85-7745

Amicus-Briefs

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HANSON TRUST PLC,

Plaintiff-Appellant,

v.

SCM CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

DANIEL L. GOELZER
General Counsel

LINDA D. FIENBERG
Associate General Counsel

DAVID A. SIRIGNANO
Assistant General Counsel

MICHAEL S. SMITH
Special Counsel

MARTHA H. McNEELY
J. ROBERT BROWN, JR.
Attorneys

Of Counsel
PAUL GONSON
Solicitor

Securities and Exchange Commission
Washington, D.C. 20549

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MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION,
AMICUS CURIAE

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND SUMMARY OF ITS POSITION

The Securities and Exchange Commission, the agency primarily responsible for the administration and enforcement of the Securities Exchange Act of 1934, of which the Williams Act 1/ is a significant part, respectfully submits this memorandum in response to the Court's request for the Commission's views on the issues raised in this case. This litigation raises novel issues concerning the manner in which a bidder in a takeover contest, commenced pursuant to the provisions of the Williams Act, may terminate its tender

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1/ The Williams Act, enacted in 1968 and amended in 1970, added Sections 13(d), 13(e), 14(d), 14(e), and 14(f) to the Securities Exchange Act. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454; Act of December 22, 1970, Pub. L. No. 91-567, 84 Stat. 1497 (codified at 15 U.S.C. 78m(d)-(e) and 78n(d)-(f) (1970)).

offer, and then make large purchases of target corporation shares. 2/

The district court found that on August 21, 1985, Hanson Trust PLC ("Hanson") announced a cash tender offer for any or all of the outstanding shares of the common stock of SCM Corporation at $60 per share. SCM and Merrill Lynch Capital Markets ("Merrill Lynch") subsequently announced a competing plan for a leveraged buy-out of SCM involving a cash tender offer for 85% of SCM stock at $70 per share. Hanson responded by increasing its cash tender offer to $72 per share. On September 11, 1985, SCM and Merrill Lynch announced a new leveraged buy-out agreement including a cash tender offer for SCM's stock at $74 per share. The agreement was conditioned upon Merrill Lynch acquiring in the tender offer two-thirds of SCM's common stock. It also granted Merrill Lynch a "crown jewel" option to buy two valuable divisions of SCM should a third party acquire one-third of SCM common stock. At 12:38 p.m., shortly after learning of the revised SCM/Merrill Lynch

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2/ The Commission's views expressed in this brief are based on facts set forth in the opinion of the district court, the briefs of the parties, and the transcript of proceedings before the district court.

The Commission is conducting a nonpublic inquiry, pursuant to a formal order, into certain events related to this action. The Commission is still in the process of gathering information in that investigation.

The Commission addresses in this brief only the issue of whether there is a serious question going to the merits (see page 4, infra). We do not address the question of irreparable harm.

agreement, Hanson publicly announced that it was terminating its tender offer. Between 3 p.m. and 4:34 p.m. that afternoon, Hanson purchased approximately 25% of SCM's common stock on the New York Stock Exchange and Pacific Stock Exchange. Most of the sellers were arbitrageurs. All of the purchases were pursuant to cash contracts at $73.50 per share, approximately one point above the market price. Several hours later, the district court issued a temporary restraining order prohibiting Hanson from acquiring any additional SCM stock. After an evidentiary hearing, the district court subsequently entered the preliminary injunction now under emergency review in this Court.

The district court found, in granting SCM's motion for a preliminary injunction, that a sufficient factual showing had been made that violations of the Williams Act may have occurred to warrant entry of preliminary relief. The court concluded that the conduct alleged constituted a "deliberate attempt to do an 'end run' around the requirements of the Williams Act" and that "Hanson's conduct was a de facto tender offer" (slip op. 8).

