Supreme Court of the United States

October [redacted] TERM 1969

In the Matter of:

ELMER E. MILLS AND LOUIS SUSMAN,

Petitioners,

vs.

THE ELECTRIC AUTOLITE CO., ET AL.

Respondents.

Docket No. 64

CORRECTED TRANSCRIPT

Place Washington, D. C.

Date November 13, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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BENHAM
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vs	)	No. 64
THE ELECTRIC AUTOLITE CO., ET AL., Respondents	)	

The above-entitled matter cam on for argument at 11:05 o'clock a.m. on November 13, 1969

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice=
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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Chicago, Illinois 60603

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 64. Mills and others against the Electric Auto-Lite Company.

Mr. Shure.

ORAL ARGUMENT BY ARNOLD I. SHURE, ESQ.

ON BEHALF OF PETITIONERS

MR. SHURE: Mr. Chief Justice and may it please the Court: This case is here on certiorari to the Seventh Circuit Court of Appeals. Petitioner sare minority shareholders of Electric Auto-Lite Company and they sue derivatively and as a class action on behalf of all other minority shareholders with respect to a merger, proxy statement, which was mailed to the shareholders of Auto-Lite in 1963.

As the action is brought against Auto-Lite for whose benefit it is sought, against Mergenthaler, the majority shareholder, which owns 54 percent of Auto-Lite stock, and against American Manufacturing Company, a parent of Mergenthaler and owner of one-third of its stock.

The story begins about two years earlier when the American Manufacruring Company, the top of the pyramid, found itself in a legal situation where presumptively, all of the transactions between its affiliates, Mergenthaler and Auto-Lite and itself or any of them, had to be subject, possibly, to Investment Company Act scrutiny and regulation. This regulation, in substantive terms, posed some very serious problems and to

avoid the risks of this kind of regulation, an application was made to the Corporate Regulation Division of the Securities and Exchange Commission for an exemption under a provision which permits such an exemption if it can be shown that the business of the parent is not that of an investment company, but it is primarily engaged in a business other than that of owning stocks through controlled subsidiaries.

To show that American was primarily engaged in the operation of Auto-Lite and its business on a day-to-day basis, Respondents offered evidence of the fact that Mergenthaler actually dominated the day-to-day business of Auto-Lite and that this was done in cooperation with American and that this domination occurred through the fact that all of the directors -- all of the directors -- of Auto-Lite had been hand-picked. Seven of them were hand-picked by Mergenthaler; seven of them were direct nominees and four of them had been retained at sufferance and as the testimony went there, for the benefit of Mergenthaler; not for the benefit of Auto-Lite, as they put it.

On this showing they obtained the exemption order. And hard on the heels of this exemption order they issued the proxy statement with regard to the proposed merger, between Mergenthaler and Auto-Lite.

The proxy statement was completely silent about this domination of the board of directors. In fact, it was completely silent as to any relationship between the board of

directors of Auto-Lite and Mergenthaler and American, and although conscious of the fact that it was necessary to disclose such relationships, they did disclose that there we-e four directors of Auto-Lite who were common to Mergenthaler; and went on to make the positive representation that no director has any other interest, direct or indirect in the proposed merger.

In the Complaint the Plaintiffs claimed that this was an out-and-out misrepresentation. It was certainly a major nondisclosure. The proxy statement did say that "The board of directors has carefully considered and approved the terms of the merger and recommends that the shareholders vote to approve the plan of merger."

Respondents, despite the fact that the suit was pending, proceeded to consummate the merger and this puts our situation here in exactly the same context as the situation in Borak versus J. I. Case, which this Court decided in 1964, and which we say is determinative of the issues here, because there, too, the merger was consummated; the people took the risk, decided to go ahead knowing there was a lawsuit pending, but nevertheless went ahead with knowledge of what the claims of the Plaintiffs were.

Since the facts are undisputed because we had these sworn statements from the other case, the District Court took the view that the shareholders were entitled to be informed of

these interrelationships between the board of directors making the recommendations and the adversary in the merger negotiations and entered judgment -- a summary judgment under Rule 56-C of the Federal Rules of Civil Procedure, which is appropriate where there are no genuine issues of fact that there had been a violation through nondisclosure of a material fact or facts.

The Court reserved, however -- brought up the question of causal relationship, and after hearings were had on the casual relationship and it was demonstrated to the Court that this merger was consummated through the use of proxies procured through the unlawful proxy statement, the Court then made a further finding and entered a supplemental summary judgment holding that the issue of liability had been established and that there was a violation of the Act.

