

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, :
 :
 : Plaintiff, :
 :

-against-

TEXAS GULF SULPHUR COMPANY, a Texas :
corporation, CHARLES F. FOGARTY, :
RICHARD D. MOLLISON, RICHARD H. :
CLAYTON, WALTER HOLYK, KENNETH H. :
DARKE, DAVID M. CRAWFORD, THOMAS :
S. LAMONT, FRANCIS G. COATES, :
CLAUDE O. STEPHENS, THOMAS P. :
O'NEILL, JOHN A. MURRAY, EARLE L. :
HUNTINGTON and HAROLD B. KLINE, :
 :

Defendants. :
 :

65 Civ. 1182

POST-TRIAL MEMORANDUM FOR DEFENDANT COATES*

Summary of Argument

Plaintiff's claims against Coates are based upon the contention that his placing an order to buy Texas Gulf stock in a telephone call to Haemisegger after the news conference on April 16, 1964, was "an act . . . which operates or would operate as a fraud or deceit upon any

* References to "CM" are to the pre-trial memorandum on behalf of Coates, "SF" to the Statement of Facts on behalf of Lamont and Coates, "T" to the trial transcript and "L&C Ex." to Lamont and Coates exhibits.

person in connection with the purchase or sale of . . .
[a] security". (Rule 10b-5(c)) On the basis of that tele-
phone call plaintiff asserts three separate claims against
Coates:

(1) an alleged cause of action on its own behalf
to enjoin the future use by Coates of inside informa-
tion in purchasing Texas Gulf stock;

(2) an alleged cause of action for rescission on
behalf of the sellers of the stock purchased by Coates;
and

(3) an alleged cause of action for "restitution"
on behalf of the sellers of the stock purchased by
Haemisegger and his customers.

I

With respect to each of plaintiff's claims, since
Coates made no statement whatever, expressly or by implica-
tion, to any seller of Texas Gulf stock, Section 10(b) and
Rule 10b-5 are inapplicable. The only relevant statute is
Section 16(b) and that Section does not make unlawful the
use of inside information in purchasing stock held for more
than six months. (CM 8-14)

II

Even if Section 10(b) and Rule 10b-5 are regarded

as applicable, each of plaintiff's claims must be dismissed.

1. Coates did not engage in any act "which operates or would operate as a fraud or deceit upon any person". (CM 15-28)

(a) Whether or not plaintiff's suit requires proof of all of the elements of common-law fraud, it does require at least proof of (i) the making of a false representation and (ii) knowledge of its falsity--or, in the context of this case, (i) deception by silence and (ii) knowledge that silence was a deception. (CM 15-26)

(b) There can be no misrepresentation by silence unless the circumstances are such as to make silence deceptive; and there are no such circumstances here. Coates was under no legal duty to make any statement to potential sellers of Texas Gulf stock and, therefore, there was no reason for anyone to expect a statement from him. (CM 8-14) (T 2787-2791) Not only is there no proof that anyone was deceived by his failure to make a statement but the evidence is to the contrary.

Stories of a major ore discovery by Texas Gulf circulated throughout Toronto during the week of April 6. (SF 1, 2)

On April 12, Texas Gulf issued a news release which, although optimistic, disclaimed the exaggerated rumors in circulation. That release confirmed that preliminary indications from the Timmins drilling justified further drilling and stated that the company would "issue a definite statement to its stockholders and to the public" as soon as it "progressed to the point where reasonable and logical conclusions can be made". The press and, as reflected by the stock market, the investment community reacted optimistically to that release. (SF 2-5)

On Monday, April 13, a reporter for The Northern Miner visited the drilling site accompanied by Company representatives and wrote the article which was published in The Northern Miner on April 16. (SF 5)

During the week of April 13, detailed information with respect to the Timmins discovery, its tonnage and grade of ore and the fact that The Northern Miner was to publish a favorable article on Thursday, April 16, circulated in both New York and Toronto as well as in other cities. As a result, Texas Gulf's copper strike was common knowledge and substantial buying based on that knowledge occurred prior to and at the opening of the exchanges on April 16. (SF 5-7)

