No. 14-19

In the Supreme Court of the United States

ALFRED S. TEO, SR., ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed, in a civil-enforcement action brought by the Securities and Exchange Commission, the district court's order that petitioners disgorge profits that the district court concluded were caused by petitioners' violations of securities laws.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 746 F.3d 90. The opinion of the district court (Pet. App. 50a-76a) is not published in the *Federal Supplement* but is available at 2011 WL 4074085.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2014. A petition for rehearing was denied on March 7, 2014 (Pet. App. 83a-84a). On May 21, 2014, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 5, 2014, and the petition was filed on July 3, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this civil-enforcement action brought by the Securities and Exchange Commission (SEC or Commission), a jury found that petitioner Alfred S. Teo, Sr. had violated Section 10(b) of the Securities Exchange Act of 1934 (the 1934 Act), 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, and that Teo and petitioner MAAA Trust (the Trust) had violated Section 13(d) of the 1934 Act, 15 U.S.C. 78m(d), and Rules 12b-20, 13d-1, and 13d-2, 17 C.F.R. 240.12b-20, 240.13d-1, and 240.13d-2. Pet. App. 2a, 5a. The district court ordered, *inter alia*, that petitioners disgorge their illegally obtained profits. *Id.* at 59a-68a, 77a-82a. The court of appeals affirmed. *Id.* at 1a-37a.

1. a. Section 10(b) of the 1934 Act makes it unlawful to "use or employ, in connection with the purchase or sale of any security, * * * any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. 78j(b). The SEC adopted Rule 10b-5 to implement Section 10(b). 17 C.F.R. 240.10b-5. Rule 10b-5 declares it unlawful, "in connection with the purchase or sale of any security," to "employ any device, scheme, or artifice to defraud"; to "make any untrue statement of a material fact or * * * omit to state a material fact necessary in order to make the statements made * * * not misleading"; or to "engage in any act, practice, or course of business which operates * * * as a fraud or deceit upon any person." *Ibid.* Those antifraud provisions are intended to "ensure honest securities markets and thereby promote investor confidence." *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002) (citation omitted).

The 1934 Act and its implementing regulations also require any person (or two or more persons who act as a group) who beneficially owns more than 5% of a company's equity securities (*i.e.*, has the power to sell or vote those securities) to publicly file a statement that discloses the identity of the shares' beneficial owner and the number of shares he beneficially owns. See 15 U.S.C. 78m(d) (Section 13(d)), 78p(a) (Section 16(a)) (10% threshold); 17 C.F.R. 240.13d-1(a) (Rule 13d-1(a)), 240.16a-3 (Rule 16a-3), 249.103. Section 13(d)(1) of the 1934 Act requires any person who beneficially owns more than 5% of a company to disclose any plans or proposals that relate to or would result in an extraordinary corporate transaction or a change in the board of directors. 15 U.S.C. 78m(d)(1); 17 C.F.R. 240.13d-101 (Item 4 of Schedule 13D). Any material change to prior disclosures must appear in an amended disclosure statement. See 15 U.S.C. 78m(d)(2) (Section 13(d)(2)); 17 C.F.R. 240.12b-1 (Rule 12b-1), 240.12b-20 (Rule 12b-20), 240.13d-2(a) (Rule 13d-2(a)), 249.104. Those "disclosure provisions are intended to protect investors, and to enable them to receive the facts necessary for informed investment decisions." *Chromalloy Am. Corp.* v. *Sun Chem. Corp.*, 611 F.2d 240, 248 (8th Cir. 1979). When a person makes a material misrepresentation or omission under these reporting provisions with scienter, that person also violates the antifraud provisions of Section 10(b) and Rule 10b-5. See, *e.g., United States* v. *Bilzerian*, 926 F.2d 1285, 1297-1299 (2d Cir.), cert. denied, 502 U.S. 813 (1991).

b. The Commission may bring a civil-enforcement action against "any person" who has "violated any provision of [the 1934 Act]" or "the rules or regulations thereunder." 15 U.S.C. 78u(d)(3)(A). Congress has authorized the SEC to bring civil actions "to enjoin" violations of the securities laws. 15 U.S.C. 78u(d)(1). In such actions, "the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. 78u(d)(5). This Court has construed legislative grants of equitable authority "to enjoin" statutory violations as encompassing the power to enter a decree compelling a defendant "to disgorge profits * * * acquired in violation" of the relevant statutory provisions." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398-399 (1946); see, *e.g.*, *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (*First City*); *SEC* v. *Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95-96 (2d Cir. 1978) (*Commonwealth Chem.*) (Friendly, J.).

