No. 14-1647

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CORRE OPPORTUNITIES FUND, LP, ZAZOVE ASSOCIATES LLC, DJD GROUP LLLP, FIRST DERIVATIVE TRADERS LP, and KEVAN A. FIGHT,

Plaintiffs – Appellants

v.

EMMIS COMMUNICATIONS CORPORATION,

Defendant – Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, CASE NUMBER 12-cv-491

BRIEF OF AMICUS CURIAE
Council of Institutional Investors

IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-1647

Short Caption: Corre Opportunities Fund et al. vs. Emmis Communications Corporation

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The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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i) Identify all its parent corporations, if any; and

None.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None. Amicus is a not-for-profit corporation.

Attorney's Signature: s/ Jeffrey P. Mahoney Date:

Attorney's Printed Name: Jeffrey P. Mahoney

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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STATEMENT PURSUANT TO FED R. APP. P. 29(c)(5)

No party and no party's counsel authored this brief in whole or in part and no party or party's counsel has contributed money that was intended to fund preparing or submitting this brief. No person other than *amicus* has contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF INDENTITY AND INTEREST

This brief is submitted by the Council of Institutional Investors ("CII") as *amicus curiae*. CII is a nonprofit association of pension funds, other employee benefit funds, endowments, and foundations with combined assets that exceed $3 trillion.[1]

Amicus submits this brief to provide the Court with information pertinent to the issue of whether Emmis Communications Corporation's acquisition of shares through "swap" transactions and the subsequent voting of those shares is consistent with corporate governance best practices.

[1] Council of Institutional Investors, *About Us*, http://www.cii.org/about_us (last visited June 27, 2014).

ARGUMENT

EMMIS'S ACQUISITION OF SHARES THROUGH "SWAP" TRANSACTIONS AND VOTING OF THE SHARES IS INCONSISTENT WITH CORPORATE GOVERNANCE BEST PRACTICES.

A. CII Corporate Governance Best Practices

CII has developed a comprehensive body of corporate governance best practices on a broad range of matters, including executive compensation, CEO succession and board diversity. CII also has adopted policies on other investment-related issues of interest to institutional investors, such as credit rating agencies and the independence of accounting standard-setters. Our policies provide a foundation from which CII advocates on matters of importance to members, and institutional investors generally.[2]

The nine non-officer members of CII's Board of Directors serve as CII's Policies Committee. They suggest ideas for policies, guide staff on policy drafts and decide which proposed policies to submit to the full Board. If approved by the Committee, a proposed policy becomes subject to a comment period open to all CII members, a subsequent vote by the full Board and a final vote by CII General Members.[3]

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[2] Council of Institutional Investors, *CII Policies* (revised May 9 2014), *available at* http://www.cii.org/policies.

[3] *Id.*

B. Section 1.4 Accountability to Shareowners

Section 1.4 of CII's membership approved corporate governance policies states:

> **Accountability to Shareowners**: Corporate governance structures and practices should protect and enhance a company's accountability to its shareowners, and ensure that they are treated equally. An action should not be taken if its purpose is to reduce accountability to shareowners.[4]

C. Application of Section 1.4 to the Emmis Swaps

In our opinion, Emmis's acquisition and subsequent voting of its own shares through "swap" transactions is inconsistent with the above-referenced CII policy and corporate governance best practices generally.

State law rules that prevent corporations from voting reacquired stock play an important role in corporate governance by helping to insure that corporate managements remain ultimately accountable to corporate shareowners. Affirming Emmis's swap transactions and subsequent voting as valid, would likely encourage the same or similar practices by other corporations with respect to their common shares (which is entirely possible), corporate accountability to shareowners would almost certainly be reduced.

The risk to corporate accountability is most pronounced in cases when corporations could reacquire and vote shares to affect actions requiring shareowner

[4] Council of Institutional Investors, *Corporate Governance Policies* (revised May 9, 2014), *available at* http://www.cii.org/files/policies/05_09_14%20CII%20Corp%20Gov%20Policies%20Full%20and%20Current%20%20FINAL.pdf.

approval. Affirming the validity of Emmis's actions could potentially grant management a tool to exert profound influence over, or even wholly control, issues requiring a shareholder vote. Management, not shareowners, may become the decision-makers. A fundamental tenet of corporate law—the separation of ownership from management—could be turned on its head.

The risk extends to voting on at least two general categories of proposals: Management initiated proposals and shareowner initiated proposals. Generally, management initiated proposals apply to a broad set of issues and are frequently required to be put to a shareowner vote as a result of state law.[5] Examples include proposals to approve certain non-salary compensation, changes to the company's anti-takeover provisions, recapitalization of the company, and the annual uncontested election of directors.

Though most management-initiated proposals are approved by shareowners, many are rejected.[6] For example, in 2013 at Russell 3000 companies, 68 management initiated proposals to approve non-salary compensation, 25 management initiated proposals to make changes to the company's anti-takeover provisions, and six

[5] Doron Levit & Nadya Malenko, *Nonbinding Voting for Shareholder Proposals*, 66 J. Fin. 2 n.3 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1325504.