The district court observed that, in order to obtain a preliminary injunction, a private party must meet the following standard:

> "[p]reliminary injunctive relief in this Circuit calls for a showing of '(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'"

Slip op. 5, quoting Jack Kahn Music Co., Inc. v. Baldwin Piano &

Organ Co., 604 F.2d 755, 758 (2d. Cir. 1979). The court stated (slip op. 11) that, in granting the preliminary injunction, it was relying primarily on "the likelihood of success on the merits" prong of the controlling standard. The court also concluded that SCM had raised a serious question going to the merits which was a fair ground for litigation. That question was whether Hanson's conduct in acquiring 3.1 million shares of SCM's stock was a tender offer commenced in violation of Section 14(d) of the Williams Act.

The Commission agrees with the district court that, at this early stage in the litigation, SCM has raised a serious question going to the merits on the issue whether the Williams Act may have been violated. Because of the procedural posture of this case and the speed with which the district court was required to act, a full factual development of key issues has not yet occurred.

Two alternative theories in this case support the district court's determination to issue a preliminary injunction pending a full factual development of the issues. First, there was sufficient evidence before the district court to support the conclusion that Hanson's announcement on the afternoon of September 11, 1985 may not have been an effective termination of its tender offer. If Hanson's purchases of 25% of SCMs' shares were a de facto continuation of its tender offer, they violated several provisions of the Williams Act and the rules thereunder, including the best price, offer to all, and proration provisions which are intended to afford all shareholders equal treatment in con-

tests for corporate control. Resolution of the ultimate issue of whether Hanson's termination was not effective will require an examination, at trial, of many factual issues. One issue will be whether Hanson intended to continue its program to purchase shares immediately following the purported termination of its offer. The district court did not rely on this theory, but we believe that its order granting a preliminary injunction may be sustained on this basis.

The Commission also supports the district court's conclusion that there are sufficiently serious questions as to whether Hanson's conduct may have constituted an unconventional tender offer to justify a preliminary injunction until there is a full factual development of the issues. The Commission has consistently taken the position, and the courts have held, that under certain circumstances a rapid acquisition of a large percentage of shares at a premium can constitute a tender offer within the meaning of the Williams Act. Resolution of this issue must await further development of critical facts in the district court.

I. A PURPORTED "TERMINATION" OF A TENDER OFFER SHOULD NOT BE GIVEN EFFECT IF IT IS DESIGNED TO EVADE THE WILLIAMS ACT.

The Commission agrees that the bidder is the master of its offer, and can make its offer on the terms it wishes and withdraw that offer when it wishes. On the other hand, all tender offers must comply with the terms of the Williams Act must be read into every tender offer. If a bidder would structure its offer, for example, to permit it to pay a higher price to some shareholders than to others, or purchase a greater percentage of tendered

shares from some than others, or to close its offer prior to the minimum prescribed offering period, its efforts to do so would be unlawful. Such terms would be directly contrary to specific provisions of the Act and the Commission's rules. The Commission urges that a bidder should not be permitted to accomplish precisely that result through a purported termination of its offer followed immediately by large purchases at a higher price and under circumstances that do not offer all shareholders an opportunity to participate.

A. An offeror should not be permitted to accomplish indirectly what it would be prohibited from doing directly under the Williams Act.

An offeror's purported "termination" or "withdrawal" of its outstanding tender offer which is made in order to continue the offer in circumvention of the shareholder protection provisions of the Williams Act should not be given effect. As in other areas of the federal securities laws, the guiding principle is that "'form should be disregarded for substance and the emphasis should be on economic reality.'" 3/ Thus, if the purported termination of an

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3/ United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 848 (1975) (involving the definition of the term "security"), quoting Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

"Congress intended the Williams Act 'to be construed * * * not technically and restrictively, but flexibly to effectuate its remedial purposes' * * * and it has long been the rule that all the federal securities laws must be given a construction which effectuate their remedial objectives" (citations omitted). Wellman v. Dickinson, 475 F. Supp. 783, 825 (S.D.N.Y. 1979) aff'd, 682 F.2d 355 (2d Cir. 1982), cert. denied, 460 U.S. 1069 (1983). Accord: Herman & MacLean v. Huddleston, 459 U.S. 375, 387 (1983), quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963).

