UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-3386

THE HANNA MINING COMPANY, *et al.*,

Plaintiffs-Appellees,

v.

NORCEN ENERGY RESOURCES LIMITED, *et al.*,

Defendants-Appellants.

On Appeal from the United States District
Court for the Northern District of Ohio

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*

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MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

PRELIMINARY STATEMENT AND INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission, the agency primarily responsible for administering the Securities Exchange Act of 1934, including the Williams Act amendments of which Sections 13(d) and 14(e) of the Act, 15 U.S.C. 78m(d) and 78n(e), are important parts, submits this memorandum, amicus curiae, to express its views on the following legal issues before this Court concerning the interpretation and enforcement of those statutory provisions:

(1) Whether a private right of action exists under Section 13(d) of the Securities Exchange Act in favor of the issuer corporation and its shareholders when they seek

injunctive relief to halt or correct violations of Section 13(d) and other equitable relief;

(2) Whether Section 14(e) of the Securities Exchange Act can apply prior to the public announcement of a tender offer; and

(3) Whether a federal district court, in a private action under the Williams Act provisions, has authority, under appropriate circumstances, to order -- in addition to corrective disclosure -- other equitable remedies.

The Commission expresses no view on any factual disputes in this case, the proper outcome of this appeal or the proper application of the legal principles to the facts of this case, particularly in light of its potential enforcement interest in the matters at issue here. 1/

In this action, The Hanna Mining Company ("Hanna") and a present and a former Hanna shareholder claim that Norcen Energy Resources Limited ("Norcen") and associated persons violated, *inter alia*, Sections 10(b), 13(d) and 14(e) of the Securities Exchange Act and Rule 10b-5 in connection with Norcen's purchases of Hanna stock and its efforts to obtain control of Hanna. On plaintiffs' motion, the district court entered a preliminary injunction restraining Norcen's previously announced tender offer and, without court approval, Norcen's disposition of its Hanna holdings. The propriety of that order depends on the resolution of various questions, including the legal questions addressed by the Commission in this *amicus curiae* memorandum.

1/ The Commission's staff is conducting an investigation of the events which are the subject of this private action, and the Commission may file its own enforcement action.

DISCUSSION

I. AN IMPLIED PRIVATE RIGHT OF ACTION FOR EQUITABLE RELIEF EXISTS UNDER SECTION 13(d) OF THE SECURITIES EXCHANGE ACT IN FAVOR OF THE ISSUER CORPORATION AND ITS SHAREHOLDERS WHEN, AS HERE, THEY SEEK INJUNCTIVE RELIEF TO HALT OR CORRECT VIOLATIONS OF SECTION 13(d) AND OTHER EQUITABLE RELIEF.

The Williams Act amendments to the Securities Exchange Act have as a major purpose the protection of shareholders confronted with a possible change in corporate control by giving those shareholders information concerning persons in a position to effect the possible change. See Piper v. Chris-Craft Industries, 430 U.S. 1, 22-24 (1977); H.R. Rep. No. 1711, 90th Cong. 2d Sess. 3-4 (1968) ("H.R. Report"). In particular, Section 13(d), a key provision of the Williams Act, is designed to require disclosure of information by "persons who have acquired a substantial interest or increased their interest in the equity securities of a company by a substantial amount, within a relatively short period of time." H.R. Report, supra, at 8.

Because Congress did not provide an express private right of action under Section 13(d), any right of the plaintiffs to sue under that Section must be implied from the "language or structure of the statute, or in the circumstances of its enactment." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979). To assist the courts in determining whether such a right should be implied under a federal statute, the Supreme Court has developed a four-prong test. In Cort v. Ash, 422 U.S. 66 (1975), the Court articulated the test as follows (id. at 78, citations omitted, emphasis in original):

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted' -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? And finally,

> is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

In Mobil Corporation v. Marathon Oil Company, 669 F.2d 366 (1981), this Court held that a private right of action for injunctive relief exists under Section 14(e) of the Securities Exchange Act, the antifraud provision of the Williams Act, in favor of a tender offeror, distinguishing the Supreme Court's decision in Piper v. Chris-Craft Industries, supra, where the Court held that a tender offeror lacks standing under that statute to seek damages. 2/ In applying the Cort v. Ash analysis, this Court in Mobil was "mindful that as a general rule the Supreme Court has cautioned against the implication of private causes of action under the securities laws," but recognized that the special circumstances of that case warranted implication of a private injunctive remedy (669 F.2d at 373):

> "First, the action is one for a preliminary injunction which, as noted by Chief Justice Burger in Piper, is at the stage 'when relief can best be given.' 430 U.S. at 42. Second, the inherent nature of tender offer litigation requires a plaintiff to possess a large amount of data and information in order to challenge successfully Williams Act violations during the short time frame at hand. Third, the relief sought * * * is injunctive. Because a court may structure its remedy on a case-by-case basis, this satisfies the concern of the Court in Piper 'that shareholder protection * * * can more directly be achieved with other less drastic means more closely tailored to the congressional goal underlying the Williams Act.' 430 U.S. at 40. Finally, [plaintiff's] interest in the controversy assures a full and fair development of the issue in this action."

These same circumstances exist in the present case, where the corporate issuer is seeking injunctive relief in order to halt and correct alleged violations of

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2/ Presumably in light of this Court's decision in Mobil Corporation, defendants do not challenge the existence of an implied right of action for equitable relief under Section 14(e).

Section 13(d) of the Securities Exchange Act. 3/ Those circumstances thus militate in favor of the implication of a private right of action on behalf of Hanna and its shareholders.