Disgorgement of profits is a nonpunitive remedy that "depriv[es] violators of ill-gotten profits," thereby "prevent[ing] unjust enrichment." *Zacharias* v. *SEC*, 569 F.3d 458, 471-472 (D.C. Cir. 2009) (quoting *SEC* v. *Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000)). In general, "[a] district court order of disgorgement forces a defendant to account for all profits reaped through his securities law violations and to transfer all such money to the court, even if it exceeds actual damages to victims." *SEC* v. *Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006). "[T]he primary purpose of disgorgement is not to compensate investors. Unlike damages, it is a method of forcing a defendant to give up the amount by which he was unjustly enriched." *Commonwealth Chem.*, 574 F.2d at 102.

In the SEC's civil enforcement actions, courts employ a three-step burden-shifting approach to determine the amount by which a defendant has been unjustly enriched.[1] In the first step, the SEC must establish an amount that is a "reasonable approximation of profits causally connected to the violation." *First City*, 890 F.2d at 1231-1232. In the second step, the defendant has the burden "clearly to demonstrate that the disgorgement figure" established by the Commission is "not a reasonable approximation." *Id.* at 1232. To do that, a defendant may demonstrate, for example, "a clear break in or considerable attenuation of the causal connection between the illegality and the ultimate profits." *Ibid*. In the third step, the burden shifts back to the SEC to rebut the defendant's evidentiary showing, so that the Commission has the "ultimate burden of persuasion." *Ibid.*

2. Petitioner Teo is a businessman and investor. In 1992, he established petitioner MAAA Trust, which held various securities. Teo was the beneficial owner of the Trust for the relevant time period. Pet. App. 2a.

In early 1997, petitioners held approximately 5.25% of the stock in Musicland, a Delaware corporation that was a retailer of music, videos, books, computer software, and video games. Pet. App. 2a-3a. Musicland had a "poison pill" plan in place to prevent a hostile takeover. The plan could be activated when any indi-

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[1] See, *e.g.*, *SEC* v. *Happ*, 392 F.3d 12, 31 (1st Cir. 2004); *SEC* v. *Razmilovic*, 738 F.3d 14, 31-32 (2d Cir. 2013), cert. denied, 134 S. Ct. 1564 (2014); *SEC* v. *Halek*, 537 Fed. Appx. 576, 581-582 (5th Cir. 2013); *SEC* v. *Lawton*, 449 Fed. Appx. 555, 556 (8th Cir. 2012); *SEC* v. *Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010); *SEC* v. *Curshen*, 372 Fed. Appx. 872, 883 (10th Cir. 2010); *SEC* v. *Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004); *First City,* 890 F.2d at 1232 (D.C. Cir.).

vidual or group owned 17.5% or more of the company's stock. *Id.* at 3a. If the plan was activated, other shareholders would be able to purchase stock at a lower price in order to dilute the holdings of the hostile buyer. *Ibid.*

From early 1997 to July 1998, petitioners properly disclosed their combined Musicland holdings on SEC Schedule 13D disclosure forms. Pet. App. 3a. During that time period, their holdings remained below the threshold for triggering the poison pill. *Ibid.* On July 30, 1998, petitioner Teo amended his Schedule 13D disclosure to falsely state that he had "ceased to have investment powers with respect to" the Trust. *Ibid.* The Trust later filed two Schedule 13D disclosures falsely stating that Teo's sister-in-law had sole power to buy and sell the Trust's shares. *Id.* at 4a.