The Northern Miner, the authoritative newspaper with respect to the mining industry of Canada, with a circulation in excess of 30,000, published a front page article with respect to Texas Gulf's ore discovery in its issue of April 16. That issue was on newsstands and in brokerage houses by 8:00 a.m. and the information contained therein was widely disseminated throughout the financial community in New York and Toronto prior to the opening of the market. (SF 8-18)

The Ontario Minister of Mines delivered a press release with respect to the Timmins discovery to the press gallery at the Ontario

Parliament in Toronto at 9:40 a.m. on April 16. Members of that gallery include the Associated Press, United Press International, the Canadian Press, Reuters and Canadian television and radio networks, many of which are affiliated with United States networks. (SF 19)

Texas Gulf held a news conference at 10:00 a.m. in New York attended by over 22 representatives of the press, wire services and brokerage houses including the Dow Jones Instant News Service, Merrill Lynch, Pierce, Fenner & Smith and Francis I. duPont & Co. Shortly after the conference started a number of the members of the press and brokerage house representatives left the room to telephone their offices. (SF 19, 20, 22, 24)

At that point, all of the individuals present at the press conference, all of the organizations that they represented and their customers, the 30,000 readers of The Northern Miner and the countless number of investors and brokers whom those readers telephoned and telegraphed were free to enter orders to buy or sell Texas Gulf stock on the basis of the public announcement.

The unusually heavy volume of trading prior to 10:54 a.m. on April 16 demonstrates very vividly the extent to which the news was disseminated and acted upon prior to the belated transmission of the Company's announcement on the Dow Jones broad tape. 117,400 shares traded in the first 55 minutes of trading on April 16. By contrast on April 15 only 43,800 shares were traded during the entire day. (SF 14-17) (L&C Ex. JJ)

(c) Even if plaintiff had been able to prove that a seller was deceived by Coates' silence, the fact that Coates acted in entire good faith precludes the possibility of a finding of fraud on

his part. (CM 22-26) At the time he placed his telephone call to his broker, Coates reasonably believed that the news of the Timmins discovery had been made public and understood that he was legally and morally free to make purchases and to advise his broker that a public announcement had been made. (SF 24)

At the time of the transaction in question, Coates knew that the information reported at the news conference had been widely disseminated to the organizations there represented. (SF 24)

He assumed--and was entitled to assume--that the report would be on the Dow Jones broad tape in a matter of minutes. (T 166, 167) It had been his experience as a Director that dividend announcements are on the broad tape two to four minutes from the time that they are announced. (T 167, 170) The reasonableness of this assumption was attested to by Jerry Bishop, the Dow Jones reporter present at the conference, who testified by deposition that if normal procedures had been followed "this would have appeared [on the tape] within a matter of two or three minutes after I dictated it". (SF 20, 24)

Coates had been told on April 15 that the Minister of Mines of the Province of Ontario would make an announcement of the Timmins discovery at 11:00 p.m. that night. (SF 8) At the Board of Directors meeting on April 16 Coates and the entire Board were informed (although erroneously) by President Stephens that the Ontario Minister of Mines had made the radio announcement at 11 o'clock the night before and it was Coates' understanding that the announcement had been

disseminated to the financial community in New York. (SF 18, 19, 24)

Coates waited until the completion of the public announcement on April 16, notwithstanding the fact that he could readily have placed his order on the afternoon of April 15 when he saw the draft of press release, or on April 16, prior to the commencement of the press conference. (SF 8, 20, 24)

2. If Rule 10b-5 is construed to make unlawful Coates' purchase of Texas Gulf stock under these circumstances, then the Rule would be unconstitutionally vague for failure to provide an ascertainable standard of conduct. (CM 28-31)

III

Plaintiff's claims should be dismissed for the additional reasons that:

1. There has been no showing of any conceivable need for injunctive relief against Coates. (CM 31-34)

(T 175)

2. Plaintiff lacks authority to assert causes of action on behalf of sellers. (CM 34-36)

3. There is not a scintilla of evidence that any seller to Coates sold his stock in reliance upon anything said or not said by Coates. (Cf. Testimony of Billings T 2503-2517.) List v. Fashion Park, 340 F.2d 457 (2d Cir.),

cert. denied, 382 U.S. 811 (1965). (CM 26-28) (T 2801-2806)

July 5, 1966.

Respectfully submitted,

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