offer causes the same effect on shareholders as Congress intended to prohibit by enacting the Williams Act, then the termination should be deemed ineffective. It is undisputed that, if Hanson had not "terminated" its offer on September 11, it could not have legally purchased, in 90 minutes that same afternoon, 25% of SCM stock from a handful of sellers on the floors of the New York and Pacific Stock Exchanges. Hanson would have violated numerous provisions of the Williams Act and rules thereunder, including: (1) Rule 10b-13, 17 C.F.R. 240.10b-13, which prohibits a tender offeror from purchasing target company securities otherwise than pursuant to the tender offer; (2) Section 14(d)(7) of the Securities Exchange Act of 1934, which requires any tender offeror which amends its offer by increasing the price to pay the increased consideration to each shareholder whose stock is purchased pursuant to the tender offer; and (3) Section 14(d)(6) of the 1934 Act and Rule 14d-8, 17 C.F.R. 240.14d-8, which require that a tender offeror purchase shares from all tendering shareholders on a pro rata basis if more shares are tendered than the offeror seeks. 4/

These provisions and rules were designed to "outlaw tender offers on a first-come first-served basis," to preclude offers which tended to pressure shareholders to sell without the opportunity

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4/ Such purchases would also violate Section 14(d)(1) of the 1934 Act, and Rules 14d-3(b) and 14d-6(d), 17 C.F.R. 240.14d-3(b) and 14d-6(d), which require a bidder to amend its Schedule 14D-1 to disclose any material change in the information set forth in that Schedule; and Rule 14e-1(b), 17 C.F.R. 240.14e-1(b), which prohibits a tender offeror from increasing the consideration offered unless the amended offer remains open for at least ten business days following the announcement of the increase.

to consider the offer; 5/ to ensure that all shareholders are treated fairly and equally; 6/ and to provide shareholders with the opportunity to take advantage of subsequent, competing tender offers. 7/

By announcing a tender offer, the bidder puts into play market forces which may result in a concentration of shares in the hands of risk arbitrageurs. 8/ Having achieved these results bidders should not be able to take advantage of those conditions without compliance with the rules governing tender offers.

5/ See Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 14 (1967) ("Senate Hearings"). See also Edgar v. Mite Corp., 457 U.S. 624, 634 (1982), in which the Supreme Court held that the Williams Act was intended to prevent management and the bidder from obtaining "any undue advantage that could frustrate the exercise of an informed choice" (emphasis added).

6/ See Securities Exchange Act Release No. 8595 (May 5, 1969), 34 Fed. Reg. 7547 (1969) (The purpose of Rule 10b-13 is to "safeguard the interests of the persons who have tendered their securities in response to a cash tender offer or exchange offer [and to] remove any incentive of holders of substantial blocks of securities to demand from the person making a tender offer or exchange offer a consideration greater than or different from that currently offered to public investors by the offer"). See also Securities Exchange Act Release No. 22198 (July 1, 1985), 50 Fed. Req. 27976 (1985).

7/ See Takeover Bids: 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. 47, 50 (1968) ("House Hearings") (Testimony of Donald L. Calvin of the New York Stock Exchange); id. at 47 (comments of Phillip West, Vice President of the New York Stock Exchange) ("We think competition is the life of the trade, and if [bidders] want to increase [their offering price], let them do it. It is a healthy thing.")

8/ See generally Henry, Activities of Arbitrageurs in Tender Offers, 119 U. Pa. L. Rev. 466 (1971).

The Commission is not suggesting that all open market or privately negotiated purchases following the termination of a tender offer are unlawful. Rather, only when a court determines as a matter of fact that the offeror accomplished indirectly what it was prohibited by the Williams Act from doing directly should the purported termination be disregarded. A court must look at the confluence of circumstances to make the determination. Factors to be considered may include the timing of the purchases, the number or percentage of the shares purchased, and the consequences or effect of the purchases and other relevant facts. 9/ These and other factors may cumulatively shed light on whether the offeror intended in effect that the tender offer continue without the benefit of the protective provisions of the Act and rules.

Timing of the purchase. If an offeror enters the open market or negotiates purchases from private investors immediately following its termination announcement, the inference is strong that the offeror intended to make such purchases prior to termination. 10/

9/ Of course, these factors are not exclusive; nor is each one necessary in every case. Additional factors may apply and some may be more significant than others.