In fact, however, Teo continued to be the beneficial owner of the Trust during that time and continued to invest in Musicland on behalf of the Trust. Pet. App. 2a-4a. By falsely disclaiming his beneficial ownership in the Trust, Teo underreported his Musicland holdings and failed to comply with his reporting obligations under Section 13(d). *Id.* at 4a. Teo filed three false Schedule 13D disclosures on his own behalf and failed to file several other required 13D disclosures. *Id.* at 3a. The Trust similarly failed to file numerous required disclosures. *Id.* at 4a. On August 2, 1998, Teo and the Trust together controlled 17.79% of Musicland shares, an amount sufficient to trigger the poison pill if petitioners had truthfully disclosed their holdings and Teo's control of the Trust. *Ibid.* By December 6, 2000, petitioners' combined holdings in Musicland were 35.97%. *Ibid.*

During the same time period, petitioners also failed to disclose their plans and proposals to sell Musicland in a corporate-control transaction and to put Teo, or his selected candidates, on Musicland's board of directors. Pet. App. 4a, 16a-17a. Starting in 1999, Teo made three proposals to take Musicland private in a leveraged buyout of outstanding Musicland shares, including all of petitioners' shares. *Ibid.* Teo admitted that his motive for doing so was to create an opportunity for him to "cash out" petitioners' Musicland shares. *Id.* at 4a.

In 1999, Teo submitted to Musicland an investment bank's financial analysis of his buyout plan, which Musicland rejected. Pet. App. 16a. In early 2000, Teo again proposed to take Musicland private, and he signed a term sheet for the buyout with a different investment bank. *Ibid.* When Musicland rejected that proposal, Teo formulated a third buyout plan with another investment bank. *Ibid.* Teo discontinued that plan only when he learned that Musicland was in negotiations to be sold to a third party, which turned out to be Best Buy Co. (Best Buy). *Id.* at 16a-17a. Faced with opposition by Musicland to his proposed corporate-control transactions, Teo made multiple unsuccessful proposals between 1998 and 2000 to place himself and three of his "associates" on Musicland's board of directors. *Id.* at 4a, 17a. Although federal securities laws required petitioners to disclose all of those plans and proposals, petitioners never did so. *Id.* at 4a.

In December 2000, Best Buy announced an all-cash tender offer for all Musicland shares. Pet. App. 5a. The price of Musicland stock rose after the announcement, and Teo sold a portion of his shares in the market. *Ibid.* He sold his remaining shares to Best Buy. *Ibid.* Teo realized a total profit of more than $21 million from the stock that he and the Trust had purchased after July 30, 1998, when he first misrepresented his beneficial ownership of the Trust. *Ibid.*

3. In April 2004, the SEC filed a civil action against petitioners, asserting violations of Sections 10(b), 13(d), and 16(a) of the 1934 Act and various SEC rules and regulations. Pet. App. 5a.[2] The district court granted summary judgment in part to the Commission, finding no genuine dispute that Teo had violated the shareholder-reporting requirements of Section 16(a). *Id.* at 5a, 51a. After a jury trial, the jury found that Teo had violated the antifraud provisions of Section 10(b) and Rule 10b-5. *Ibid.* The jury further found that both petitioners had violated the shareholder-reporting provisions of Section 13(d) and Rules 12b-20, 13d-1, and 13d-2, and that the Trust had violated Section 16(a) and Rule 16a-3. *Ibid.*

The district court enjoined petitioners from future violations of the relevant securities-law provisions. Pet. App. 6a. On the SEC's motion, the district court held petitioners jointly and severally liable for a civil penalty and for the disgorgement of their illegally obtained profits. *Id.* at 6a, 59a-68a, 77a-82a. In determining the proper disgorgement amount, the dis-

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[2] The Commission also alleged that Teo had engaged in insider trading, in violation of Sections 10(b) and 14(e), 15 U.S.C. 78j(b) and 78n(e), and Rules 10b-5 and 14e-3, 17 C.F.R. 240.14b-5 and 240.14e-3, including by engaging in unlawful trades of Musicland's stock ahead of the Best Buy tender offer. Teo entered into a consent judgment with respect to those claims, agreeing to disgorge his profits. Pet. App. 5a n.3, 78a.

trict court applied the established three-step burden-shifting framework described above. *Id.* at 60a; see *id.* at 27a-32a.

The district court found that the SEC had made an initial showing that a total of $21,087,345 in profits were "causally connected" to petitioners' violations. Pet. App. 59a-63a, 78a-79a. That amount, the court determined, represented the total profit that petitioners had earned on all shares of Musicland they had purchased after their fraud and reporting violations commenced on July 30, 1998. *Ibid.* The district court subtracted from that amount $181,865.87 that Teo had already disgorged as part of his consent judgment, as well as $3,483,425 in margin interest on petitioners' trades, to reach a total disgorgement amount of $17,422,054.13. *Id.* at 78a-79a. The court also assessed $14,649,034.89 in prejudgment interest. *Id.* at 79a. The court did not require petitioners to disgorge any gains they had earned from the "sale of stock purchased before July 30, 1998." *Id.* at 32a n.31; see also *id.* at 77a.

