M. on April 12, 1964, evidently believing it desirable to comment upon the rumors concerning the Timmins project, TGS issued the press release quoted in pertinent part in the text at page 845, supra. The SEC argued below and maintains on this appeal that this release painted a misleading and deceptive picture of the drilling progress at the time of its issuance, and hence violated Rule 10b-5(2). [FN25] TGS relies on the holding of the court below that 'the issuance of the release produced no unusual market action' and 'in the absence of a showing that the purpose of the April 12 press release was to affect the market price of TGS stock to the advantage of TGS or its insiders, the issuance of the press release did not constitute a violation of Section 10(b) or Rule 10b-5 since it was not issued 'in

connection with the purchase or sale of any security" and, alternatively, 'even if it had been established that the April 12 release was issued in connection with the purchase or sale of any security, the Commission has failed to demonstrate that it was false, misleading or deceptive.' 258 F.Supp. at 294.

FN25. Rule 10b-5(2) provides in pertinent part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, * * * (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, * * * in connection with the purchase or sale of any security.

Before further discussing this matter it seems desirable to state exactly what the SEC claimed in its complaint and what it seeks. The specific SEC allegation in its complaint is that this April 12 press release '* * * was materially false and misleading and was known by certain of defendant Texas Gulf's officers and employees, including defendants Fogarty, Mollison, Holyk, Darke and Clayton, to be materially false and misleading.'

The specific relief the SEC seeks is, pursuant to Section 21(e) of Securities Exchange Act of 1934, 15 U.S.C. § 78u(e), a permanent injunction restraining the issuance of any further materially false and misleading publicly distributed informative items. [FN26]

FN26. The prayer for relief reads:

WHEREFORE the plaintiff prays for:

(5) The issuance of a final judgment permanently enjoining the defendant Texas Gulf from directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of

> securities, making any untrue statement of material fact or omitting to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading, namely, from issuing, publishing, distributing or otherwise disseminating materially false, misleading, inadequate or inaccurate press releases and other communications and reports concerning material facts about Texas Gulf's activities and operations.

B. The 'In Connection With * * *' Requirement.

In adjudicating upon the relationship of this phrase to the case before us it would appear that the court below used a standard that does not reflect the congressional purpose that prompted the passage of the Securities Exchange Act of 1934.

[28] The dominant congressional purposes underlying the Securities Exchange Act of 1934 were to promote free and open public securities markets and to protect the investing public from suffering inequities in trading, including, specifically, inequities that follow from trading that has been stimulated by the publication of false or misleading corporate information releases. Commenting on the disclosure purposes of the House bill (H.R. 9323), the bill a Committee of Conference eventually integrated with a similar Senate bill (S. 3420) to make the bill passed by both Houses of Congress that became the Securities Exchange Act of 1934, the House Committee which reported out H.R. 9323 stated:

> The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings about a situation where the market price reflects as nearly as possible a just price. Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value. There cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy. The disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite the intricacies of

> security values truth does find relatively quick acceptance on the market. That is why in many cases it is so carefully guarded. Delayed, inaccurate, and misleading reports are the tools of the unconscionable market operator and the recreant corporate official who speculate on inside information. Despite the tug of conflicting interests and the influence of popular groups, responsible officials of the leading exchanges have unqualifiedly recognized in theory at least the vital importance of true and accurate corporate reporting as an essential cog in the proper functioning of the public exchanges. Their efforts to bring about more adequate and prompt publicity have been handicapped by the lack of legal power and by the failure of certain banking and business groups to appreciate that a business that gathers its capital from the investing public has not the same right to secrecy as a small privately owned and managed business. It is only a few decades since men believed that the disclosure of a balance sheet was a disclosure of a trade secret. Today few people would admit the right of any company to solicit public funds without the disclosure of a balance sheet. (Emphasis supplied.) H.R.Rep.No. 1383, 73rd Cong., 2d Sess. 11 (1934).

Section 10(b) of the Act (see footnote 8, supra) was taken by the Conference Committee from Section 10(b) of the proposed Senate bill, S. 3420, and taken from it verbatim insofar as here pertinent. The only alteration made by the Conference Committee was to substitute the present closing language of Section 10(b), '* * * in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors' for the closing language of the original Section 10(b) of S. 3420, '* * * which the Commission may declare to be detrimental to the interests of investors.' 78 Cong.Rec. 10261 (1934).

The Report of the Senate Committee which presented S. 3420 to the Senate summarized Section 10(b) as follows:

> Subsection (b) authorizes the Commission by rules and regulations to prohibit or regulate the use of any other manipulative or deceptive practices

> which it finds detrimental to the interests of the investor. (Emphasis supplied.) S.Rep.No. 792, 73rd Cong., 2d Sess. 18 (1934).