A. The Issuer Corporation and Its Shareholders are Intended Beneficiaries of Section 13(d).

With respect to the first Cort v. Ash factor, it is undisputed that shareholders are in that class for whose especial benefit the protections of Section 13(d) were enacted (Br. 44). 4/ The fact that Hanna, the issuer corporation, may not appear to be the "especial" beneficiary of Section 13(d) is not fatal to its standing to seek equitable relief to halt or correct violations of that statute. 5/ In Mobil Corporation, supra, this Court determined that it can

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3/ Defendants urge that the relief granted by the district court does not operate to halt violations and in fact harms shareholders (see Br. 16-17, 19-24, 29-31). The Commission takes no position on the effect of the relief awarded by the district court.

4/ Chromalloy American Corporation v. Sun Chemical Corporation, 611 F.2d 240, 248 (8th Cir. 1979); GAF Corporation v. Milstein, 453 F.2d 709, 717 n.16 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972); Bath Industries, Inc. v. Blot, 427 F.2d 97, 109 (7th Cir. 1972); Financial General Bankshares, Inc. v. Lance, [1978] Fed. Sec. L. Rep. (CCH) ¶ 96,403 at 93,424 (D.D.C. 1978). See also Grow Chemical Corporation v. Uran, 316 F. Supp. 891, 892 (S.D.N.Y. 1970). Indeed, courts have held that shareholders are the intended beneficiaries of all the protections added by the Williams Act amendments in 1968. See Piper v. Chris-Craft Industries, Inc., supra, 430 U.S. at 35; Mobil Corporation v. Marathon Co., supra, 669 F.2d at 371; Crane Company v. Harsco Corp., 511 F. Supp. 294, 300 (D. Del. 1981). See also S. Rep. No. 550, 90th Cong., 1st Sess. 2-3 (1967) ("Senate Report").

5/ Although every court of appeals which has considered the question has held that a private right of action for equitable relief exists in favor of the issuer under Section 13(d) (see Dan River, Inc. v. Unitex Limited, 624 F.2d 1216 (4th Cir. 1980), cert. denied, 449 U.S. 1101 (1981); Chromalloy American Corp. v. Sun Chemical Corp., 611 F.2d 240 (8th Cir. 1979); General Aircraft Corp. v. Lampert, 556 F.2d 90 (1st Cir. 1977); GAF Corp. v. Milstein, supra), the district court opinions lack such unanimity. Compare Spencer Companies, Inc. v. Agency Rent-A-Car, Inc., [1981-1982] Fed. Sec. L. Rep. (CCH) ¶ 98,301 (D. Mass. 1981); Saunders Leasing System, Inc. v. Societe Holding Grey D'Albion, S.A., 507 F.

(footnote continued)

look to the "practical realities" of tender offer litigation and "determine that a cause of action is necessary to aid the shareholders * * *." 669 F.2d at 371. 6/ There this Court upheld the standing of a tender offeror to sue under Section 14(e) since

> "issues such as incomplete disclosure and manipulative practices can only be effectively spotted and argued by parties with complete knowledge of the target, its business, and others in the industry. The tender offeror * * * may often be the only party with enough knowledge and awareness to identify nondisclosure or manipulative practices in time to obtain a preliminary injunction."

Id. Accord, Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 946 (2d Cir. 1969); Crane Co. v. Harsco Corp., 511 F. Supp. 294, 300 (D. Del. 1981); Weeks Dredging and Contracting, Inc. v. American Dredging Co., 451 F. Supp. 468, 476 (E.D. Pa. 1978). The same reasoning also applies in the context of litigation under Section 13(d); the issuer, because of its significant interest and resources, may be the only party in a position to uncover and litigate violations of that statute. In fact, the Supreme Court in Piper reiterated its statement first made in J.I. Case Co. v. Borak, 377

5/ (continued)

Supp. 627 (N.D. Ala. 1981); Kaufman & Broad, Inc. v. Belzberg, 522 F. Supp. 35 (S.D.N.Y. 1981); Standard Metals Corp. v. Tomlin, 503 F. Supp. 586 (S.D.N.Y. 1980); Kirsch Co. v. Bliss & Laughlin Industries, Inc., 495 F. Supp. 488 (W.D. Mich. 1980); W.A. Krueger Co. v. Kirkpatrick, Pettis, Smith, Polian, Inc., 466 F. Supp. 800 (D. Neb. 1979) (upholding private right of action), with SZRL Investments v. U.S. Realty Investments, C31-327 (N.D. Ohio, May 7, 1981); American Bakeries Co. v. Pro-Met Trading Co., [1981] Fed. Sec. L. Rep. (CCH) ¶ 97,925 (N.D. Ill. 1981); First American Banc- shares, Inc. v. Lowder, [1981] Fed. Sec. L. Rep. (CCH) ¶ 98,015 (N.D. Ala. 1981); Gateway Industries, Inc. v. Agency Rent-A-Car, Inc., 495 F. Supp. 92 (N.D. Ill.), appeal dismissed per stipulation, No. 80-1871 (7th Cir. 1980); Sta-Rite Industries, Inc. v. Nortek, Inc., 494 F. Supp. 358 (E.D. Wisc. 1980) (holding no private right of action).

6/ See also Crane Co. v. Harsco Corp., 511 F. Supp. 294, 300 (D. Del. 1981); Humana, Inc. v. American Medicorp, Inc., 445 F. Supp. 613, 616 (S.D.N.Y. 1977).

U.S. 426, 432 (1964), that a corporation can assert remedies on behalf of its shareholders. 430 U.S. at 32 n.21. Since violations of Section 13(d), like violations of the proxy provisions at issue in Borak, can result in damage "not from the deceit practiced on [the individual shareholder] alone, but rather from the deceit practiced on the shareholders as a group" (id.), the issuer can bring suit on behalf of its shareholders when Section 13(d) is violated.