The Court of Appeals agreed with the District Court on the fact that there was this material nondisclosure. Both Courts had little difficulty in coming to the conclusion that the failure to disclose this conflict of interest, the relationship with the adversary, was so material that a violation had occurred, so the Court of Appeals, in a very carefully considered opinion, ruled that there had been this violation of Section 14-A and Rule 14 of the regulations promulgated by the SEC.

The District Court reserved all questions of relief for further hearing. Under the summary judgment proceedings,

it is permissible to have a judgment on liability first and then after, that is disposed of. The appeal of the Appellants, of course, came immediately after the District Court's ruling and finding.

Since the Court of Appeals found that there had been a violation and the fact not disclosed was material, the Respondents here filed no petition for certiorari and did not seek to save that question for review by this Court. When Petitioners filed a petition, the Respondents resisted our petition, filed no cross-petition, and we believe that that matter is therefore not pending before this Court.

Now, this Court requested the Government to file a brief as Amicus and the Government in its brief, as will be noted, agrees with Petitioners' view as to what issues are pending on this certiorari hearing and theirs are essentially the same as ours -- that is, the Government.

The Respondents, of course, attempt to seek a review and a weighing of the evidence by this Court and at great length in their brief they argue what evidence there was before the other Courts. We have not answered that because we have felt governed by the rules of this Court and we have adhered to the question only on which this Court granted certiorari.

Now, in a separate portion of the opinion, the Court of Appeals deals with the question of causation, and here rules that the District Court was in error. Although

agreeing that the proxy statement calls the merger in the sense that the votes essential were procured through the unlawful proxy statement, the Court of Appeals laid down a different test of causation asking whether the misleading statement of omission caused the submission of sufficient proxies to change the result of the vote.

As the Court of Appeals said, the more exact question is whether that particular misrepresentation or wrongful -- material wrongful omission -- actually resulted in the votes. The crux of the Court of Appeals' opinion lies at this point toward the end; it is within the last two pages of the opinion. "The material offered by Defendants on the merits of the terms of merger suggest that it may be possible for them to satisfy the Court by a preponderance of probabilities; that the merger would have received a sufficient vote even if the proxy statement had not been misleading in the respect found."

Petitioner take the position that this kind of speculation or guess-work or attempt to unscramble the minds of the 5,400 minority shareholders who voted for the merger, is essentially going to be a guesswork proposition; the type of undertaking that Courts do not undertake. There are many decisions, in-luding one by Justice Cardozo long ago, in which at common law he said that we can't get into these nice speculations as to which particular bit of information in a complicated series of facts, affected the person's mind.

But what the Court of Appeals was really talking abot here they speak of in a footnote when they say the corresponding question in common law is reliance. Now, there is nothing in the Borak case and there is nothing in the Exchange Act of 1934, which is before this court; there is nothing in the Rules and Regulations of the Securities and Exchange Commission that says anything about reliance.

We get down to the question of what is the purpose of this legislation. Our test must be Borak because we think Borak conclusively disposes of this case. The test is: what was the purpose? And the purpose was tohave an honest suffrage. The Rule 14 and Section 14(a) do not say that all unfair mergers are barred. This is a disclosure statute. It says that you must make full disclosure so that there may be a fully-informed voting on the question that is presented in the proxy statement.

If the proponents of a merger want to set out all the horrible things, assuming the plan is just terribly unfair and they want to set the whole thing out and they tell everything fully, there is no violation of the statute. But, the Court of Appeals in interpreting a Federal Statute, has gone to common law standards and creates this impracticable standard as to how you resolve what went on in people's minds, and this assumes, of course, that the stockholders would have voted for any fair merger. They don't discuss whether it need be just

fairfair; a little bit fair; a whole lot fair; overwhelming, or what. The assumption there is that the shareholders, in guessing what went on in their minds and guessing and speculating what they would do, would vote for a fair merger. Well, that is not consistent with the known facts. People have many reasons for voting. Here there were many facts disclosed as to the market value, the book value; the book value here was $88 a share and the people were getting less than 75 percent of book on this merger and when one analyzes the figures in the proxy statement you realize they weren't even getting the market value of their Auto-Lite shares because the pre erred shares of Mergenthaler that would be given in exchange and converted into common immediately, would bring something like $6 to $9 less on the market than they would have had for their shares of Auto-Lite.

But the reason that the whole plan was unfair was that they were -aking this at less than 75 percent of book value. Now, all of these it is true --

Q I perhaps have missed the point in this case. I thought that there was no attack here on the fairness of the terms of the merger itself. Am I mistaken about that?