Indeed, from its very inception, Section 10(b), and the proposed sections in H.R. 1383 and S. 3420 from which it was derived, have always been acknowledged as catchalls. See Bromberg, Securities Law: SEC Rule 10b-5, p. 19 (1967). In the House Committee hearings on the proposed House bill, Thomas G. Corcoran, Counsel with the Reconstruction Finance Corporation and a spokesman for the Roosevelt Administration, described the broad prohibitions contained in § 9(c), the section which corresponded to Section 10(b) of S. 3420 and eventually to Section 10(b) of the Act, as follows: 'Subsection (c) says, 'Thou shalt not devise any other cunning devices' * * *. Of course subsection (c) is a catch- all clause to prevent manipulative devices. I do not think there is any objection to that kind of a clause. The Commission should have the authority to deal with new manipulative devices.' Stock Exchange Regulation, Hearings before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. 115 (1934). Although several other witnesses objected to the breadth of the proposed prohibition that Corcoran was supporting, the section as enacted did not in any way limit the broad scope of the 'in connection with' phrase. See 3 Loss, Securities Regulation, 1424 n. 7 (2d ed. 1961).

Thus, the legislative history of Section 10(b) does not support the proposition urged upon us by Texas Gulf Sulphur that Congress intended the limited construction of the 'in connection with' phrase applied by the trial court. Moreover, comparisons of Section 10(b) with the antifraud provisions of the Securities Act of 1933 (§ 12(2), 15 U.S.C. § 77l(2) '* * * (offers or) sells a security by means of * * *'; § 17(a), 15 U.S.C. § 77q(a) '* * * in the (offer or) sale of any securities to obtain money or property by means of * * *'; (language in brackets was added in 1954 amendments)), and with the 1936 antifraud amendment of Section 15 of the Securities Exchange Act of 1934 (§ 15(c) (1), 15 U.S.C. § 78o(c)(1) '* * * effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security * * *') demonstrate that when Congress intended that there be a participation in a securities transaction as a prerequisite of a violation, it knew how to make that intention clear. See Bromberg, op. cit. supra Table 1 at 16-17.

[29][30] Therefore it seems clear from the legislative purpose Congress expressed in the Act, and the legislative history of Section 10(b) that Congress when it used the phrase 'in connection with the purchase or sale of any security' intended only that the device employed, whatever it might be, be of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities. There is no indication that Congress intended that the corporations or persons responsible for the issuance of a misleading statement would not violate the section unless they engaged in related securities transactions or otherwise acted with wrongful motives; indeed, the obvious purposes of the Act to protect the investing public and to secure fair dealing in the securities markets would be seriously undermined by applying such a gloss onto the legislative language. Absent a securities transaction by an insider it is almost impossible to prove that a wrongful purpose motivated the issuance of the misleading statement. The mere fact that an insider did not engage in securities transactions does not negate the possibility of wrongful purpose; perhaps the market did not react to the misleading statement as much as was anticipated or perhaps the wrongful purpose was something other than the desire to buy at a low price or sell at a high price. Of even greater relevance to the Congressional purpose of investor protection is the fact that the investing public may be injured as much by one's misleading statement containing inaccuracies caused by negligence as by a misleading statement published intentionally to further a wrongful purpose. We do not believe that Congress intended that the proscriptions of the Act would not be violated unless the makers of a misleading statement also participated in pertinent securities transactions in connection therewith, or unless it could be shown that the issuance of the statement was motivated by a plan to benefit the corporation or themselves at the expense of a duped investing public.

Nor is there anything about Rule 10b-5 which demonstrates that the SEC sought by the Rule not fully to implement the Congressional purpose and objectives underlying Section 10(b). See Securities Exchange Act of 1934, Release No. 3230 (May 21, 1942); 10 SEC Ann.Rep. 56-7 (1944); 8 SEC Ann.Rep. 10 (1942). To be sure, SEC official publicity accompanying the promulgation of the Rule emphasized the insider trading aspects of the Rule, particularly the prohibition against

purchases by insiders, but this was emphasized because 'the previously existing rules against fraud in the purchase of securities applied only to brokers and dealers,' 8 SEC Ann.Rep. 10, and the Commission wished to make it emphatically clear that the Rule was expected, inter alia, to close this loophole.

[31] The foregoing discussion demonstrates that Congress intended to protect the investing public in connection with their purchases or sales on Exchanges from being misled by misleading statements promulgated for or on behalf of corporations irrespective of whether the insiders contemporaneously trade in the securities of that corporation and irrespective of whether the corporation or its management have an ulterior purpose or purposes in making an official public release. Indeed, the Commission has been charged by Congress with the responsibility of policing all misleading corporate statements from those contained in an initial prospectus to those contained in a notice to stockholders relative to the need or desirability of terminating the existence of a corporation or of merging it with another. To render the Congressional purpose ineffective by inserting into the statutory words the need of proving, not only that the public may have been misled by the release, but also that those responsible were actuated by a wrongful purpose when they issued the release, is to handicap unreasonably the Commission in its work. We should have in mind the wise words of Judge Learned Hand in Cawley v. United States, 272 F.2d 443, 445 (2 Cir. 1959), relative to an interpretation of the words contained within a congressional statute, that '* * * unless they explicitly forbid it, the purpose of a statutory provision is the best test of the meaning of the words chosen. We are to put ourselves so far as we can in the position of the legislature that uttered them, and decide whether or not it would declare that the situation that has arisen is within what it wishes to cover. Indeed, at times the purpose may be so manifest as to override even the explicit words used. Markham v. Cabell,326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165.'