Moreover, an examination of the language of Section 13(d) and the legislative history demonstrates that Congress intended to grant the issuer itself certain rights under Section 13(d). In Cannon v. University of Chicago, 441 U.S. 677 (1979), the Supreme Court noted, in this regard, that whether the language of a statute creates a right in favor of a class of persons including the plaintiff or a duty on the part of the defendant vis-a-vis such a class "has generally been the most accurate indicator of the propriety of implication of such a cause of action." 441 U.S. at 690 n.13.

Section 13(d)(1) of the Securities Exchange Act provides that any person who acquires beneficial ownership of more than five percent of a class of certain equity securities of an issuer must file a disclosure statement with the Commission and the exchange on which the securities are traded and "send [a copy of the statement and amendments thereto] to the issuer of the security at its principal executive office, by registered or certified mail." Moreover, while Section 13(d) does not contain an antifraud provision similar to Section 14(e) of the Act, the requirement that the purchaser file a truthful statement is implicit in the provision. Securities and Exchange Commission v. Savoy Industries, Inc., 587 F.2d 1149, 1165 (D.C. Cir. 1978), cert. denied, 440 U.S. 913 (1979); GAF Corporation v. Milstein, 453 F.2d 709, 720 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972). Thus, by requiring that the statement be

sent to the issuer, Section 13(d) grants corporate issuers certain specifically delineated rights -- the right to receive the required information about persons obtaining large blocks of their securities and the right to expect that information to be accurate. 7/ As explained by Senator Williams (113 Cong. Rec. 855-856 (1967)), the sponsor of the Williams Act, the disclosure provisions of Section 13(d) are

> "the only way that corporations, their shareholders and others can adequately evaluate * * * the possible effect of a change in substantial shareholdings." Id. at 855 (emphasis supplied). 8/

Defendants' reliance (Br. 37) on Touche Ross v. Redington, 442 U.S. 560 (1979), which held that a private right of action may not be implied under the broker-dealer reporting provisions of Section 17(a) of the Securities Exchange Act, 15 U.S.C. 78q(a), is misplaced. Although Section 13(d), like Section 17(a), contains a requirement that certain reports be filed with the Commission, the purposes of the two statutes are entirely different. The Supreme Court in Touche Ross characterized Section 17(a) as resembling

> "countless other statutes that simply require certain regulated businesses to keep records and file periodic reports to enable the relevant governmental authorities to perform their regulatory functions. The reports and records provide the regulatory authorities with the necessary information to oversee compliance with and

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7/ The language of Section 13(d) likewise expressly designates shareholders as an intended beneficiary; that section contemplates that the Commission will prescribe the content of a disclosure statement as necessary or appropriate for "investors." In addition, sending information to the issuer and the exchanges provides a mechanism by which that data can reach the shareholder-investors. See Spencer Companies v. Agency Rent-A-Car, Inc., [1981-1982] Fed. Sec. L. Rep. (CCH) ¶98,301 at 91,895 (D. Mass. 1981). Armed with accurate information, shareholders can make an informed response to a potential shift in control. Cf. Piper v. Chris-Craft Industries, Inc., supra, 430 U.S. at 35.

8/ See also Hearings on S. 510 before the Senate Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 2, 49 (1967) ("Senate Hearings"); 113 Cong. Rec. 857-858, 24665 (1967) (Remarks of Sen. Kuchel).

> enforce the various statutes and regulations with which they are concerned."

Id. at 569 (emphasis supplied). The reporting requirement of Section 13(d), on the other hand, is intended to do much more than provide assistance to the Commission; the information required by Section 13(d) is intended for the use of the issuer and shareholders. Since Section 13(d), and the Williams Act generally, denote a specific class of beneficiaries, it cannot be viewed as merely a record-keeping or filing provision of the type involved in Touche Ross. See Mobil Corp. v. Marathon Oil Co., supra, 669 F.2d at 373 n.5.

B. Congress Intended to Create a Private Right of Action For Equitable Relief Under Section 13(d).

With respect to the second Cort v. Ash factor -- whether Congress intended to create or deny a private remedy -- the Supreme Court in Cannon v. University of Chicago, supra, held that where, as here, a particular class has been identified as the especial beneficiaries of the Act, "'it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling.'" 441 U.S. at 694, quoting Cort v. Ash, supra, 422 U.S. at 82 (emphasis in original). Not only is there no indication in the legislative history or in the structure of the Williams Act that Congress intended to deny such a remedy, there is substantial affirmative evidence that Congress intended that such a remedy exist.

In Cannon, the Supreme Court held that an implied right of action exists under Title IX of the Civil Rights Act, 20 U.S.C. §§1681-1686, which prohibits discrimination on the basis of sex in education programs receiving financial support from the federal government. The Court in Cannon relied heavily on the fact that Title IX was patterned on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et. seq., and that at the time Title IX was enacted in

1972, Title VI already had been construed as giving rise to an implied private right of action. The Court reasoned that because the courts had consistently found implied rights of action under the civil rights statutes during the years between the enactment of Title VI and the enactment of Title IX, "Congress was thoroughly familiar with these unusually important precedents * * * and * * * expected its enactment [of Title IX] to be interpreted in conformity with them." Cannon v. University of Chicago, supra, 441 U.S. at 698-699. Indeed, Mr. Justice Rehnquist in his concurring opinion made the point that during the Sixties and early Seventies, Congress relied on the federal courts to decide whether a right of action should be implied under a statute and that "[c]ases such as J.I. Case Co. v. Borak, [377 U.S. 426 (1964)] and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task." Id. at 718.

The evidence that Congress understood in 1968 that private rights of action would be implied under the Williams Act, including Section 13(d), is equally as persuasive as that present in Cannon. The sections added to the Securities Exchange Act by the Williams Act, like Title IX, were patterned after a prior enactment which had worked successfully, in this case the statute and regulations governing proxy solicitations, chiefly Section 14(a) of the Securities Exchange Act, 15 U.S.C. 78n(a). See H.R. Report, supra, at 5; Senate Report, supra, at 2-5. 9/ The fact that Congress patterned the Williams Act after the proxy provisions is significant because only four years earlier the Supreme Court had decided the landmark case of

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9/ At the time the bill which with minor amendment later became the Williams Act was passed by the Senate, its sponsor, Senator Williams, explained that the bill would "provide the same kind of disclosure requirements which now exist, for example, in contests through proxies for controlling ownership in a company. * * * [It] is patterned on the present law and the regulations which govern proxy contests." 113 Cong. Rec. 24665 (1967).