A That is not pending before the Court, Your Honor, at this time. The question of fairness we say -- Petitioners say -- that the issue of fairness has nothing to do with the remedy and restitution. The trial here -- the verdict

in the Court below that brought the case here did not involve the question of fairness at all. It was a showing that there was a violation of the proxy rules and Plaintiffs maintain, that to establish our cause of action under Borak, fairness has absolutely nothing to do with it.

Q Well, that's what I thought.

A The Court of Appeals injected this issue of fairness and they set up a standard that if the plan is fair we will assume that the people wouldhave voted for it and if you, the Petitioners or Plaintiffs, are unable to establish that the plan was unfair, or putting the burden the other way, they said that the Respondents, by the burden of persuasion, should demonstrate that it is fair, if they can, and they put in their expert witnesses and so on, and then we put in ours and you get down to the question of whether or not, in a very lengthy battle of attrition, as to whether or not it is fair.

We say that it has absolutely nothing to do with the violation and on that we must stand or fall. Either Borak means what it says or it doesn't mean anything. And to borrow a common-la test of constructive fraud, which the Borak decision says the Court was trying to get away from and Congress was trying to get away from, and toinject it into a disclosure statute which involves the public interest and fair disclosure to shareholders so they may vote and know what they are voting on without having all the evils that came prior to the

Securities Act. We're arguing this case exactly 40 years and two weeks, to the day, after the stock market crash of 1929 and all these investigations, the preambles to the Securities Act, all talk about what they are trying to cure. They are trying to cure the secrecy; they're trying to cure the nondisclosures; they're not trying to say let's have fair plans; you are commanded to make thisplan fair; you are commanded to make disclosures and full and honest disclosure, and that's all that's involved.

Q Do you think it's irrelevant whether or not these misrepresentations or these omissions affected any votes?

A I believe it is irrelevant because Congress in passing its statute, did not inject any element of reliance. If we are going to get into questions of reliance and causation, then we get into the area of speculation and what affects people's minds and this is something that is almost impossible to unscramble. How can we go back now, years later. If the Defendants had gone back immediately when they were served with the Complaint and they knew what the facts were, they knew about this other proceeding; they knew about the evidence; they could have gone back and resubmitted it and would have had a very easy disposition of the case.

Q Do you rely on Borak?

A I certainly do.

Q Didn't Borak say causal connection would be

tried out in the District Court?

A Borak does not say that causal relationship must be tried. It must be remembered that Borak was here. I was in this case. Borak was my case.

Q Yes.

A In Borak, the case came to this Court on the pleadings.

Q I know it did.

A And it was not after a resolution; there was no evidence here --

Q And what did Borak say?

A Borak said that causal relationship is a matter for the trial court. Now, in order to understand what the Court meant by that, you must recognize that this Superme Court has laid down Rules of Federal Procedure and in the Rules of Federal Procedure you have provisions for summary j judgment where all the facts are admitted. We say here the facts are admitted. The causal relationship is not some vaque and indefinite thing that goes into the question of fairness. We can have a war of attrition which will never be over in the case and completely destroy the remedy for any small share-holder. And, after all, these laws are here to help the small shareholder who is not able to carry on this kind of fight.

Q You speak of remedy; do you want damages?

A As far as remedy is concerned --

Q But do you want damages?

A We have the alternative. What we want here now, we want restitution. Restitution may come in two ways: either in kind or it may come in damages. Now, the law of restitution goes back to the 16th Century. You start with the Slades case and --

Q In other words, you want your old pieces of paper,; that is, in the money that pu can get out of your new ones.

A No, Your Honor, I don't want the old pieces of paper. What I am saying is this: that if the Court, after a trial, and hearing all the relevant facts, decides this merger should be set aside, I don't want that avenue foreclosed. We have never said, regardless of what the Defendants have in their brief, and unfortunately we apparently didn't make ourselves that clear. When we talk about restitution, and that the statute says that it shall be void as to the rights, we're not saying that that means automatic divestitute; what we are saying is the fact that the Congress set the stage for restitutionary remedies.

Now, I'll give one example of why this is so important: In Sterling versus Mayflower it was held that when there is a merger the only damage that the shareholder can get is the merger value. And then they decide -- this is a State Court case -- they say that merger value is the market value. So, all

you can get is the market value of what your shares would have sold for on that day.

Now, we say that when the assets of our company are sold by the majority shareholder to himself -- Mergenthaler sold these assets to itself because they controlled the board of directors -- well, we say that we're entitled to a restitutionary measure of damages which says: "We will look at this." The Court is going to look at this as though the merger hadn't gone through. "We are not going to make you take your merger proceeds; we're not going to look at this in the way of an expectancy as though the merger had gone through; we're going to look at this as though the transaction had never taken place.