10/ For example, without agreeing or disagreeing with the court's reasoning in Crown Zellerbach Corp. v. Sir James Goldsmith, R-85-173 BRT (D. Nev. May 9, 1985) (attached as Exhibit B to the brief of Appellants Hanson Trust PLC, et al.), we note that the challenged purchases began eleven days after the termination of the tender offer. See Crown Zellerbach Corp. v. Sir James Goldsmith, 609 F. Supp. 187, 188 (S.D.N.Y. 1985). Similarly, in Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773 (S.D.N.Y. 1979) (see Appellant's Br. at 39), the court found that "no firm decision to purchase Brascan shares on the AMEX was made until the early morning of

(footnote continued)

Number of shares purchased and the effect of such purchases.

If the offeror purchases approximately the same number of shares it sought in its original tender offer, it could be inferred that the subsequent purchases are merely a continuation of that offer. The offeror's purchase of a smaller number of shares than initially sought might still be significant, if the purchases would enable the offeror to achieve the same purpose as in the original offer -- for example, obtaining control of the company or defeating a competing offer.

Perception in the market. The market's perception of the offeror's post-termination purchases could be significant. If market professionals interpreted the offeror's purchases as a signal that the bidder was continuing to offer to purchase shares, then an inference that such a signal was intended might be drawn.

10/ (continued)

April 30," a full ten days following Edper's abandonment of its conditional tender offer proposal.

As noted by Hanson in its brief (pp. 37-38), the Commission proposed for comment in 1979 Rule 14e-5 which would have required all bidders who terminate their offers, regardless of intent, to wait ten business days before purchasing target company shares. See Securities Exchange Act Release No. 16385 (Nov. 29, 1979), 44 Fed. Reg. 70349 (1979). The Commission stated that the broad prophylactic rule "may be necessary to ensure that a bidder does not take advantage of unsettled market conditions following the termination of its tender offer." Rule 14e-5 has not been promulgated and the Commission is not suggesting that it applies in this case. The Commission is suggesting, however, that an express prohibition is not necessary to find a violation of the Williams Act.

B. The circumstances surrounding Hanson's purchases create a serious question whether its purported termination was a device to allow it to purchase the market without complying with the Williams Act.

The Commission takes no position on the ultimate factual question of whether Hanson intended to continue its tender offer by other means at or prior to the time it terminated its offer. We believe, however, that the issue of whether the termination was an attempt to avoid the prescriptions of the Williams Act is sufficiently "serious" to make it a "fair ground for litigation." See, e.g., Jack Kahn Music Co., 604 F.2d at 758. We base our conclusion on the following factors:

1. Hanson terminated its offer in a press release carried on the Dow Jones Broad Tape at 12:38 p.m. Hanson's first purchases crossed the NYSE tape at 3:11 p.m. and was reported on the Dow Jones Broad Tape at 3:29 p.m. The remainder of Hanson's purchases were completed by 4:35 that afternoon. (Slip op. at 3.) The short period of time between the purported termination and the purchases, coupled with the fact that Hanson spent $230 million in 90 minutes, permits an inference that the decision to purchase may have been made prior to termination.

2. Hanson's purchases appear to have been made in an attempt to keep open its ability ultimately to obtain control of SCM, the purpose of the tender offer. Hanson acquired of 25% of SCM's shares in 90 minutes. Those holdings made it likely that the competing Merrill Lynch offer would be defeated, since that tender offer was conditioned on obtaining 66-2/3% of the SCM shares. We

question whether Hanson would have sought to purchase as much as 33-1/3% of SCM, because at that level Hanson would have triggered the "crown jewel" option.

3. Hanson's investment adviser was contacted by a large holder of SCM shares early on the morning of September 11 offering to sell his shares outside of Hanson's then-ongoing tender offer (Appellee Br. at 15). Although this offer was refused, the inference might be drawn that this conversation "planted the seed" that such a course of action was possible. Indeed, Hanson's first purchase of stock that afternoon was from the same investor who had initially made the offer (Pirie Tr. at 269-70).