J.I. Case Co. v. Borak, supra, where the Court held that a corporation and its shareholders have an implied right of action to sue under Section 14(a) for a violation of the proxy provisions, finding that "[p]rivate enforcement of the proxy rules provides a necesary supplement to Commission action." 377 U.S. at 432. 10/

Recently, the Supreme Court expanded upon the rationale utilized in Cannon, articulating an additional means for determining congressional intent in situations where Congress revises a statute under which an implied private right of action has already been recognized by the federal courts. In Merrill Lynch, Pierce, Fenner & Smith v. Curran, 50 U.S.L.W. 4457 (Sup. Ct., May 3, 1982), which involved several private actions brought under the Commodity Exchange Act, 7 U.S.C. 1 et seq., the Supreme Court held that implied private rights of action exist under that Act in favor of purchasers of commodity futures contracts against commodities brokers and exchanges. In reaching this conclusion,

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10/ Judge Friendly stated in Leist v. Simplot, 638 F.2d 283, 296 (2d Cir. 1980), aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith v. Curran, 50 U.S.L.W. 4457 (Sup. Ct., May 3, 1982), that the years prior to the Cort v. Ash decision in 1975 were years of a "widespread indeed almost general, recognition of implied causes of action" under the Securities Exchange Act. See also id. at 297 (implied causes of action widely recognized under other statutes administered by the Commission).

It is not necessary merely to assume that Congress in 1968 was aware of the state of the law of implied rights of action under the federal securities laws since there is ample legislative history demonstrating that Congress was actually informed of the existence of cases upholding such private rights. For example, Professor Carlos Israels specifically brought to Congress' attention the Supreme Court's decision in J.I. Case Co. v. Borak, supra. See Senate Hearings, supra, at 67. And Commission Chairman Manuel F. Cohen, one of the drafters of the Williams Act, testified before the House committee considering the bill that litigation between private parties alleging fraud in takeover bids, one of the subjects covered by the Williams Act, was a common occurrence, calling it "almost standard operating procedure." Hearings on H.R. 14475, S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 19 (1968) ("House Hearings").

the Court stated that the intent of Congress to create or deny a private remedy under a statute can be discerned by focusing on the state of the law at the time Congress significantly amends a statute or, more particularly, on "Congress' perception" of the law that it is amending (50 U.S.L.W. at 4464). The court explained (id.):

> "When Congress enacts new legislation, the question is whether Congress intended to create a private remedy as a supplement to the express enforcement provisions of the statute."

By contrast,

> "[w]hen Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts * * * the inquiry logically is different. Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the preexisting remedy."

When Congress in 1970 amended Section 13(d) (Pub. L. No. 91-567, 84 Stat. 1497 (Dec. 22, 1970)), 11/ federal courts had recognized the existence of a private right of action under Section 13(d). See Bath Industries, Inc. v. Blot, 427 F.2d 97 (7th Cir. 1970) (private right on behalf of issuers); Grow Chemical Corporation v. Uran, 316 F. Supp. 891 (S.D.N.Y. 1970) (private right of action on behalf of shareholders). 12/ In addition, the Court of Appeals

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11/ The 1970 amendments to the Williams Act, among other things, lowered the percentage of issued and outstanding stock of a corporation necessary to trigger the Act's provisions from 10 percent to 5 percent and included the equity securities of insurance companies within the coverage of the Act.

12/ The decision in Bath Industries, Inc. v. Blot, supra, received considerable attention in the national press. See New York Times, May 23, 1970, at 37, col. 2; New York Times, November 12, 1970, at 69, col. 6; Wall Street Journal, July 24, 1970, at 12, col. 2; Wall Street Journal, November 4, 1970, at 15, col. 1. See also GAF Corporation v. Milstein, supra, 453 F.2d at 714-721, where the court held that a

(footnote continued)

for the Second Circuit had held in Electronic Specialty Company v. International Controls Corporation, 409 F.2d 937 (2d Cir. 1969), that an implied private right of action exists in favor of the issuer under Section 14(e) of the Securities Exchange Act, another provision added by the Williams Act of 1968. 13/ Moreover, less than a year before Congress amended the Williams Act, the Supreme Court had decided Mills v. Electric Auto-Lite Company, 396 U.S. 375, 381-383 (1970), which reaffirmed the Court's holding in J.I. Case Company v. Borak, supra, that an implied private right of action is available under the proxy provisions of Section 14(a). The fact that Congress significantly amended Section 13(d) after the federal courts had found an implied right of action under that Section, as well as under the Williams Act generally, without any indication of disapproval of these judicial decisions is itself evidence that "Congress affirmatively intended to preserve the remedy." Merrill Lynch, supra, 50 U.S.L.W. at 4465 (footnote omitted). 14/

12/ (continued)

private right of action in favor of the issuer exists under Section 13(d), stating that "[t]he teachings of J.I. Case Co. v. Borak * * * are part of the ABC's of securities law." 453 F.2d at 719. Although GAF Corporation was decided shortly after Congress amended the Williams Act in 1970, it is nevertheless indicative of the view of the law at the time Congress acted. See Leist v. Simplot, supra, 638 F.2d at 301.

13/ The litigation between Electronic Specialty Corporation and International Controls Corporation, like Bath Industries, Inc. v. Blot, supra, attracted the attention of the national press. See Wall Street Journal, January 8, 1969, at 5, col. 1; Wall Street Journal, January 27, 1969, at 6, col. 2; Wall Street Journal, January 29, 1969, at 34, col. 2.