Q Well, don't you get right to the fairness of the merger, then?

A No, that is nothing to do with fairness, Your Honor.

Q Well, I would think it would if your stock is worth more now than it would have been if the merger hadn't taken place. What about your restitution --

A No one can speculate what the stock would be worth now if the merger hadn't taken place. That's pure guesswork. The measure of value -- one measure of value is right there on the books. The Mergenthaler people say, "Oh, book value doesn't mean anything." That's what Respondents say in

their brief. But, they, themselves, used book value. They went out in he market and bought hundreds of thousands of shares and they set up the excess of book open market as an asset on their books and they took $800,000 a year of that excess value and treated it as earnings and then in figuring out this fantastic merger ratio, they said, "Look at how much more earnings Mergenthaler has." Now, Auto-Lite can't give any consideration whatsoever to any such values, but Mergenthaler's values and earnings are appreciated. They had some $30 million or some huge sum, and they put that in; they were writing it off on their books as additional income, earned by Mergenthaler and it was nothing more than the difference between what they picked up their share for on the market and the excess of book value over it.

All that we are saying is that we are not asking for divestiture, other than the fact that we put the prayer in our Complaint. We are asking for restitutionary measures of damages as stated in Borak. Borak cites Deckert versus Independent Shares under the '33 Act. It says: "The language here of jurisdiction is virtually identical with that in the '33 Securities Act and there you can get restitution." We want the restitutionary measure; we want it as of the moment before the merger, as though the transaction had never occurred. When you look at the book value; you look at the liquidating value; you can look at all these values, because if these assets -- the

position of the minority -- were sold to the majority shareholder for less than it was worth, then we are entitled to get what it was really worth because all it was was the liquidation of the company and they sold out our share as though they sold all the assets themselves and they are giving us what they want to give us.

We think we are entitled to get what they were really worth. Now, that has nothing to do with the fairness of the plan whatsoever. That plan never existed if we are going to follow the mandate of Congress.

Thank you. I will reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: You have about seven minutes.

Mr. Jenner.

ORAL ARGUMENT OF ALBERT E. JENNER, JR., ESQ.

ON BEHALF OF RESPONDENTS

MR. JENNER: Mr. Chief Justice, and Members of the Court: I caught a cold yesterday and I think it's affected my hearing a little bit, but not otherwise.

If Your Honors please, it may be unusual and perhaps is unusual that a Securities and Exchange Commission case be as living ascase as this one, involving uses of summary judgment procedures, so that the Respondent in this case has never had a trial.

The limitation of various issues -- arguments now in this Court that under as spotted a beneficient statute as this one is, that what the Congress intended and what the Securities and Exchange Commission intended in adopting a rule under Section 14(a) was to cut off -- to cut off from consideration of any Court, including this one, at some early stage of the game if there is -- let us say, a technical -- any kind of alleged violation of the rule which I am about to read to Your Honors, that at that moment further judicial inquiry ceases and as Mr. Shure has argued to Your Honors, there comes a situation in which that trial court must then say to itself as of the time of the consummation of this merger that amounted to a purchase by the surviving company of the company merged into that surviving company and so you must judge its value on pure asset value as a way of liquidation.

Fairness is immaterial. Did Congress intend by the adoption of this beneficient statute of the SEC adopting the rule under it, that fairness should be excluded?

Now, may I turn to Borak. Mr. Justice White has inquired of Mr. Shure on that subject matter. On this issue, Mr. Justice White, Mr. Chief Justice and gentlemen: what this Court said -- first, that case as Your Honors will clearly recall, of course, was a hodling that Section 14(a) created a Federal right. It was not a controversy of citizenship; did not have to sue on common law or fraud. You had a Federal cause of

action. And when there was a pressing in the course of that case as to the consequences of a violation -- great, small, indifferent, or horrendous as the case might be -- what was the consequence?

Mr. Justice Clark, for the Court, said, "The causal relationship" -- and I am quoting from that case -- "the causal relationshipof the proxy material and the merger are questions of fact to be resolved at the trial; not here."

Now, may I respectfully suggest that, to me means that if a violation is determined upon by the trial court after considering all the circumstances, then the Court goes on to determine what consequences of causal relationships have resulted. And not one of those factors is fairness, as the Securities and Exchange Commission says in its amicus curiae brief submitted to Your Honors.

Now, what is the statute or rule that is presented here? It is simply this: solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time, and in the light of the circumstances under which it is made -- may I repeat that, if Your Honors please -- at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact or which omits to state any material fact necessary in order to make the statement

therein not false or misleading.