[32][33] As was pointed out by the trial court, 258 F.Supp. at 293, the intent of the Securities Exchange Act of 1934 is the protection of investors against fraud. Therefore, it would seem elementary that the Commission has a duty to police management so as to prevent corporate practices which are reasonably likely fraudulently to injure investors. And, of course, as we have already emphasized, a

corporation's misleading material statement may injure an investor irrespective of whether the corporation itself, or those individuals managing it, are contemporaneously buying or selling the stock of the corporation. Therefore, when materially misleading corporate statements or deceptive insider activities have been uncovered, the courts, as they should, have broadly construed the statutory phrase 'in connection with the purchase or sale of any security.' Freed v. Szabo Food Serv., Inc., CCH Fed. SEC L.Rep. P91,317 (N.D.Ill.1964); Stockwell v. Reynolds & Co., 252 F.Supp. 215 (SDNY 1965); Cooper v. North Jersey Trust Co., 226 F.Supp. 972, 978 (SDNY 1964); Miller v. Bargain City, U.S.A., Inc., 229 F.Supp. 33, 37 (E.D.Pa.1964); see Ruder, Corporate Disclosures Required by the Federal Securities Laws: The Codification Implications of Texas Gulf Sulphur, 61 Nw.U.L.Rev. 872, 895 (1967). The court below found: 'There is no evidence that TGS derived any direct benefit from the issuance of the press release or that any of the defendants who participated in its preparation used it to their personal advantage.' 258 F.Supp. at 294. The requirement that a statement may not be found misleading unless its issuance is actuated by a 'wrongful purpose' might well have the effect of permitting the issuers of misleading statements to seek an advantage but to escape liability if the advantage fails to materialize to the degree contemplated, or cannot be demonstrated.

[34][35] More important, however, is the realization which we must again underscore at the risk of repetition, that the investing public is hurt by exposure to false or deceptive statements irrespective of the purpose underlying their issuance. [FN27] It does not appear to be unfair to impose upon corporate management a duty to ascertain the truth of any statements the corporation releases to its shareholders or to the investing public at large. Accordingly, we hold that Rule 10b-5 is violated whenever assertions are made, as here, in a manner reasonably calculated to influence the investing public, e.g., by means of the financial media, Fleischer, supra, 51 Va.L.Rev. at 1294-95, if such assertions are false or misleading or are so incomplete as to mislead irrespective of whether the issuance of the release was motivated by corporate officials for ulterior purposes. It seems clear, however, that if corporate management demonstrates that it was diligent in ascertaining that the information it published was the whole truth and that such

diligently obtained information was disseminated in good faith, Rule 10b-5 would not have been violated.

> FN27. See the discussion in footnotes 20, 21, and 22, supra, and in the accompanying text, dispensing with a fraudulent intent requirement in actions based on clause (3) of Rule 10b-5.

C. Did the Issuance of the April 12 Release Violate Rule 10b-5?

[36] Turning first to the question of whether the release was misleading, i.e., whether it conveyed to the public a false impression of the drilling situation at the time of its issuance, we note initially that the trial court did not actually decide this question. Its conclusion that 'the Commission has failed to demonstrate that it was false, misleading or deceptive,' 258 F.Supp. at 294, seems to have derived from its views that 'The defendants are to be judged on the facts known to them when the April 12 release was issued,' 258 F.Supp. at 295, (emphasis supplied), that the draftsmen 'exercised reasonable business judgment under the circumstances,' 258 F.Supp. at 296, and that the release was not 'misleading or deceptive on the basis of the facts then known,' 258 F.Supp. at 296 (emphasis supplied) rather than from an appropriate primary inquiry into the meaning of the statement to the reasonable investor and its relationship to truth. While we certainly agree with the trial court that 'in retrospect, the press release may appear gloomy or incomplete,' [FN28] 258 F.Supp. at 296, we cannot, from the present record, by applying the standard Congress intended, definitively conclude that it was deceptive or misleading to the reasonable investor, or that he would have been misled by it. Certain newspaper accounts of the release viewed the release as confirming the existence of preliminary favorable developments, and this optimistic view was held by some brokers, so it could be that the reasonable investor would have read between the lines of what appears to us to be an inconclusive and negative statement and would have envisioned the actual situation at the Kidd segment on April 12. On the other hand, in view of the decline of the market price of TGS stock from a high of 32 on the morning of April 13 when the release was disseminated to 29 3/8 by the close of trading on April 15, and the reaction to the release by other brokers, it is far from certain that the release was generally interpreted as a highly encouraging report or even encouraging at all. Accordingly, we remand this issue to the district

court that took testimony and heard and saw the witnesses for a determination of the character of the release in the light of the facts existing at the time of the release, by applying the standard of whether the reasonable investor, in the exercise of due care, would have been misled by it.