14/ See also Wachovia Bank and Trust Co. v. National Student Marketing Corp., 650 F.2d 342 (D.C. Cir. 1980), cert. denied, 452 U.S. 954 (1981), where the court stated that "[l]ongstanding judicial application of a court's statutory interpretation, * * * when added to the failure of Congress to reject its reasoning, 'argues significantly in favor of [its] acceptance.'"

(footnote continued)

C. Implication of a Private Remedy for Equitable Relief in This Case Would Be Consistent With the Congressional Purpose.

Allowing the corporate issuer and its shareholders to obtain equitable relief to enforce the disclosure provisions of Section 13(d) will further the congressional purpose of protecting shareholders. Defendants rely (Br. 45 n.18) upon the suggestion in Sta-Rite Industries, Inc. v. Nortek, 494 F. Supp. 358, 362-363 (E.D. Wis. 1980), that the proper procedure for a corporation challenging a Schedule 13D is instead to raise the issue with the Commission for a determination whether to bring a Commission enforcement action. This view of Section 13(d), however, erroneously assumes that the Commission has sufficient resources adequately to police all Section 13(d) filings. See GAF Corporation v. Milstein, 453 F.2d 714, 721 (2d Cir. 1971); Crane Company v. Harsco Corporation, supra, 511 F. Supp. at 301. That the Commission does not have that ability is reflected in the fact that in fiscal year 1981, for example, over 1,500 Schedule 13D's, as well as over 3,600 amendments to those reports, were filed with the Commission. More importantly, Schedule 13D's are only a small part of the many thousands of disclosure documents filed with the Commission each year under the various provisions of the federal securities laws. It is entirely unrealistic to assume that the Commission has the resources to investigate every allegation that a report is false or misleading, and to assume that Congress intended to leave corporate issuers and shareholders

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14/ (continued)

Id. at 351, quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975).

Not only is there no hint in the legislative history of the 1970 amendments that Congress was disturbed with the development of the Williams Act up to that time, but when Senator Williams introduced the bill that with minor amendments was subsequently enacted, he stated that the Williams Act had "worked well" and was recognized as "a valuable and important tool in the arsenal of investor protection." 116 Cong. Rec. 3024 (1970).

without an effective remedy. See Cannon v. University of Chicago, supra, 441 U.S. at 706-708, 706-707 n.41. Private equitable actions to force compliance with the disclosure requirements of Section 13(d) are thus a "necessary supplement" to Commission actions. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 382 (1970); J.I. Case Co. v. Borak, supra, 377 U.S. at 432; cf. Cannon v. University of Chicago, supra, 441 U.S. at 706-707.

Moreover, as this Court noted in Mobil Corporation, supra, 669 F.2d at 371, 372, the Supreme Court has suggested that private actions for equitable relief, particularly those -- like the present one -- which seek preliminary injunctive relief, are fully consistent with the congressional goals underlying the Williams Act. In Piper v. Chris-Craft Industries, Inc., supra, the Supreme Court, in holding that a defeated tender offeror lacks standing under Section 14(e) of the Securities Exchange Act to sue for damages, stated that investor protection can better be served by "less drastic means more closely tailored" to the goals of the Williams Act. 430 U.S. at 40. Equitable relief meets that criterion. Indeed, the Court in Piper further stated that "in corporate control contests the stage of preliminary injunctive relief, rather than post-contest lawsuits, 'is the time when relief can best be given.'" 430 U.S. at 42, quoting Electronic Specialty Co. v. International Controls Corp., supra, 409 F.2d at 947.

Thus, defendants' contention (Br. 46) that recognition of an equitable right of action in this case is contrary to the Williams Act's policy of evenhandness is without merit. This Court stated in Mobil Corporation, supra, 669 F.2d at 372, that recognizing an equitable remedy under that Act in favor of the bidder

> "serves merely to prevent the manipulative practices at which the Williams Act was aimed without deterring management or competing offerors from engaging in the battle."

Similarly, and particularly in light of the equitable remedy already recognized in favor of the bidder in Mobil, recognition of a private equitable remedy on behalf of the issuer would not tip the balance in its favor.

D. Actions for Equitable Relief to Remedy Violations of Section 13(d) Are Not Matters Relegated to the States.

The final factor enunicated in Cort v. Ash for determining whether to imply a private remedy is whether the action is one traditionally relegated to state law. If so, under Cort it would be inappropriate to imply a cause of action under federal law. 422 U.S. at 78.

In Piper, the Court determined that it was appropriate to relegate the bidder to its common law cause of action for "interference with a prospective commercial advantage," since the defeated tender offeror based its claim for damages on harm suffered as a result of its loss of "'a fair opportunity' to compete for control" of the issuer. 430 U.S. at 40-41. Thus, in Piper the plaintiff sought compensation for harm which the federal statute was not intended to remedy. That is not the case here. It would be inappropriate to relegate the plaintiffs to state court since the only interest involved is enforcement of rights granted by a federal statute.

Accordingly, the four-prong Cort v. Ash analysis establishes that Congress intended that there be a private right of action for equitable relief in favor of the corporate issuer and its shareholders under Section 13(d) of the Securities Exchange Act.

II. SECTION 14(e) OF THE SECURITIES EXCHANGE ACT, WHICH PROHIBITS DECEPTION "IN CONNECTION WITH" ANY TENDER OFFER, CAN APPLY PRIOR TO THE PUBLIC ANNOUNCEMENT OF A TENDER OFFER.