Now, what happened in this particular case? A proxy statement of 108 pages, as set forth in Volume I of the transcript, appendix in this case, was sent to the shareholders three weeks before a proposed merger meeting of the shareholders, received by Mr. Shure's clients. One client turned over the proxy statement to him; the other client, I don't know whether it was Mr. Mills or Mr. Susman, to Mr. Norman Asher of the Chicago Bar, both distinguished lawyers. They expressed their views -- that is, the clients', that they understood the proxy statement and they were opposed to the merger and they voted against the merger; and they appear here as Plaintiffs who have voted against the merger on behalf of all shareholders, including those who voted for it -- over 5,000 who voted for it -- seeking to set this aside.

Now, I have never been quite able to comprehend Mr. Shure's argument, either in the trial court or in the Court of Appeals or in this Court, as to what he means by "restitution." May I suggest to Your Honors that I can resort to Mr. Shure's brief in which he says as follows, as to what consequence he wants to flow from what the Court of Appeals held in this case, if Your Honors please, was a misemphasis -- not a horrendous condition; a misemphasis with respect to the relationship of directors in these several corporations.

Mr. Shure says at Page 69 of his brief -- so I don't

misinterpret him -- this is what he says: "Here the Petitioners have repudiated the merger, asking for 'appropriate orders setting it aside' and for an order directing Respondents to account to the corporation forthe damages sustained by reason of the invalid transfer of corporate assets." They do not ask to enforce the merger agreement, but to be put in the position they would have occupied if no unlawful merger had been effected. Their right to that relief, unobstructed by any inquiry into 'fairness' -- this Court is not to go into the question of fairness; no one is to go into the question of fairness -- is "necessary to make effective the Congressional purpose."

Now, what is the perspective? What is in the time and, in the light of the circumstances, under which these supposed omissions or misemphasis in this proxy statement occurred?

In dollar terms, if Your Honors please, the minority shareholders here have benefitted enormously. Now, if they have not benefitted I am sure that Mr. Shure would be here urging that upon the Court; but they have benefitted enormously. On the day of the merger the Electric Auto-Lite shares were selling at $59; the shares of the surviving corporation as of yesterday's market, on the conversion of substantially all of these shares that have been converted -- very, very few, I think less than 500 shares have not converted -- was $127 a share, and at one time were up as high as $200 a share.

Q Was that a one-to-one?

A 1.88 of the shares of the surviving corporation for each share of Electric Auto-Lite. And then there was in the mantime, if Your Honor please, on conversion,there was a stock split, two for one, and then there was a percentage dividend.

Q So, for every dollar that a man's stock was worth in Electric Auto-Lite, what's that dollar worth in --

A As of yesterday's market, $2.00.

Secondly, now although Petitioner do claim to the contrary in their brief, the fact is there is absolutely, if Your Honors please, no questionof fraud in this case; no question of fraud in thise case at all and no intentional wrong-doing. There isn't a word in the briefs of the Petitioners here and there isn't a word in the Securities and Exchange Commission's amicus curiae brief to Your Honors, to suggest any intentional wrong-doing whatsoever in this case.

We're not evil-doers. A comedy is being urged upon the Court. Here is a living case in which the Petitioner is asking the Court, having found a misemphasis in a proxy statement, "you must not close your eyes to this statute and the effect of this action."

Now, under any common-sense view of this case, any common sense view, this alleged deficiency, that is, a failure to emphasize as strongly as Mr. Shure and his clients thought

should be emphasized, and as the Court of Appeals in the opinion by Mr. Justice Fairchild thought should have been emphasized a little bit more -- that is, that directors of Electric Auto-Lite were nominated by Mergenthaler; that directors of Mergenthaler were nominated by American Manufacturing -- should have been brought out more formally to show an alleged conflict.

But, if Your Honors please, in the very proxy statement itself, five lines, if I may seek Your Honors' permission, in five lines in the proxy statement itself, page 30 of the first volume of the abstract, Mergenthaler, which owns approximately 54 percent of the outstanding shares of Electric Auto-Lite intends to vote in favor of approval of the agreement of merger.

Q Mr. Jenner, haven't both Courts found the material omission here? Do we have to reargue that question? Is that a question of fact or what?

A We think it's a question of fact, and we believe because the Trial Court followed so-called summary judgment procedure, that we have never received a full trial on the issue of whether this difference in emphasis was, in fact, a material omission.

Q That question isn't here is it? You didn't cross-petition up here?