4. Testimony at the hearing indicated that market professionals who held SCM stock interpreted Hanson's purchases for cash as a signal that Hanson's offer to purchase SCM shares was not over (Freeman Tr. at 178-79; Burch Tr. at 87-90).

In the Commission's view, these factors demonstrate that a substantial question exists as to whether Hanson intended to continue its offer outside the requirements of the Williams Act and that the validity of its termination announcement is a "fair ground for litigation." These factual questions can only be ultimately resolved after a full trial on the merits.

II. UNDER APPROPRIATE CIRCUMSTANCES, OPEN MARKET AND PRIVATELY NEGOTIATED PURCHASES MAY CONSTITUTE AN UNCONVENTIONAL TENDER OFFER UNDER SECTION 14(d) OF THE SECURITIES EXCHANGE ACT.

The district court concluded that the purchases by Hanson constituted an "unconventional" or "de facto" tender offer. In reaching this determination, the court relied in part on the "eight factor" test articulated in Wellman v. Dickinson, 475 F.

Supp. 783 (S.D.N.Y. 1979), aff'd on other grounds, 682 F.2d 355 (2d Cir. 1982), cert. denied, 460 U.S. 1069 (1983). Slip op. 7-8. While additional factual development will be required at a trial on the merits, the evidence before the district court raised a sufficiently serious question concerning the existence of an unconventional tender offer to make it a fair ground for litigation.

A. The Commission has consistently interpreted the term "tender offer" to encompass all offers, in the context of contests for control, designed to have the same impact on shareholders as that which Congress intended to eliminate in the Williams Act.

The Williams Act and rules promulgated thereunder contain no definition of the term "tender offer." The absence of a definition was deliberate. 11/ Aware of "the almost infinite variety in the terms of most tender offers" and concerned that a definition could be evaded, Congress left to the Commission and the courts the flexibility to define the term in light of ever-evolving tender offer practices. 12/

Consistent with Congress' concerns, the Commission has never adopted a definition of the term. The Commission has expressed

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11/ See Smallwood v. Pearl Brewing Co., 489 F.2d 579, 598 (5th Cir.), cert. denied, 419 U.S. 873 (1974).

12/ See House Hearings at 18 (statement of SEC Chairman Cohen). As Senator Williams, the principal sponsor of the Act, noted in 1979:

> [t]he term 'tender offer' is not defined in the statute as enacted and subsequently amended, because Congress preferred to leave to the Commission and the courts the ability to deal effectively with transactions, not envisioned or imagined in 1968, which required the application of the statutory provisions of the Williams Act for the protection of investors. The wisdom of this flexible approach has been proved by the dynamic and ever-changing nature of tender offers.

(footnote continued)

the view that a definition would be inappropriate in light of "the dynamic nature of these transactions and the need of the Commission to remain flexible in determining what types of transactions, either present or yet to be devised, are or should be encompassed by the term." 13/ The Commission has emphasized, however, that the term should apply to "any transaction where the conduct of the person seeking control causes pressures to be put on shareholders similar to those attendant to a conventional tender offer." 14/

12/ (continued)
Letter from Senators Proxmire, Sarbanes and Williams to Harold M. Williams, Chairman of the Securities and Exchange Commission (July 3, 1979), *reprinted in* Securities and Exchange Commission Report on Tender Offer Laws, Printed for the Use of the Senate Comm. on Banking, Housing and Urban Affairs 3 (Comm. Print 1980).

13/ Securities Exchange Act Release No. 12676 (Aug. 2, 1976), 41 Fed. Reg. 33004, 33005 (1976). The Commission noted that "no consensus of opinion was reached on the meaning of the term" during the Commission's studies. *Id.*

14/ *Id.* In February 1979, the Commission considered and again rejected adoption of a definition of the term "tender offer" because of "the need for the Williams Act to be interpreted flexibly in a manner consistent with its purposes * * *." Securities Exchange Act Release No. 15548 (Feb. 15, 1979), 44 Fed. Reg. 9956, 9960 (1979). The Commission reaffirmed that "the determination of whether a transaction or series of transactions constitutes a tender offer depends upon the *consideration of the particular facts and circumstances* in *light of such purposes*." *Id.* (emphasis supplied).