The district court then determined that petitioners had not rebutted the SEC's initial showing by "clearly * * * demonstrat[ing]" that the disgorgement amount established by the SEC was unreasonable. Pet. App. 60a (quoting *First City*, 890 F.2d at 1232). In particular, the court concluded that petitioners had not demonstrated that the Best Buy tender offer constituted an "intervening event" that broke the causal connection between their violations and the profits at issue. *Id.* at 62a-63a.

4. The court of appeals affirmed. Pet. App. 1a-49a.[3]

a. The court of appeals affirmed the disgorgement order. Pet. App. 18a-36a. The court concluded that the district court "did not abuse its discretion by determining that the profit [petitioners] realized from selling the stock they acquired while consciously violating the law unjustly enriched [petitioners], and that the enforcement objectives of this cause of action warranted ordering [petitioners] to disgorge $17,422,054.13." *Id.* at 35a-36a.

The court of appeals noted that petitioners had not challenged the calculation of the disgorgement amount, but had argued instead that the district court should not have ordered *any* disgorgement of profits reaped in connection with the sale of stock to Best Buy. Pet. App. 18a. The court rejected petitioners' contention that Best Buy's tender offer had broken the causal connection between petitioners' illegal conduct and the profits they received as a result of the

[3] With respect to liability, the court of appeals concluded that "substantial evidence" supported the jury's findings that Teo had committed fraud and that petitioners had committed shareholder-reporting violations. Pet. App. 14a-18a. The court also rejected petitioners' argument that the SEC had provided false evidence. *Id.* at 11a-14a. The court further concluded that the district court had not abused its discretion by admitting into evidence Teo's allocution testimony in *United States* v. *Teo*, No. 04-cr-583 (D.N.J.), in which Teo had admitted to a criminal violation of Section 10(b) based on his sharing with eight people the inside information that Best Buy planned to make a tender offer for Musicland. Pet. App. 6a-11a. The court concluded that the "allocution was probative of Teo's willfulness and knowledge in evading SEC regulations as they related to his Musicland stock holdings." *Id.* at 8a. The petition for a writ of certiorari does not challenge any of those holdings.

stock sale. *Id.* at 18a-19a, 23a-36a. Applying the established burden-shifting framework, the court of appeals held that the SEC may meet its initial burden by "produc[ing] evidence supporting a reasonable approximation of 'actual profits on the tainted transactions,' which is essentially satisfying a but-for [causation] standard." *Id.* at 28a (quoting *First City*, 890 F.2d at 1232). The court of appeals agreed with the district court that the SEC had produced evidence demonstrating that petitioners "obtain[ed] over $21 million in profits from the portion of the shares that were tainted with reporting violations," and that "this evidence presumptively demonstrate[s] a reasonable approximation of the profits arising from transactions tainted by the Section 13(d) and Section 10(b) violations." *Id.* at 32a.

Turning to the second step of the burden-shifting framework, the court of appeals concluded that petitioners "did virtually nothing to rebut [the] presumption" established by the SEC. Pet. App. 32a-33a. The court noted that, although petitioners had "asserted that the Best Buy tender offer was the direct, intervening cause of their profits," they had failed to "adduce—at a minimum—specific evidence explaining the interplay (or lack thereof) among the violation(s) at issue, the market valuation of the stock at fixed points in time, and any other cause for the profits they assert were untainted by illegality." *Ibid.* The court stated that "it might have been possible for [petitioners] to demonstrate that intervening causes made the profits in question greatly attenuated from the violation at issue, but they failed to do so." *Id.* at 33a.