A No; we didn't cross-petition, if Your Honor

please, and we do thinkit's here. Your Honors granted cert; Your Honors did not limit the grant of cert; and, in our opinion, that -- excuse me, Your Honor --

Q Arguments are usually limited to questions raised in the cert petition; aren't they, Mr. Janner?

A Well, yes they are, and they certainly should be.

Q Well, are you arguing something not in the question in the cert?

A I think not, if Your Honor pleases. It is my position that the issue of materiality is inextricably bound into the questionof causation of fairness and the effect of this on the shareholders.

But, I must say to all of Your Honors in great sincerity and candor that my clients can live and live well with the opinion and judgment of the Court of Appeals of the Seventh Circuit, because the Court of Appeals in the Seventh Circuit remanded this case to the Trial Court to afford us a trial on the issue of whether, as stated in 14(a) sub 9 of the Securities and Exchange Commission, a rule that at the time and in light of the circumstances under which it was made, the statement violated the rule to have a consequential effect upon, as this Court said should be determined in Borak -- upon this merger, rather than as Mr. Shure suggests, get the entry quickly of an order, on summary judgment or otherwise, which says there

is a technical violation of this rule, and then you don't have to gointo fairness. Fairness is immaterial.

Q Mr. Jenner, what's the difference between your position and the Government's position as amicus?

A The Government's position, as I understand its position, is very well stated in its brief, and if I may say, and I wish to compliment the SEC Counsel and the Solicitor General on a well-written brief.

The Government is concerned, as I view their brief, about what is called corporate suffrage. Since they have a rule that certain material matters shall be reported in a proxy statement, that there should be encouragement of minority shareholders and other to make cimplaint promptly in the event that they see oversights or other violations of 14(a)(9). And in order to encourage that, there should at the outset, as quickly as possible, be some kind of a technical finding of liability. Now, the liability with which the Government speaks, is not a consequential liability, but one that will afford enough anchor -- may I put it that way -- enough anchor to allow suit expense and attorneys fees to the minority shareholders who make their complaint.

The Government says that fairness is a factor; disagrees with Mr. Shure on that. The Government says -- SEC says: "This is not void;" that is, the fact that a proxy statement doesn't happen to fit in all degrees with 14(a)(9).

doesn't make the transaction void; doesn't make those votes void. They are voidable, perhaps, in light of all the circumstances and after a full trial of the case -- but they are not void.

Mr. Shure, Your Honors will recall from the record, prosecuted a cross-appeal from the District Court's Opinion in which the District Court had struck out of his judgment a finding that this merger was void.

Mr. Shure does not argue very vigorously in his reply brief, but he did argue in his opening brief and his petition for cert in this case, that it was all void. Now, whether this Court, having before it now, the position of the SEC, Mr. Justice Harlan, to create a Federal law of corporations in which the Court would hold that 14(a) and the rule under it, 14(a)(9), does give a District Court jurisdiction to allow attorneys fees and suit expense even though the traditional creation of a fund or other benefit is not obtained, but only after it has been called to the attention of the Court, some deviation from 14(a)(9)and the proxy material should be restated and there should be a resolicitation.

In order to encourage that, says the Securities and Exchange Commission, fees and expenses should be allowed.

May I suggest to Your Honors in that connection, that as I have trouble going through that theory, I would liken it to this as a possibility: In your experience, and of course, all

litigators, are will and trust-constructing cases in which the testator has a will, or a trust is prepared, and there is an ambiguity in it, if it i- his cause or his lawyer's cause, then the expense of resolving that ambiguity is assessed against the estate and perhaps that may be an avenue whereby the Securities and Exchange Commission's suggestions to this Court may possibly be accommodated.

Now, it seems inconceivable to use -- of course, I'm an advocate and it seems inconceivable to me because I'm advocating for a client -- but trying to be as candid as I possibly can, I can't conceive of a situation in which fairness -- I woul-n't say it was a defense; it's a factor to take into consideration in the ultimate resolution of the whole case.

As we complain in our brief, we tried; we tried; we tried before His Honor, Judge Parsons of the District Court, to have this case set for trial on all three counts; not on these motions for limited findings on summary judgment and then a reference of the whole case to a master with no limitations on the Master; no guidelines to the Master as to what he was going to decide on the causation and result, and as the Court of Appeals held, that the reference to a Master here had to fall with the order, but not only because it fell with the summary judgment order, but also because there were no guidelines -- and in referring this case to a master to tell the Court ultimately what the relief was going to be.

Now, when I made my opening statement, this was a live case, presenting to this Court many problems I had in m mind, the procedures that were followed. We have never had a trial.

Q Did you object to that in the Court of Appeals?

A Yes, we did, if Your Honor pleases --

Q You aren't arguing here that the summary judgment was wrong-- are you? because it was a summary judgment?