> FN28. Examined in retrospect, the situation in Timmins at the time the release was prepared seems to offer good reason for optimism. The draftsmen of the release had full knowledge of the discoveries up to 7:00 P.M. on Friday, April 10. At that time approximately 2/3 of the ore ultimately found to exist by the time of the preparation of the April 16 'major strike' release had been discovered by 5 holes placed so as to indicate continuity of mineralization within the large anomaly. As of that time SEC experts estimated ore reserves of over 8 million tons at a gross assay value (excluding costs) of over $26 a ton. Accepting the conservative view of TGS's expert Wiles that 95.2% Would be absorbed by costs, the ultimate profit could then have been estimated at more than $14,000,000. TGS experts could name very few base metal mines with a greater assay value and the court observed that bodies of much lower assay value were commercially mined, 258 F.Supp. at 282 n. 10. Roche, a mining stock specialist, added that mines with significantly lower percentages of copper and with no zinc or silver , as here, were profitably operated. On the basis of approximately one-third more data, and, for all the record shows, without any additional figures as to estimated costs, TGS announced on April 16 a major strike with over 25 million tons of ore. The trial court found that as of 7:00 P.M. on Thursday, April 9, 'There was real evidence that a body of commercially mineable ore might exist.' 252 F.Supp. at 282. And, by 7:00 A.M. on Sunday, April 10, eight hours before the release was issued to the press, 77.9% Of the drilling in mineralization had been completed, 84.4% By 7:00 P.M. on the 12th, and 90.2% By 7 A.M. on April 13. The release did not appear in most newspapers of general circulation until later in the morning of Monday, the 13th.
>
> The release, see p. 845, supra, began by referring to rumored reports that the company had made a substantial copper discovery and then continued: 'These reports exaggerate the scale of operations, and mention plans and

> statistics of size and grade of ore that are without factual basis and have evidently originated by speculation of people not connected with TGS.' It then stated, purporting to give the true facts in contradiction to the rumors: 'The facts are as follows.' However, the 'facts' disclosed relative to the Kidd-55 segment were: 'Recent drilling on one property near Timmins has led to preliminary indications dications that more drilling would be required for proper evaluation of this prospect. The drilling done to date has not been conclusive but the statements made by many outside quarters are unreliable.' It was then said that, as of April 12, the release date, '* * * any statement as to size and grade of ore would be premature and possibly misleading.' A definite statement 'to clarify' was promised in the future.

In the event that it is found that the statement was misleading to the reasonable investor it will then become necessary to determine whether its issuance resulted from a lack of due diligence. The only remedy the Commission seeks against the corporation is an injunction, see footnote 26, supra, and therefore we do not find it necessary to decide whether just a lack of due diligence on the part of TGS, absent a showing of bad faith, would subject the Corporation to any liability for damages. We have recently stated in a case involving a private suit under Rule 10b-5 in which damages and an injunction were sought, "It is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for monetary damages." Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540, 547, quoting from SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 193, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963)

[37] We hold only that, in an action for injunctive relief, the district court has the discretionary power under Rule 10b-5 and Section 10(b) to issue an injunction, if the misleading statement resulted from a lack of due diligence on the part of TGS. The trial court did not find it necessary to decide whether TGS exercised such diligence and has not yet attempted to resolve this issue. While the trial court concluded that TGS had exercised 'reasonable business judgment under the circumstances,' 258 F.Supp. at 296 (emphasis supplied) it applied an incorrect legal standard in appraising whether TGS should have issued its April 12 release on the basis of the facts known to its draftsmen at the time of its preparation, 258 F.Supp. at 295, and in assuming that disclosure of the full underlying facts of the Timmins

situation was not a viable alternative to the vague generalities which were asserted. 258 F.Supp. at 296.

It is not altogether certain from the present record that the draftsmen could, as the SEC suggests, have readily obtained current reports of the drilling progress over the weekend of April 10-12, but they certainly should have obtained them if at all possible for them to do so. However, even if it were not possible to evaluate and transmit current data in time to prepare the release on April 12, it would seem that TGS could have delayed the preparation a bit until an accurate report of a rapidly changing situation was possible. See 258 F.Supp. at 296. At the very least, if TGS felt compelled to respond to the spreading rumors of a spectacular discovery, it would have been more accurate to have stated that the situation was in flux and that the release was prepared as of April 10 information rather than purporting to report the progress 'to date.' Moreover, it would have obviously been better to have specifically described the known drilling progress as of April 10 by stating the basic facts. Such an explicit disclosure would have permitted the investing public to evaluate the 'prospect' of a mine at Timmins without having to read between the lines to understand that preliminary indications were favorable-- in itself an understatement.