The court of appeals also stated that, even if petitioners had established that the Best Buy tender offer was the direct cause of their profits, the court would still have affirmed the disgorgement order. Pet. App. 33a. While acknowledging that the tender offer "is likely one cause" of petitioners' profits, the court explained that "whether [petitioners'] profit[s] resulted directly—from a causal perspective—from the wrongdoing or from the operation of dumb luck is not dispositive on the question of whether it is proper and fair to regard those profits as tainted by the wrongdoing." *Id.* at 34a. The court further explained that, "[w]hile [petitioners] were amassing Musicland shares, their collective misreporting and Teo's flagrant fraud insulated the valuation of [petitioners'] Musicland stock holdings from the effects of a poison pill that could have been activated if the extent of their holdings in the company had been known." *Id.* at 34a-35a. The court concluded that petitioners' "serious" violations of securities laws, "done with conscious intent" to mislead, had "enabled [petitioners] to surreptitiously acquire and hold a large volume of stock that, in turn, netted huge profits when sold to Best Buy." *Id.* at 35a.

b. Judge Jordan dissented in relevant part. Pet. App. 38a-49a. Judge Jordan agreed with the panel majority that the "SEC met its initial burden to establish that a plausible relationship exists between [petitioners'] securities violations and the profits gained." *Id.* at 41a-42a. He would have held, however, that petitioners had produced sufficient evidence to show that the Best Buy tender offer constituted "an independent and intervening event" that "bears no relationship to [petitioners'] securities violations." *Id.* at

44a-45a. The dissent recognized that "[s]uch a determination is fact-specific," *id.* at 48a n.7, but concluded that "profits on [petitioners'] sale of Musicland stock that are solely attributable to Best Buy's tender offer should not be subject to disgorgement," *id.* at 38a.

ARGUMENT

Petitioners ask (Pet. 7) this Court to decide whether defendants in SEC enforcement actions can be ordered to disgorge profits earned as a result of intervening events unrelated to their securities violations. Review of that question is not warranted because it is not squarely presented here and is not the subject of a conflict among the courts of appeals.

Petitioners do not contest the court of appeals' primary rationale for affirming the district court's disgorgement order—*i.e.*, that they presented insufficient evidence to establish that the relevant profits were attributable to an intervening event unrelated to their illegal conduct. Petitioners instead challenge the court of appeals' alternative rationale that, even if the Best Buy tender offer was the most direct cause of the profits that were ordered to be disgorged, those profits were *also* attributable to petitioners' securities-law violations, since accurate reporting of petitioners' trades would likely have triggered the poison pill and thereby prevented petitioners from realizing those profits. Besides being unnecessary to the court's ultimate decision, that analysis was correct and consistent with other appellate authority. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioners do not contend that the court of appeals erred in applying a burden-shifting legal framework to determine whether and how much disgorgement should be ordered. Petitioners also do not chal-

lenge the court of appeals' actual application of that framework to the facts of this case. In particular, petitioners do not challenge the court of appeals' conclusion that the SEC presented sufficient evidence to establish a causal connection between petitioners' violations of securities laws and the profits they reaped from the sale of the shares they purchased in connection with their illegal activities. Nor do they challenge the court of appeals' conclusion that petitioners failed to demonstrate (or do anything beyond assert) that the Best Buy tender offer was an independent and intervening event that broke the causal chain between petitioners' illegal activities and the profits they pocketed. Those unchallenged aspects of the court of appeals' decision provide both the primary rationale and a fully sufficient basis for the court's affirmance of the district court's disgorgement order.[4]

Petitioners instead ask this Court to review only the court of appeals' *alternative* rationale for its ultimate decision. After concluding that petitioners had failed to rebut the SEC's proof of the proper amount of disgorgement, the court stated that, "even if [petitioners] had provided evidentiary support that the Best Buy tender offer was the direct cause of all of their profits, it would not have changed our conclusion." Pet. App. 33a-34a. The conditional nature of that statement leaves no doubt that it, and the discussion that follows, were unnecessary to the court of appeals' ultimate conclusion. Because review of the court's alternative rationale would have no effect on the outcome of this case (including the amount peti-

[4] Review of the court of appeals' fact-bound application of the burden-shifting framework to this case would not warrant review even if petitioners had challenged it. See Sup. Ct. R. 10.

tioners are required to disgorge), the petition for a writ of certiorari should be denied. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court reviews judgments, not statements in opinions.") (citation and internal quotation marks omitted); see also Stephen M. Shapiro et al., *Supreme Court Practice* 241 (10th ed. 2013) (explaining that "merely an inconsistency in dicta" does not justify granting a petition for a writ of certiorari).

2. Even if the court of appeals' disposition of this case had depended on the proposition that favorable market conditions do not *always* qualify as an intervening event that breaks the causal chain between a fraudster's violations and subsequent profits, that proposition is correct and would not warrant this Court's review.