A No, that isn't our position. I don't want to be facetious, if Your Honor pleases; it wasn't wrong because it was a summary judgment, it was wrong because questions of fact were presented that could not be resolved by summary judgment, but which were, in fact, resolved by summary judgment; that there were considerations and factors to be taken into consideration by the Court which he did not take into consideration, one factor being, if Your Honor pleases, the question of fairness.

Now, Mr. Shure says, how=are you going to determine what's in the mind of a shareholder who voted for this merger?

Q Well, Mr. Jenner, you are getting a trial. As I understood your argument earlier, you dont think there is any restriction on -- merely because the Court of Appeals has limited this to causation, I gather you think you can bring in everything you want to bring in?

A I certainly do, if Your Honor pleases.

Q Well, what's the complaint here? If that's the correct view of it you are going to get your trial, aren't you?

A Yes, and that's why we did not petition this Court for cross-petition for certiorari.

Q You are attempting to sustain the Court of Appeals?

A We are attempting to sustain the Court of Appeals insofar as the Court of Appeals granted us a judgment that we should have been entitled to a trial on all the issues in the case.

Q Of course, as I read it, what they say is: "We conclude that there is an issue for trial as to the causal relationship."

A Yes, Your Honor.

Q And they precede that -- they sustain the summary judgment as regards the materiality of the misrepresentation. But you still think, under the -- if I understood you earlier -- the trial on causal relationship, you're going to be entitled to contest the materiality of the misrepresentation; or did you say that?

A May I try to put it this way, if Your Honor please. Youare very precise and I would like, if I can, to answer it precisely. It is our position that causation, in

effect, and materiality are one ball of wax. You really can't separate them and when the Court separeates them, as was done here -- particularly when a resort is made tosummary judgment -- when you have these major considerations that bear on the materiality, excised from the consideration by the judge on the issue of so-called materiality, you get the case all segmented, and a badge. a scarlet letter, is placed on the --

Q I come back to what I said earlier, about you reading the Court of Appeals' order for anew trial as not limitng you to something called causal relationship, but permitting you in litigating the fact of causal relationship, also to litigate the issue of materiality; aren't you?

A ONly to the extent that the nature of that which which was not included in the proxy statement, or the mis-emphasis in the proxy statement, has a bearing on causation. I hope I dont sound as though I am double-talking. It's a factor in this whole ball of wax to be considered by the Court, and when the Court makes its judgment, should yourunscramble or, as Mr. Shure -- he would like to have this Court hold -- this is a violation of Section 14(a) and therefore, these proxies don't mean anything; there has to be what he calls restitution; that is a determination that you take this company not as a viable company earning money or trying to earn money, but as a (?) And, applying that formula as of that day -- there had been a liquidation and distribution as of that day -- this consequence would

have fallen money-wise.

And you don't pay any attention to what did happen in the meantime, even though as because of the soundness of the plan of merger and placing these two companies together, that these shares are as of this day worth twice as much as what they were when the shareholders overwhelmingly -- 94 percent -- voted in favor of this merger.

Mr.Shure wants to cut things off; especially he wants to cut off fairness. All we have been seeking to do is what the Court of Appeals gave us -- although not quite the way we wanted it, but we can live with it.

Actually, now, among all these issues, that's all we're seeking. We think the Court of Appeals gave it to us and we think Mr. Shure is seeking to urge this Court to deny it to us.

Do any of Your Honors have any further questions?

MR. CHIEF JUSTICE BURGER: I think not; thank you, Mr. Jenner.

Mr. Shure, you have seven minutes.

REBUTTAL ARGUMENT BY ARNOLD L. SHURE, ESQ.

ON BEHALF OF PETITIONERS

MR. SHURE: Mr. Chief Justice, and Your Honors: The fairness as the matter of a fair ration of exchange in the merger is not here; what we seek is the value of what we gave up. We charge unfairness in the sense that the Respondents were

unjustly enriched -- not that the ration of exchange was unfair.

It is not Mr. Shure who wrote the Act and said that the transaction shall be deemed as void. Congress said that. We are taking the posture the Congress places when it says: "The wrongdoer shall not profit." Now, Mr. John P. Dawson, who is the outstanding authority, of Harvard, on the subject of unjust enrichment, wrote his leading text on that in 1951 and any resort to that shows that remedies at law, the general assumpsit remedy; remedies in equity and the tracing of assets; equitable liens and so on, are all different forms and this gives what people who understand the law of restitution are talking about when they say that "you shall view a transaction under the Securities Act as void," it means that you get that, not with all the consequences of the merger attached to it, but what the situation was as it existed before that.