[38][39][40] The choice of an ambiguous general statement rather than a summary of the specific facts cannot reasonably be justified by any claimed urgency. The avoidance of liability for misrepresentation in the event that the Timmins project failed, a highly unlikely event as of April 12 or April 13, did not forbid the accurate and truthful divulgence of detailed results which need not, of course, have been accompanied by conclusory assertions of success. Nor is it any justification that such an explicit disclosure of the truth might have 'encouraged the rumor mill which they were seeking to allay.' 258 F.Supp. at 296.

We conclude, then, that, having established that the release was issued in a manner reasonably calculated to affect the market price of TGS stock and to influence the investing public, we must remand to the district court to decide whether the release was misleading to the reasonable investor and if found to be

misleading, whether the court in its discretion should issue the injunction the SEC seeks.

CONCLUSION

In summary, therefore, we affirm the finding of the court below that appellants Richard H. Clayton and David M. Crawford have violated 15 U.S.C. § 78j(b) and Rule 10b-5; we reverse the judgment order entered below dismissing the complaint against appellees Charles F. Fogarty, Richard H. Clayton, Richard D. Mollison, Walter Holyk, Kenneth H. Darke, Earl L. Huntington, and Francis G. Coates, as we find that they have violated 15 U.S.C. § 78j(b) and Rule 10b-5. As to these eight individuals we remand so that in accordance with the agreement between the parties the Commission may notice a hearing before the court below to determine the remedies to be applied against them. We reverse the judgment order dismissing the complaint against Claude O. Stephens, Charles F. Fogarty, and Harold B. Kline as recipients of stock options, direct the district court to consider in its discretion whether to issue injunction orders against Stephens and Fogarty, and direct that an order issue rescinding the option granted Kline and that such further remedy be applied against him as may be proper by way of an order of restitution; and we reverse the judgment dismissing the complaint against Texas Gulf Sulphur Company, remand the cause as to it for a further determination below, in the light of the approach explicated by us in the foregoing opinion, as to whether, in the exercise of its discretion, the injunction against it which the Commission seeks should be ordered.

FRIENDLY, Circuit Judge (concurring):

Agreeing with the result reached by the majority and with most of Judge Waterman's searching opinion, I take a rather different approach to two facets of the case.

I.

The first is a situation that will not often arise, involving as it does the acceptance of stock options during a period when inside information likely to produce a rapid and substantial increase in the price of the stock was known to some of the grantees but unknown to those in charge of the granting. I suppose it would be clear, under Ruckle v. Roto American Corp., 339 F.2d 24 (2 Cir. 1964), [FN1] that if a corporate officer having such knowledge persuaded an unknowing board of directors to grant him an option at a price approximation the current market, the option would be rescindable in an action under Rule 10b-5. It would seem, by the same token, that if, to make the pill easier to swallow, he urged the directors to include others lacking the knowledge he possessed, he would be liable for all the resulting damage. The novel problem in the instant case is to define the responsibility of officers when a directors' committee administering a stock option plan proposes of its own initiative to make options available to them and others at a time when they know that the option price, geared to the market value of the stock, did not reflect a substantial increment likely to be realized in short order and was therefore unfair to the corporation.

> FN1. Since none of the parties has raised the question, I assume the continuing vitality of Ruckle, despite what have been regarded as contrary intimations in O'Neill v. Maytag, 339 F.2d 764 (2 Cir. 1964), a decision that has not found favor with other circuits. Cf. Dasho v. Susquehanna Corp., 380 F.2d 262 (7 Cir.), cert. denied, Bard v. Dasho, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 470 (1967); Pappas v. Moss, 393 F.2d 865 (3 Cir. 1968); see Jennings, Insider Trading in Corporate Securities: A Survey of Hazards and Disclosure Obligations under Rule 10b-5, 62 Nw.U.L.Rev. 809, 830-33 (1968). If we were writing on a clean slate, I would have some doubt whether the framers of the Securities Exchange Act intended § 10b to provide a remedy for an evil that had long been effectively handled by derivative actions for waste of corporate assets under state law simply because in a particular case the waste took the form of a sale of securities. We will shortly be exploring this issue in the in banc consideration of Schoenbaum v. Firstbrook, 2 Cir., 405 F.2d 215.