Contrary to petitioners' contentions (Pet. 7-9), the court of appeals did not hold that the defendant in a federal securities-law action can be ordered to disgorge profits that are wholly unrelated to his illegal activities. The court merely noted that not all intervening market events or conditions will suffice to break the causal chain between illegal activities and subsequent profits. Pet. App. 33a-35a. The court thus did not treat principles of causation as irrelevant, but simply recognized that an event (here, petitioners' receipt of large profits from their ultimate sales of Musicland stock) can have more than one cause. Thus, even if petitioners had successfully demonstrated that their profits were attributable *in part* to intervening market events, those profits could *also* be attributable to petitioners' own unlawful conduct.

That understanding is consistent with this Court's recent decision in *Robers* v. *United States*, 134 S. Ct.

1854 (2014). In *Robers*, the Court considered how to calculate the restitution due in connection with a prosecution for mortgage fraud when the mortgage victims (banks) had foreclosed on the mortgaged properties and later sold the collateral in a declining market. *Id.* at 1856-1857. The Court rejected the defendant's argument that his fraud was not the proximate cause of the full measure of the banks' losses because the declining housing market had caused the collateral to lose value. *Id.* at 1859. The Court explained that "[f]luctuations in property values are common" and "foreseeable." *Ibid.* The Court further noted that, at least when a scheme involves obtaining collateralized property through fraud, "losses in part incurred through a decline in the value of collateral sold are directly related to an offender's" illegal actions. *Ibid.*

The same principles apply in cases involving violations of federal securities laws. Indeed, persons who engage in securities fraud often do so because they anticipate, and seek to profit from, future changes in market conditions. Petitioners engaged in fraud and misrepresentation in order to evade Musicland's poison pill, with the ultimate goal of acquiring a greater proportion of Musicland's shares than would have been possible if petitioners had complied with the law. But for petitioners' illegal conduct, they likely could not have possessed the shares that they ultimately sold to Best Buy at a profit. As the court of appeals explained, "if the extent of [petitioners'] holdings in [Musicland] had been known," the poison pill would have disabled petitioners from "amassing [the] Musicland shares" they sold in the tender offer. Pet. App. 34a-35a; see 2 Restatement (Third) of Restitution and Unjust Enrichment § 51 & cmt. f, at 203, 211 (2011) (cited at Pet. App. 28a-30a, 34a) (explaining that the profits from a wrongfully acquired asset that increases in value due to "favorable market conditions" are "properly attributable to the underlying wrong").

Petitioners acknowledge that the poison pill acted as an upper "threshold" on their holdings. Pet. 4. Petitioners' scheme to evade the poison-pill threshold was the direct cause of their profits because their scheme "enabled [petitioners] to surreptitiously acquire and hold a large volume of stock that, in turn, netted huge profits when sold to Best Buy." Pet. App. 35a. The profits that petitioners realized from hiding the extent of their ownership of Musicland's shares were thus attributable to their illegal conduct, even if those profits were *also* attributable in part to Best Buy's tender offer.

That approach is particularly sound because the Best Buy tender offer was not a fortuity, but instead was directly related to the "purpose and effect of the scheme" that petitioners had devised. *SEC* v. *Lorin*, 76 F.3d 458, 462 (2d Cir. 1996) (per curiam); see *United States* v. *Speakman*, 594 F.3d 1165, 1172 (10th Cir. 2010) (an intervening event that is "directly related to the offense conduct" does not defeat a chain of causation) (quoting *United States* v. *Wilfong*, 551 F.3d 1182, 1187 (10th Cir. 2008), cert. denied, 556 U.S. 1215 (2009)); 1 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* § 7.13, at 584 (1956) ("all intended consequences" of an intentional act "are proximate"). The purpose of petitioners' fraud and reporting violations was to obtain illegal profits from a corporate-control transaction like the Best Buy tender offer. Teo's "flagrant fraud" and petitioners' "collective misreporting" were "done with conscious intent" to "surreptitiously acquire and hold a large volume of stock," Pet. App. 35a, while they also concealed material plans to bring about an "extraordinary corporate transaction" that would permit them to "cash out" from the sale of all of their Musicland shares, *id.* at 4a, 17a.