In challenging the district court's holding that they violated Section 14(e) of the Securities Exchange Act (op. 48; see id. at 43, 45-48), defendants argue that their conduct was not within the scope of Section 14(e)'s antifraud

prohibitions because it was not "in connection with" a tender offer (Br. 36-38). They assert that there is no authority to support the application of Section 14(e) "to transactions occurring * * * prior to the public announcement of a tender offer" and that statements made in Norcen's Schedule 13D, Annual Report and Form 10-K are not covered by that statutory provision because those documents were filed "before [Norcen's] April 5 announcement" of a tender offer (Br. 36).

As noted above (page 2 and note 1, supra), the Commission may determine to bring an enforcement action based on the events which are the subject of this private action. Accordingly, the Commission does not take a position with respect to the proper application of legal principles to the facts found by the district court on the preliminary injunction record in this case and, thus, with respect to the question when, if at all, Section 14(e) became applicable under the circumstances here. As a matter of law, however, it is critical to effective investor protection that Section 14(e) not be limited to the period following public announcement of a tender offer. For example, one of the major abuses prohibited by Section 14(e) is trading on non-public information that a tender offer is about to be made; by its very nature, that misconduct occurs only prior to public announcement. The Commission has previously taken the position that Section 14(e) can apply prior to the public announcement of a tender offer (see Rule 14e-3, 17 CFR 240.14e-3), 15/ and that administrative

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15/ The Commission's recently adopted Rule 14e-3, which proscribes, among other things, trading while in possession of certain material, non-public information related to a contemplated tender offer, is triggered "if any person has taken a substantial step or steps to commence or has commenced a tender offer." Rule 14e-3(a). The Rule, which was promulgated pursuant to authority granted in Section 14(e), is thus not limited in application to conduct occurring after the effective date, or after public announcement, of a tender offer. See Securities Exchange Act

(footnote continued)

interpretation, which is consistent with the text, legislative history and investor protection purpose of the statute, is entitled to deference. See, e.g., E.I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 54-55 (1977); United States v. National Association of Securities Dealers, Inc., 422 U.S. 694, 718-719 (1974).

The critical language with respect to the scope of Section 14(e)'s application is the phrase "in connection with any tender offer or request or invitation for tenders or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation." Nothing in that broad language limits the provision's application to conduct occurring after a tender offer has been publicly announced. 16/ The legislative history likewise

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15/ (continued)

Release No. 17120 (Sept. 4, 1980), 20 SEC Docket 1241, 1248, 1248 n.33 (Sept. 16, 1980) (release on adoption of Rule 14e-3). See also Camelot Industries Corp. v. Vista Resources, Inc., 535 F. Supp. 1174, 1183 (S.D. N.Y. 1982). And, Rule 14e-3 has recently been sustained in the face of a challenge that it exceeded the scope of the "in connection with" language. O'Connor & Associates v. Dean Witter Reynolds, Inc., 529 F. Supp. 1179, 1188-1193 (S.D.N.Y. 1981). See also Securities Exchange Act Release No. 15548 (Feb. 5, 1979), 16 SEC Docket 973, 1008, n.128 (Feb. 20, 1979) (discussing proposed Rule 14e-2, not subsequently adopted by the Commission, proscribing certain trading activities prior to the bidder's public announcement of its intent to make a tender offer); Mergers and Acquisitions 132 (1982) ("Mergers").

16/ The expansive nature of the statutory language is underscored by the extension of its coverage not only to fraud in connection with tender offers, but also to fraud "in connection with * * * any solicitation" relating to a tender offer. Indeed, in the analagous area of proxy regulation, on which tender offer regulation was patterned (see, e.g., Senate Hearings, supra, at 16, 33, 180-181, 206), a communication need not formally request a proxy to fall under Section 14(a) of the Securities Exchange Act, 15 U.S.C 78n(a). Thus, "even a communication well in advance of any formal request for a proxy may be made 'under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy,' and thus may be a solicitation within the proxy rules." Smallwood v. Pearl Brewing Company, 489 F.2d 579, 600 (5th Cir.), cert. denied, 419 U.S. 873 (1974), quoting Rule 14a-1(f) under the Securities Exchange Act, 17 CFR 240.14a-1(f). See also Studebaker Corp. v. Gittlin, 360 F.2d 692, 696 (2d Cir. 1966); Securities and Exchange Commission v. Okin, 132 F.2d 784, 786 (2d Cir. 1943).

(footnote continued)

militates against a restrictive reading of Section 14(e). Both the Senate and the House Reports state that Section 14(e) is intended to affirm that anyone "seeking to influence the decision of investors or the outcome of a tender offer" has a duty to disclose material information. Senate Report, supra, at 10-11; H.R. Report, supra, at 11. 17/ Thus, activity prior to public announcement can fall within the ambit of the prohibitions of Section 14(e).

Furthermore, Congress' regulation of activity which occurs prior to the public announcement of a tender offer furthers the purposes of the Williams Act. Certain activity, including misrepresentations made to the investing public before public announcement has been made, can have an immediate impact on market activity and investment decisions. Fraud in that context may be as harmful to public investors -- for example, those who sell their shares in the mistaken belief that an owner of a block of shares is holding them for investment and has no intention of making a tender offer for all or some of the remaining shares -- as fraud at a subsequent stage of the tender offer process. Cf. United States v. Naftalin, 441 U.S. 768, 778 (1979) (interpreting "in the offer or sale" in Section 17(a) of the Securities Act, 15 U.S.C. 77q(a)).

The only previous case of which we are aware that squarely presents the issue whether Section 14(e) can apply prior to a public announcement agreed with the Commission's affirmative response to that question. In O'Connor & Associates v. Dean Witter Reynolds, Inc., 529 F. Supp. 1179 (S.D.N.Y. 1981),

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16/ (continued)

The Williams Act similarly reflects Congress' intent that a communication which does not formally request the present tendering of shares is nevertheless a solicitation (and therefore subject to Section 14(e)'s antifraud proscriptions) if it is made as part of a process which may result in the tendering of shares.