A rule requiring a minor officer to reject an option so tendered would not comport with the realities either of human nature or of corporate life. If the SEC had

appealed the ruling dismissing this portion of the complaint as to Holyk and Mollison, I would have upheld the dismissal quite apart from the special circumstance that a refusal on their part could well have broken the wall of secrecy it was important for TGS to preserve. Whatever they knew or didn't know about Timmins, they were entitled to believe their superiors had reported the facts to the Option Committee unless they had information to the contrary. Stephens, Fogarty and Kline stand on an altogether different basis; as senior officers they had an obligation to inform the Committee that this was not the right time to grant options at 95% Of the current price. Silence, when there is a duty to speak, can itself be a fraud. I am unimpressed with the argument that Stephens, Fogarty and Kline could not perform this duty on the peculiar facts of this case, because of the corporate need for secrecy during the land acquisition program. Non-management directors would not normally challenge a recommendation for postponement of an option plan from the President, the Executive Vice President, and the Vice President and General Counsel. Moreover, it should be possible for officers to communicate with directors, of all people, without fearing a breach of confidence. Hence, as one of the foregoing hypotheticals suggests, I am not at all sure that a company in the position of TGS might not have a claim against top officers who breached their duty of disclosure for the entire damage suffered as a result of the untimely issuance of options, rather than merely one for rescission of the options issued to them. [FN2] Since that issue is not before us, I merely make the reservation of my position clear.

> FN2. Though the Board of Directors of TGS ratified the issuance of the options after the Timmins discovery had been fully publicized, it obviously was of the belief that Kline had committed no serious wrong in remaining silent. Throughout this litigation TGS has supported the legality of the actions of all the defendants-- the company's counsel having represented, among others, Stephens, Fogerty and Kline. Consequently, I agree with the majority in giving the Board's action no weight here. If a fraud of this kind may ever be cured by ratification, compare Continental Securities Co. v. Belmont, 206 N.Y. 7, 99 N.E. 138, 51 L.R.A., N.S., 112 (1912), with Claman v. Robertson, 164 Ohio St. 61, 128 N.E.2d 429 (1955); cf. Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), that cannot be done

without an appreciation of the illegality of the conduct proposed to be excused, cf. United Hotels Co. v. Mealey, 147 F.2d 816, 819 (2 Cir. 1945).

II.

The second point, to me transcending in public importance all others in this important case, is the press release issued by TGS on April 12, 1964. This seems to me easier on the facts but harder on the law than it does to the majority.

No one has asserted, or reasonably could assert, that the purpose for issuing a release was anything but good. TGS felt it had a responsibility to protect would-by buyers of its shares from what it regarded as exaggerated rumors first in the Canadian and then in the New York City press, and none of the individual defendants sought to profit from the decline in the price of TGS stock caused by the release. I find it equally plain, as Judge Waterman's opinion convincingly demonstrates, that the release did not properly convey the information in the hands of the draftsmen on April 12, even granting, as I would, that in a case like this a court should not set the standard of care too high. To say that the drilling at Timmins had afforded only 'preliminary indications that more drilling would be required for proper evaluation of this prospect,' was a wholly insufficient statement of what TGS knew. Cf. Gediman v. Anheuser Busch, Inc., 299 F.2d 537, 545 (2 Cir. 1962). Since the issue of negligence is open to full review, Mamiye Bros v. Barber SS. Lines, 360 F.2d 774 (2 Cir.), cert. denied, 385 U.S. 835, 87 S.Ct. 80, 17 L.Ed. 2d 80 (1965); Esso Standard Oil, S.A. v. S.S. Gasbras Sul, 387 F.2d 573 (2 Cir.), cert. denied, 391 U.S. 914, 88 S.Ct. 1808, 20 L.Ed.2d 653 (May 21, 1968), I see no need for a remand on that score. It is an equally needless exercise cise to require the district court to determine whether a reasonable investor would have been misled. The text of the release and the three point drop in the market price following its issuance in the face of press reports that would normally have led to a large and, as matters developed, justified increase, are sufficient proof of that.

The majority says that negligent misstatement by a corporation is enough for injunctive relief under Rule 10b-5(2) in a proper case; it reserves the question, not here presented, whether the corporation is liable for damages. I think the remand

should make crystal clear that the issue whether this is a proper case for an injunction remains open, and that with 49 private actions pending in the District Court for the Southern District of New York, see 258 F.Supp. 262, 267 n. 1 (1966), some of which may involve this issue, we should explicate more clearly why, despite the principle that a violation of the securities laws or regulations generally gives rise to a private claim for damages, see J. I. Case Co. v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964), violation of Rule 10b-5(2) may not do so under all circumstances, including those presented by the April 12 press release. The attention this case has received from the profession and our in banc consideration make it incumbent on us to give the district courts in our circuit as much guidance as we can.

A.

The consequences of holding that negligence in the drafting of a press release such as that of April 12, 1964, may impose civil liability on the corporation are frightening. As has been well said, of a situation where time pressures and consequent risks were less, 'One source of perplexity as to the appropriate bounds of the civil remedy for misleading filings is that any remedy imposed against the issuer itself is indirectly imposed on all holders of the common stock, usually the most important segment of the total category of investors intended to be protected.' Milton Cohen, Truth in Securities Revisited, 79 Harv.L.Rev. L.Rev. 1340, 1370 (1967). Beyond this, a rule imposing civil liability in such cases would work directly counter to what the SEC has properly called 'a commendable and growing recognition on the part of industry and the investment community of the importance of informing security holders and the public generally with respect to important business and financial developments.' Securities Act Interpretation Release No. 3844 (Oct. 8, 1957). If the only choices open to a corporation are either to remain silent and let false rumors do their work, or to make a communication, not legally required, at the risk that a slip of the pen or failure properly to amass or weigh the facts-- all judged in the bright gleam of hindsight-- will lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers, most corporations would opt for the former.