We are content to let the Government's brief speak for itself as to whether fairness is relevant to causation. Mr Justice Harlan asked Mr. Jenner as to what the differences were. There is a very substantial difference. They don't agree at all. The Government says that the judgment should stand, the judgment of the Trial Court, that we have proved everything necessary to establish a cause of action and that certain consequences flow from that.

They do say, as we agree, that fairness of the ratio

of exchange -- I'm talking about the Commission -- may be relevant to one measure of monetary recovery, but the fairness of the exchange ratio is not the only measure of damages. And the fairness of the ratio is not relevant to unjust enrichment causes of action which is the basis of the remedies under the '34 Act. Borak points that out.

The Commission said that "Whereas, here the misleading aspects of the solicitation to not relate to the terms of the merger, the misled stockholders should be entitled to monetary or other relief only if the merger resulted in a reduction to them of earnings or earnings potential." Now, what does that mean? That means that if we were entitldd to get two and one-half shares of preferred stock under the merger, and we only received 1 and 8 tenths, then we ought to get it or get that in dollars, we are the plaintiffs; we are the ones who have been injured. We have brought a class here and we areeasking that all these people who were shortchanged on the merger, and any way you look at that proxy statement it is inescapable.

What did they do here? They took $23 a share of the book value off of ours and we ended up with $64 or $65 a share $64,86 and the shareholders of Mergenthaler end up with $107 a share of book value. They just handed it over to the other people, and we are told here that we just have no remedy here in the ratio of exchange. We would get into a war here, of experts, and that's what the small shareholder is not able to

do. We can't match the great corporation, with all of its assets, in thatkind of a war. Congress envisioned this sort of thing and gave us a short, quick, remedy of restitution and said we can have any avenue of relief --

Q Mr. Shure, where do you differ from the Government?

A Only by way of emphasis. As far as the Government is concerned, I believe on Page 18 of their brief they did not explain what they meant by "earnings potential, loss of earnings or earnings potential." Obviously, looking at the Government's brief and looking at their other writings, it is inescapable that this is an unjust enrichment we are talking about and we can get at that unjust enrichment in any way that the facts can be reached, and we say that there is no room for any further hearing on causal relationship; all there is is room for remedy.

If somebody wants to come in and have a trial on the questionof fairness of what we received, this is an entirely different situation fromproving fairness. Now,the Government says says to us: "You are not entitled to get any damages if you didn't lose anything." But what did the Court of Appeals say? The Court of Appeals said, "If you don't get divestiture, because because it was a fair plan, then you dont get anything," except, of course, as they gave us a bill for $9,000 of costs for 1 losing the appeal. They reversed and assessed the costs

against us, when we vindicated the law and we won on the issue of materiality and the fact of violation, but they say that we lose the case and we get absolutely nothing by restitution or any other way.

The Court of Appeals seems to envision this as either divestitute, unscrambling a merger, and if you read their opinion, the language is very clear. They give this as a rationale: not every merger should be set aside because of a nondisclosure.

Now, I am not going to rebut what Mr. Jenner said about whether there was fraud charged or not; that matter is not before this Court and we didn't do it in our briefs; I don't think we should spend our time on it now.

The Respondents will get a full trial on the question of what the damages should be. We don't want this Court to foreclose us fromusing any of the means of securing restitution that Borak says should be followed and Borak relied on Deckert versus Independent Shares, which also talked of restitution; and Borak talked of the Section 33 Act which gives a restitutionary remedy.

Now, this is what we're talking about, that the wrongdoer gets no benefit whatsoever out of his wrongdoing. When I say that I don't mean to tear the thing asunder. I'm not interested in tearing apart corporate structures; I cit that as one of the things we ask for. You go down the line and

you state your prayers in a complaint and you ask for all the different things -- every lawyer does this in drafting a complaint. You ask for an accounting; you ask for damages. We are are not trying to be unreasonable here; we feel we've been very badly dealt with in this on the basis of what we were going to get under the merger because it was so far below book value and they gave our book value to the other side and we didn't get a fair market value exchange because if we took the preferred and converted into common we immediately would suffer a lossoof $6 to $9 on the basis of market values. If you don't take book and you don't take market, what do you take? You take what your own direcrors, who are the deputies of your adversary, the merger, want to give you.

MR. CHIEF JUSTICE BURGER: Your time is up, Mr. Shure.

MR. SHURE: I beg your pardon, sir. I want to thank you very much for your consideration.

(Whereupon, at 12:00 o'clock p.m. the argument in the above-entitled matter was concluded)