[6] *Id.* at 2 n.4. The Russell 3000 index is comprised of the largest 3,000 U.S. public companies by market capitalization and represents approximately 98% of the investable United States Equity Market.

management initiated proposals to recapitalize were defeated by the vote of the company's shareowners.[7]

In addition, in 2013 there were 57 directors at Russell 3000 companies who failed to receive majority shareowner support.[8] As of April 21, 2014, only eight of those directors have stepped down from their boards, leaving 49 so-called "Zombie Directors" filling the seats of corporate boards despite being rejected by the shareowners.[9]

If Emmis's actions were allowed to stand, it is likely that some corporations would attempt to use the same or similar techniques as Emmis to prevent management initiated proposals from failing to obtain shareowner approval. Such a result would be particularly egregious in the case of the uncontested election of directors, where the likely result would be to augment further the growing legion of Zombie Directors who, by definition, are not accountable to the majority of voting shareowners.[10] As "[e]lecting members of the board of Directors is one of the most important ownership

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[7] Institutional Shareholder Services, *ISS Link*, (subscription service) (last viewed June 20, 2014) (on file with CII) ("*ISS Link*").

[8] *Id.*

[9] *Id.*

[10] *See, e.g.*, Letter from members of the CII Advisory Council to Mr. John Carey, Vice President-Legal, NYSE Regulation, Inc. 1 (Aug. 2, 2013), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2013/08_02_13_CII_Advisory_Council_letter_NYSE_Majority_Voting_Directors.pdf.

rights shareholders have," the potential assault on this essential shareowner right cautions against affirming strategies such as Emmis's.[11]

The risk to shareowner accountability also exists for shareowner-initiated proposals. Although not generally binding on the corporation, shareowner-initiated proposals are an important means for shareowners to communicate concerns to corporate management.[12]

In 2013 alone, there were 93 shareowner-initiated proposals at Russell 3000 companies that received majority support from shareowners.[13] Those proposals addressed a variety of issues of importance to long-term institutional investors, including such fundamental corporate governance issues as the right to majority (rather than plurality) voting for the uncontested election of directors; the right to majority (rather than supermajority) voting for major corporate actions; and the right to annually (rather than periodically) vote on each and every member of the board.[14]

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[11] Press Release, Connecticut Office of the State Treasurer, Shareholders Tell Nabors Industries: Let Us Nominate Our Own Directors, 1 (June 16, 2014), *available at* http://www.ott.ct.gov/pressreleases/press2014/PR061614NaborsShareholdersAccessProxy.pdf.

[12] Levit & Malenko, *supra*, at 2–3.

[13] *ISS Link*, *supra*, note 7.

[14] *Id.*

Proposals winning a majority shareowner vote are likely to be implemented despite their nonbinding nature.[15] To-date, 38 of the 93 proposals receiving a majority vote at Russell 3000 companies in 2013 have since been adopted by those companies.[16] Many shareowner-initiated proposals, including those dealing with majority voting and the election of directors, will likely enhance the accountability of those companies to their shareowners.[17]

Consistent with our conclusion concerning management-initiated proposals, we are confident that if Emmis's actions were allowed to stand, some corporate managers would seek to prevent certain shareowner-initiated proposals from obtaining a majority vote using the same or similar techniques as used by Emmis. Our confidence that such activity would likely occur is bolstered by the recent aggressiveness of management responses to shareowner proposals, perhaps best illustrated by the increasingly common practice of corporate management willing to litigate to block voting on shareowner-initiated proposals.[18]

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[15] *See, e.g.*, Luc Renneboog & Peter G. Szilagyi, *The Role of Shareholder Proposals in Corporate Governance,* 17 J. Corp. Fin. 167, 167 (2011).

[16] *ISS Link*, *supra*, note 7.

[17] *See* Renneboog & Szilagyi, *supra*, at 182 ("[S]hareholder proposals are in fact a useful device of external control . . . as they tend to target firms that both underperform and have generally poor governance structures. Moreover, the voting shareholders also observe the target firm's governance quality . . . .").

[18] *See generally,* Gibson Dunn, LLP, *Shareholder Proposal Developments During the 2013 Proxy Season* 10–12 (July 9, 2013), *available at* http://www.gibsondunn.com/publications/Documents/Shareholder-Proposal-Developments-2013-Proxy-Season.pdf.

For all of the above reasons, we believe the district court's decision to permit Emmis to vote the shares acquired via the swap transactions is inconsistent with our policies and corporate governance best practices generally.

CONCLUSION

For the foregoing reasons, CII respectfully urges the Court to hold that the swap transactions Emmis used in this case to purchase shares of its own stock were in fact reacquisitions of that stock and that Emmis was, as a result, not entitled to vote those shares.

By: /s/Jeffrey P. Mahoney

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because it contains 1333 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

By: /s/Jeffrey P. Mahoney

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2014, a copy of the foregoing Brief was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

By: /s/Jeffrey P. Mahoney