17/ See also Senate Hearings, supra at 16, 33; House Hearings, supra, at 120; Mergers, supra, at 120.

the court considered trading in options based on alleged "tipped" inside information concerning an upcoming tender offer. The court held that the pre-public-announcement conduct of the defendants was "'in connection with a tender offer' under §14(e) regardless of whether the offer actually became effective," since "the insiders' sole purpose in effecting the trades * * * would have been to capitalize on the pending tender offer proposal * * *." Id. at 1192. 18/

The O'Connor court sustained Rule 14e-3, taking the view, we believe correctly, that Section 14(e) was not intended merely to regulate transactions between the tender offeror and target shareholders actually faced with the decision whether to tender their shares. Rather, the court stated, the statutory language "is open-ended as to the transactions which might be covered * * *." 529 F. Supp. at 1191. To distinguish between transactions between the tender offeror and target shareholders, on the one hand, and transactions between target shareholders and other traders on the open market, on the other, the court noted, would "unduly restrict the broad protection to target shareholders intended by the Williams Act." Ibid. The court then demonstrated the ineffectiveness of Section 14(e) if construed as restricted to conduct following the announcement of a tender offer proposal (529 F. Supp. at 1191):

18/ O'Connor was not the first case to find conduct prior to a public announcement to be "in connection with" a tender offer. In ICM Realty v. Cabot, Cabot & Forbes Land Trust, [1973-1974] Fed. Sec. L. Rep. (CCH) ¶ 94,585 (S.D.N.Y. 1974), the plaintiff issuer alleged that misrepresentations made by the offeror to prospective sellers in private negotiations, as well as those made in a Form 13D announcing a plan for a tender offer, were "in connection with a tender offer" and violated Section 14(e). In denying the defendants' motion to dismiss, the court held that the plaintiff had stated a cause of action under Section 14(e) "since the alleged misrepresentations are alleged to have been made in connection with the overall plan." Id. at 96,048. See also Berman v. Gerber Products Co., 454 F. Supp. 1310 (W.D. Mich. 1978); Applied Digital Data Systems, Inc. v. Milgo Electronic Corp., 425 F. Supp. 1145 (S.D.N.Y. 1977).

> "It is true that here the allegedly fraudulent conduct occurred prior to the announcement of the tender offer proposal. However, this circumstance does not change the fact that the alleged failure to disclose the impending announcement of the tender offer proposal worked to deny the target invest[or] the relevant information on which to decide whether to sell his shares in the same manner as fraudulent conduct operates when an offer has already been publicly announced. The very information the shareholder is denied in such circumstances is the information that the transaction, unbeknownst to him, is in connection with a tender offer attempt. The person trading on the basis of the information stands to gain precisely because of the impending announcement of the tender offer proposal, whether through a future tender or through an open-market sale. The loss suffered by the target shareholder-seller is the direct result of the lack of knowledge of the proposed tender offer." 19/

III. A DISTRICT COURT HAS THE AUTHORITY, IN A SUIT ALLEGING VIOLATIONS OF THE WILLIAMS ACT, TO ORDER EQUITABLE RELIEF IN ADDITION TO CORRECTIVE DISCLOSURE; THE PROPRIETY OF SUCH RELIEF SHOULD BE JUDGED ON AN ABUSE OF DISCRETION STANDARD.

Appellants' primary argument is that the far-reaching remedy ordered by the district court was not appropriate under the circumstances of this case.

19/ The Second Circuit has also recognized that conduct in the form of misstatements occurring prior to the commencement of a tender offer can fall within the scope of Section 14(e). In Lewis v. McGraw, 619 F.2d 192, 195 (2d Cir.), cert. denied, 449 U.S. 951 (1981), after holding that a cause of action for damages under Section 14(e) could not be maintained for deception in connection with a tender offer proposal which never became effective because the crucial element of reliance could not be shown, the panel, without referring to the public announcement as a benchmark, observed (citations omitted):

> "Our holding today does not place statements made on the eve of a tender offer * * * wholly outside the scope of the Williams Act. On the contrary, where the offer ultimately becomes effective, and reliance can be demonstrated or presumed, such statements may well be made 'in connection with a tender offer' as required by § 14(e). Otherwise, either party would be free to disseminate misinformation up to the effective date of the tender offer, thus defeating in substantial part the very purpose of the Act -- informed decision making by shareholders. Injunctive relief, moreover, may be available to restrain or correct misleading statements made during the period preceding a tender offer where it appears that such an offer is likely, and that reliance upon the statements at issue is probable under the circumstances."

To the extent that defendants argue that in granting the preliminary injunction requested by the plaintiffs, which goes beyond correcting false and misleading statements, the court abused its discretion, the Commission expresses no view as to whether that in fact was the case. To the extent, however, that defendants also suggest that the remedies available to the district court were restricted to corrective disclosure as a matter of law, the Commission disagrees. There is an important distinction between the propriety of, and the power to grant, equitable relief, and, in this suit based on Williams Act violations, the district court had broad equitable powers. Regardless of whether the relief granted here was appropriate under all the circumstances, that equitable remedy was, in the Commission's view, one of the "variety of tools," in addition to corrective disclosure, which the court had the power to order. Electronic Specialty Co. v. International Controls Corp., supra, 409 F.2d at 947 (Section 14(e)).

Once a court's equity jurisdiction is properly invoked, it may not be artificially limited. Courts of equity have the power to shape full relief, taking into account the interests of the parties affected and the goals to be pursued. See J.I. Case Co. v. Borak, supra, 377 U.S. at 433; Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); Deckert v. Independence Shares Corp., 311 U.S. 282, 288 (1940); United States v. City of Parma, 661 F.2d 562, 576 (6th Cir. 1981); Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1083, 1103-1104 (2d Cir. 1972); 1 J. Pomeroy, Equity Jurisprudence §§114-115, 181, 231, 236(a), 239(a) (5th ed. 1941).