The derivation of Rule 10b-5 is peculiar. Although the authority for the Rule comes from § 10(b) of the Securities and Exchange Act of 1934, the draftsmen turned their backs on the language of that section and borrowed the words of § 17 of the Securities Act of 1933, simply broadening these to include frauds on the seller as well as on the buyer. So far as concerns paragraphs (1) and (3), this is not very important since these are clearly within the ambit of § 10(b) and relate to frauds that would give rise to civil liability in any event. But the case stands differently as to paragraph (2). The only provision in either the 1933 or the 1934 Act that can be read to impose liability for damages for negligent misrepresentation without restrictions as to the kinds of plaintiffs, due diligence defenses, a short statute of limitations, or an undertaking for costs that were insisted on by the investment community, is § 17(a)(2) of the Act of 1933-- the source of Rule 10b-5(2). [FN3] But there is unanimity among the commentators, including some who were in a peculiarly good position to know, that § 17(a)(2) of the 1933 Act-- indeed the whole of § 17-- was intended only to afford a basis for injunctive relief and, on a proper showing, for criminal liability, and was never believed to supplement the actions for damages provided by §§ 11 and 12. See Landis, Liability Sections of Securities Act, 18 Am.Acct. 330, 331 (1933); Douglas and Bates, Federal Securities Act of 1933, 43 Yale L.J. 171, 181-82 (1933); 3 Loss, Securities Regulation 1785-86 (1961). When the House Committee Report listed the sections that 'define the civil liabilities imposed by the Act' it pointed only to §§ 11 and 12 and stated that 'to impose a greater responsibility (than that provided by §§ 11 and 12) * * * would unnecessarily restrain the conscientious administration of honest business with no compensating advantage to the public.' H.Rep.No. 85, 73dCong., 1st Sess. 9-10 (1933). Once it had been established, however, that an aggrieved buyer has a private action under § 10(b) of the 1934 Act, there seemed little practical point in denying the existence of such an action under § 17-- with the important proviso that fraud, as distinct from mere negligence, must be alleged. See Fischman v. Raytheon Mfg. Corp., 188 F.2d 783, 787 n. 2 (2 Cir. 1951); Weber v. C.M.P. Corp., 242 F.Supp. 321, 322- 325 (S.D.N.Y.1965) (Wyatt, J.); Thiele v. Shields, 131 F.Supp. 416, 419 (S.D.N.Y.1955) (Kaufman, J.); but see Dack v. Shanman, 227 F.Supp. 26 (S.D.N.Y.1964). To go further than this, as Professor Loss powerfully argues, Securities Regulation at 1785, would totally undermine the carefully framed

limitations imposed on the buyer's right to recover granted by § 12(2) of the 1933 Act.

> FN3. Of course, § 12(1)'s imposition of a liability almost absolute upon the seller of a security that has not been registered in violation of § 5 of the 1933 Act is grounded on distinctive concerns. See 3 Loss, Securities Regulation 1692-96 (1961).

Even if, however, we were to disregard the teaching of Judge Frank in Fischman v. Raytheon Mfg. Corp., supra, 188 F.2d at 786, and follow the lead of those Circuits that seem to have discarded the scienter requirement in actions for damages under Rule 10b-5, [FN4] Ellis v. Carter, 291 F.2d 270, 274 (9 Cir. 1961); Royal Air Properties, Inc. v. Smith, 312 F.2d 210, 212 (9 Cir. 1962); Kohler v. Kohler Co., 208 F.Supp. 808, 823 (E.D.Wisc.1962) (dictum), aff'd, 319 F.2d 634 (7 Cir. 1962); Stevens v. Vowell, 343 F.2d 374 (10 Cir. 1965); Myzel v. Fields, 386 F.2d 718 (8 Cir. 1967); we should not impose such expansive liability in a situation, markedly different from those considered in the cases just cited, where to do so would frustrate, not further, the larger goals of the securities laws. While I am not convinced that imposition of liability for damages under Rule 10b-5(2), absent a scienter requirement, even limited in the way just proposed, would not go beyond the authority vested in the Commission by § 10(b) to act against 'any manipulative or deceptive device or contrivance' and be so inconsistent with the general structure of the statutes as to be impermissible, it is at least clear that the April 12 press release would be the worst possible case for the award of damages for merely negligent misstatement, as distinguished from the kind of recklessness that is equivalent to wilful fraud, see SEC v. Frank, 388 F.2d 486, 489 (2 Cir. 1968).