In November 1979, the Commission published for public comment a proposed definition. Securities Exchange Act Release No. 16385 (Nov. 29, 1979), 44 Fed. Reg. 70349 (1979). At that time, the Commission emphasized the need to deter persons who had been "deliberately structur[ing] tender offers in an effort to evade the provisions of the Williams Act. *These approaches have included purported privately negotiated purchases * * * and various forms of massive open market purchase programs*. In the Commission's judgment, these tender offers, however packaged, are subject to the provisions of the Williams Act and are required to be effected in accordance with its provisions." *Id.* (emphasis added). The Commission has yet to find adoption of a definition feasible or appropriate.

The Commission has consistently interpreted the term to go beyond the conventional tender offer conducted through a depository and to encompass offers to purchase securities on the open market or in privately negotiated purchases when they are structured to present the type of abuses that Congress intended to eliminate. 15/ The Commission has emphasized that "[t]o say that purchases take place on the floor of a securities exchange * * * does not end the inquiry. The use of facilities of an exchange may be mere formality to disguise what is otherwise _in effect_ a tender offer that should be subject to the requirements of the Williams Act." 16/ If an offer to purchase stock through the medium of an exchange or in privately negotiated transactions is intentionally structured to inflict on shareholders the harms that Congress intended to prevent in adopting the Williams Act, the offer is a "tender offer." 17/

15/ This interpretation is supported by the language of Section 14(d)(1) itself. Section 14(d)(1) provides in part that it shall be unlawful for any person to make a tender offer "by use * * * of any facility of a national securities exchange or otherwise * * *." 15 U.S.C. 78n(d)(1).

16/ Securities Exchange Act Release No. 16385 (Nov. 29, 1979), 44 Fed. Reg. 70349, 70350 (1979) (emphasis supplied).

17/ Note, _The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934_, 86 Harv. L. Rev. 1250, 1275 (1973) (noting that courts should look to the shareholder impact of particular methods of securities acquisitions, "classifying as tender offers those found capable of exerting the same sort of pressure on shareholders to make uninformed, ill-considered decisions to sell which Congress found the

(footnote continued)

B. Application of the eight-factor test to Hanson's purchases creates a serious question whether those purchases constituted an unconventional tender offer.

1. The "eight factor" analysis

In an effort to develop an analytical framework for identifying the existence of a tender offer, courts have employed an "eight factor" analysis which has identified some of the characteristics commonly found to exist in tender offers. See, e.g., SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 950 (9th Cir. 1985); Wellman v. Dickinson, 475 F. Supp. at 823; Hoover Co. v. Fuqua Industries, Inc., [1979-80] Fed. Sec. L. Rep. (CCH) ¶97,107 at 96,150 (N.D. Ohio 1979). 18/ The "eight factors" are:

1. An active and widespread solicitation is made for shares of an issuer;

2. The solicitation is made for a substantial percentage of the issuer's stock;

17/ (footnote continued)

conventional tender offer was capable of exerting"). See also Corporate Takeovers, Hearings before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 69 (1976) (Letter from J. William Robinson, Georgeson & Co., to SEC, Dec. 2, 1974). See generally SEC v. Joiner Corp., 320 U.S. 344, 351, 349 (1943) (holding that the reach of the Securities Act should not stop with the obvious or commonplace but should extend to transactions that "ha[ve] all the evils * * * which it was the aim of the Securities Act to end").

18/ Other courts have adopted alternative formulations for determining the existence of a tender offer. See, e.g., S-G Securities, Inc. v. The Fuqua Inv. Co., 466 F. Supp. 1114, 1126 (D. Mass. 1978) (open market and privately negotiated purchases constituted tender offer where purchaser's acquisitions "created a risk of the pressure on sellers that the disclosure and remedial tender offer provisions of the Williams Act were designed to prevent").