Contrary to petitioners' contention (Pet. 15-19), the court of appeals' analysis does not conflict with this Court's decisions governing the award of relief in other contexts. The decisions on which petitioners rely confirm both that principles of equity limit disgorgement to profits that are related to the relevant wrongdoing, and that disgorgement should not be used as a punitive remedy. See *Tull* v. *United States*, 481 U.S. 412, 424 (1987); *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 408-409 (1940). As petitioners acknowledge (Pet. 18), however, the court of appeals agreed with those principles. Although petitioners disagree with the court of appeals' primary conclusion that the Best Buy tender offer did not break the causal chain between petitioners' fraud and their profits, that fact-specific challenge would not warrant this Court's review even if it had been the sole rationale for the decision below. Even in its alternative rationale, the court of appeals found the district court's disgorgement order to be proper not because that order served to punish petitioners, but because it prevented petitioners from retaining profits that they would not have realized but for their securities-law violations. See Pet. App. 33a-35a.

3. Petitioners contend (Pet. 9-15) that decisions of the First, Second, Tenth, and D.C. Circuits conflict with the Third Circuit's alternative conclusion that the Best Buy tender offer did not break the causal chain between their securities-law violations and the profits

that the district court had ordered to be disgorged. No such conflict exists. All of those circuits agree with the court below that disgorgement is an appropriate remedy in SEC civil-enforcement actions, and that courts should apply the established burden-shifting framework in determining the appropriate measure of disgorgement in a particular case. See, *e.g.*, *SEC* v. *Happ*, 392 F.3d 12, 31 (1st Cir. 2004) (applying burden-shifting framework and noting that "[t]he risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty"); *SEC* v. *Razmilovic*, 738 F.3d 14, 31-32 (2d Cir. 2013) (applying burden-shifting framework), cert. denied, 134 S. Ct. 1564 (2014); *SEC* v. *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) ("The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits."); *SEC* v. *Curshen*, 372 Fed. Appx. 872, 883 (10th Cir. 2010) (applying burden-shifting framework); *SEC* v. *Whittemore*, 659 F.3d 1, 7-8 (D.C. Cir. 2011) (applying burden-shifting framework and noting that "separating legal from illegal profits exactly may at times be a near impossible task") (quoting *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989)), cert. denied, 133 S. Ct. 28 (2012); *First City*, 890 F.2d at 1232 (applying burden-shifting framework).

The court of appeals decisions on which petitioners rely recognize that a defendant cannot be ordered to disgorge profits that are not causally related to the defendant's illegal conduct, and that "disgorgement must be limited to account for intervening events" that break the chain of causation. Pet. 12; see *SEC* v. *MacDonald*, 699 F.2d 47, 52 (1st Cir. 1983) (en banc) (holding that disgorgement must be limited to profits that are "causally related to" a defendant's illegal activity); *Manor Nursing Ctrs.*, 458 F.2d at 1105 (2d Cir.) (holding that disgorgement must be limited to profits "received in connection" with the illegal conduct); *United States SEC* v. *Maxxon, Inc.*, 465 F.3d 1174, 1179 (10th Cir. 2006) (upholding disgorgement order that was limited to profits causally connected to violations), cert. denied, 550 U.S. 905 (2007); *First City*, 890 F.2d at 1232 (D.C. Cir.) (holding that a defendant may rebut the SEC's initial disgorgement showing "by pointing to intervening events from the time of the violation"). Contrary to petitioners' contention, however, the court of appeals' alternative rationale in this case is fully consistent with those decisions. The Third Circuit recognized that disgorgement would have been improper if petitioners had "demonstrate[d] that intervening causes made the profits in question greatly attenuated from the violations at issue." Pet. App. 33a. Although petitioners may disagree with the court of appeals' conclusion that they failed to make that showing, that disagreement does not suggest that any circuit conflict exists.

Petitioners have not identified any other case with comparable facts in which a similar disgorgement order was reversed. Indeed, the only decision petitioners cite that involves the fraudulent acquisition of securities embraces the general proposition that, when a defendant "acquire[s] the property by fraud," subsequent "accretions" from "fortunate" market events that occur during the fraud are considered the "proximate consequence of the fraud." *MacDonald*, 699 F.2d at 53-54 (quoting *Janigan* v. *Taylor*, 344 F.2d 781, 786 (1st Cir.), cert. denied, 382 U.S. 879 (1965)). Petitioners have identified no reason to believe that their appeal would have been successful in any other circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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