> FN4. The imposition of liability on Clayton, Crawford and Coates for 'beating the gun' does not require any such metamorphosis of Judge Frank's concept of fraud as the majority opinion seeks to perform. The only one of these defendants who came close to a showing of good faith was Coates. But even he did not act on the belief that the second press release had in fact reached the market, see 258 F.Supp. at 288; his defense was rather a belief that the

> law required him only to await its issuance. While such an erroneous view of the law is pardonable, it is not 'good faith' in a legal sense.

The issue here, however, is the different one of an injunction. Mr. Justice Goldberg noted in SEC v. Capital Gains Research Bureau, 375 U.S. 180, 193, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963), that the elements of a cause of action for 'fraud' vary 'with the nature of the relief sought' and that 'It is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for money damages.' See also Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540, 547 (2 Cir. 1968). It can, indeed, be argued that, even on this basis, Rule 10b-5(2), absent the reading in of a scienter requirement, goes beyond the authority granted by § 10(b) of the 1934 Act. However, it cannot be doubted that one of the most important purposes of the securities legislation was to prevent improper information being circulated by the issuer, and I therefore am not disposed to hold that Congress meant to deny a power whose use in appropriate cases can be of such great public benefit and do so little harm to legitimate activity.

B.

However, it does not necessarily follow that this is an appropriate case for granting an injunction as to future press releases. While we have often said that 'a cessation of the alleged objectionable activities by the defendant in contemplation of an SEC suit will not defeat the district court's power to grant an injunction restraining continued activity,' SEC v. Boren, 283 F.2d 312 (2 Cir. 1960), and cases there cited, it is likewise true that an isolated violation, especially in the absence of bad faith, does not require such relief. SEC v. Torr, 87 F.2d 446 (2 Cir. 1937). Absent much clearer language than is found in the 1934 Act, the entitlement of a plaintiff to an injunction thereunder remains subject to principles of equitable discretion. The Supreme Court made this clear beyond peradventure in the leading case of Hecht Co. v. Bowles, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944). See 3 Loss, Securities Regulation 1975-83 (1961). Here there is no danger of repetition of an unduly gloomy press release like that of April 12. The essence of the SEC's case is that Timmins was a once-in-a-lifetime affair; the company's motive in issuing the release was laudable; and the defect was solely a pardonable one of execution. If

Judge Bonsal had denied a injunction on these grounds, I see no basis on which we could properly have reversed him. Instead he acted on the view, erroneous in the court's belief, that no violation of the Rule had occurred and he was thus without power to enjoin, 258 F.Supp. 296. Although I see no reason why we could not affirm nevertheless, I am content to leave it for him to consider whether, although he has power to issue an injunction, there is equity in this portion of the bill. My concurrence in the disposition of the press release issue assumes that such consideration is permitted.

IRVING R. KAUFMAN, Circuit Judge (concurring):

I concur in Judge Waterman's reasoned and thorough opinion and in the court's disposition of the instant appeal. I agree with Judge Friendly, however, that we should provide guidance to the District Courts with respect to pending private claims for damages based upon Rule 10(b)(5) arising out of the transactions now before us. And, I concur in as much as Part II of Judge Friendly's opinion as discusses the origins of the rule and the relevance of today's decision-- involving only an application by the S.E.C. for an injunction-- to private damage actions.

ANDERSON, Circuit Judge (concurring):

I concur in Judge Waterman's majority opinion and I concur in the discussion of law set forth in Part II of Judge Friendly's concurring opinion.

HAYS, Circuit Judge (concurring in part and dissenting in part):

I concur generally with Judge Waterman in his views as to the proper interpretation of Section 10(b) and Rule 10b-5 and as to the standards which are to be employed in the application of the statute and the rule.

With the exception of Stephens and Fogarty as recipients of stock options, I agree with the majority on the disposition of the cases involving individuals.

I do not agree on the remand of the issue with respect to Stephens and Fogarty as recipients of stock options. It seems to me clear that the injunction sought by the Commission should be granted.

The majority remand the case against the corporate defendant to the district court for a determination as to whether the April 12 press release was misleading and whether, if so, those responsible for the release used due diligence.

In my opinion the evidence establishes as a matter of law that the press release was misleading. Indeed, if the correct standard is applied, the finding of the trial court requires the conclusion that the press release was misleading:

'At 7:00 p.m. on April 9, those with knowledge of the drilling results had material information which it was reasonably certain, if disclosed, would have had a substantial impact on the market price of TGS stock.'

The evidence in the record in support of this finding is overwhelming.

Assuming arguendo that the corporation cannot be enjoined except on a showing of lack of due diligence, since Fogarty and those who assisted him in the preparation of the press release were aware of the drilling results to which the district court's finding refers, they obviously did not use due diligence in the preparation of the misleading press release.

I would grant the application for an injunction.

[DISSENT OMITTED]♠