As was the case in Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944), "[w]e are dealing here with the requirements of equity practice with a background of several hundred years of history." To limit the possible remedies for Williams Act violations, in all cases or a predetermined category of cases, to corrective

disclosure would distort the essential nature of equity jurisdiction which has been traditionally characterized by "[f]lexibility rather than rigidity," would fail to deter violations of the statute, and would fail to afford shareholders adequate protection against harm flowing from the violations. Id. 20/

Judge Friendly has described the role of the district judge in ruling upon an application to preliminarily enjoin a tender offer, a stage he characterized as "the time when relief can best be given," as follows:

> "If the filings are defective or the tender offer misleading, the court can require correction, along, of course, with an opportunity to withdraw and an injunction against further solicitation until the period for withdrawal has expired. * * * If the court believes the offeror has improperly depressed the price of the stock before making the offer, it can require rescission and enjoin further solicitation for a period, or allow the offeror the alternative of raising the price for both past and future deposits. We cite these merely as examples; other techniques will doubtless suggest themselves to resourceful judges. On the other hand, we do not mean at all that interlocutory relief should be given lightly. To the contrary, district judges must be vigilant against resort to the courts on trumped-up or trivial grounds as a means for delaying and thereby defeating legitimate tender offers."

Electronic Specialty Co. v. International Controls Corp., supra, 409 F.2d at 947; see Piper v. Chris-Craft Industries, Inc., supra, 430 U.S. at 42.

20/ The fact that violative conduct has ceased does not compel the denial of equitable relief. See, e.g., United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953); Bath Industries, Inc. v. Blot, supra, 427 F.2d at 113 (Section 13(d)). Similarly, corrective disclosure, although certainly an important circumstance to be considered, does not necessarily "moot[ ]" Hanna's claim for injunctive relief (Br. 18). Despite appellants' assertions (see Br. 18-19), Rondeau v. Mosinee Paper Co., 422 U.S. 49 (1975), does not call for a contrary conclusion. The Rondeau Court did not hold that relief must be denied merely because the wrongdoer has corrected its violation of the statute. Rather, its conclusion was based on all the facts and circumstances of that case, where the purchaser's "technical violation" of Section 13(d) was quickly remedied. 422 U.S. at 56; see id. at 55 n.4. Furthermore, the defendant had not attempted to gain control of the issuer, "either by a cash tender offer or any other device." Id. at 59.

In determining whether to order relief beyond corrective disclosure in a particular case, the court should consider all the pertinent circumstances, including whether a substantial number of shares were purchased after the misleading disclosures were made and before corrective disclosure, if any, was made 21/ and whether the violation was egregious. 22/ Since equitable relief can be a harsh remedy precluding the completion of a tender offer, it is essential that the court take care to avoid tipping the balance between the issuer and the bidder which the Williams Act seeks to maintain. See Edgar v. Mite Corp., No. 80-1188, slip op. at 8-9 (S. Ct., June 23, 1982); Piper v. Chris-Craft Industries, Inc.,

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21/ Compare Missouri Portland Cement Co. v. H.K. Porter Co., 535 F.2d 388, 399 (8th Cir. 1976), in which disenfranchisement or complete divestiture of all shares acquired was denied where, following the lawful acquisition of 20.6% of the issuer's stock, the purchaser allegedly filed a false Schedule 13D and then purchased an additional 0.7% of the stock prior to commencing a tender offer, with General Steel Industries, Inc. v. Walco National Corp., [1981-1982] Fed. Sec. L. Rep. (CCH) ¶ 98,402 (E.D. Mo. 1981), in which the court ordered an injunction and rescission (followed by divestiture) of the 4.5% of the issuer's stock acquired after a false Schedule 13D was filed, but not the 29.5% acquired prior to the filing obligation. The General Steel opinion was vacated as moot by the Court of Appeals for the Eighth Circuit when the parties settled the case after an appeal had been filed.

As defendants note, the Commission filed a memorandum, amicus curiae, in the Eighth Circuit in the General Steel case. The Commission did not, however, "approve" the remedy ordered by the district court in that case as defendants state (Br. 33). Instead, as in this case, the Commission expressed no view on whether the district court abused its discretion in ordering the particular relief at issue, but took the position that the court had the power to order equitable remedies in addition to corrective disclosure. See Litigation Release No. 9533, [1981-1982] Fed. Sec. L. Rep. (CCH) ¶ 98,387 (Dec. 21, 1981).

22/ Given the potential benefits from a disclosure violation — the opportunity to purchase stock on the open market at a price lower than that which would result if intent to seek control were disclosed, and the issuer corporation's lack of an opportunity to respond to the potential offeror's unannounced plans — merely requiring compliance with the original statutory disclosure obligation through corrective disclosure is no real deterrent. See Rondeau v. Mosinee Paper Co., supra, 422 U.S. at 59, 62.

supra, 430 U.S. at 30. The court should consider whether a less drastic form of relief would suffice and should carefully analyze whether granting or denying the particular relief will be detrimental to shareholders, or will unduly injure one or the other participant in the takeover contest, to the ultimate detriment of the shareholders. See Butler Aviation International, Inc. v. Comprehensive Designers, Inc., 425 F.2d 842, 845 (2d Cir. 1970). As the Supreme Court stated in Mills v. Electric Auto-Lite Co., supra, 396 U.S. at 386, arising under the proxy provisions (quoting Hecht Co. v. Bowles, supra, 321 U.S. at 329-330):

> "In selecting a remedy the lower courts should exercise 'the sound discretion which guides the determinations of courts of equity,' keeping in mind the role of equity as the 'instrument for nice adjustment and reconciliation between the public interest and private needs * * *.'"

CONCLUSION

The Commission urges that, if this Court reaches the issues addressed in this Memorandum, those questions be resolved in accordance with the positions expressed here.

Respectfully submitted,

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