3. The offer to purchase is made at a premium over the prevailing market price;

4. The terms of the offer are firm rather than negotiable;

5. The offer is contingent on the tender of a fixed minimum number of shares and often subject to a ceiling of a fixed maximum number of shares to be purchased;

6. The offer is open for only a limited period of time;

7. The offerees are subject to pressure to sell their stock; and

8. Public announcements of an acquisition program precede or accompany the accumulation of stock.

The presence of all eight factors is not a prerequisite to a finding that an acquisition program constitutes a tender offer. 19/ The "eight factors" analytical framework, which the Commission first proposed in Wellman, was not intended to be a rigid and systematic formula which is susceptible to a "checklist" analysis. In any particular case, the presence of one or more of these characteristics may be more important than the others and therefore should be accorded more weight. 20/

19/ See Mid-Continent Bancshares, Inc. v. O'Brien, No. 81-1395-C(C) (E.D. Mo. Dec. 11, 1981); Wellman v. Dickinson, 475 F. Supp. 783; Proposed Amendments to Tender Offers, Securities Exchange Act Release No. 16385 (Nov. 29, 1979), 44 Fed. Reg. 70349, 70352, n.25 (1979). Note, Toward a Definition of "Tender Offer", 19 Harv. J. on Legis. 191, 203 (1982).

20/ See Hoover Co. v. Fuqua Industries, Inc., [1979-80] Fed. Sec. L. Rep. (CCH) ¶97,107 at 96,148 (N.D. Ohio 1979); Wellman v. Dickinson, 475 F. Supp. at 824.

causes it to be attractive and which induces shareholders to tender. 26/ Without such an inducement, there is little reason for shareholders to feel pressured to accept the offer, since they can sell on the market any time at the market price.

The fact that Hanson's offer was made at a premium of only one point over the prevailing market price does not diminish the significance of the premium offered. Even a small premium is an inducement to very large holders, because large sales will push the price down. The record demonstrates that the premium Hanson offered was more than enough to cause shareholders to "rush to be a part of the selling * * *" (Freeman Tr. 178-79). 27/ Hanson was able to acquire 25% of SCM's outstanding stock in 90 minutes (slip op. 3).

The size of the premium offered by Hanson was significant under the circumstances, since Hanson's offer was directed to risk arbitrageurs, whose profits are keyed primarily to the volume of shares sold; an arbitrageur may reap a sizeable profit on a relatively small spread because of the large number of

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26/ See 113 Cong. Rec. 855-56 (statement of Sen. Williams) (A tender offer price is usually "set above the going market in order to make the offer more attractive") (emphasis added).

27/ Of course, the existence of a competing offer, and the consequences of Hanson's successfully acquiring 33% percent of SCM stock, magnified the premium offered by Hanson. As the testimony establishes, the market professionals who responded to Hanson's offer rushed to take advantage of the $73.50 a share offer because they feared that once Hanson accumulated a blocking position, "the stock would be substantially lower after those trades or the next day" (Freeman Tr. 179).

shares sold and the absence of commission expenses. See, e.g., Henry, Activities of Arbitrageurs in Tender Offers, 119 U. Pa. L. Rev. 466, 469 (1971) ("Although [the arbitrageur's] profits per share on transactions undertaken at the narrower spread are smaller, he may trade in large volumes, thus making the overall transaction highly profitable"). 28/ The amount of premium is even higher than the one dollar above market given the fact that cash trades usually trade below the market price, not at a premium (Miller Tr. 131-32; Freeman Tr. 184). Moreover, the sellers assumed no proration risk; they could sell all of their SCM shares to Hanson for cash.

(c) Terms of the offer were firm rather than negotiable (factor 4)

The district court found that the terms of the offer were firm and not negotiable. Hanson purchased all 3.1 million shares at $73.50 in cash. Almost all of the sellers attempted to negotiate a higher price or different terms; Hanson uniformly rejected all deviations from its fixed terms (slip op. at 8). The evidence supports the district court's finding that "[n]o real negotiation was engaged in." Id.

(d) The offer was open only for a limited period of time (factor 6) 29/

There is considerable evidence to indicate that the market

28/ Cf. Hayes & Taussig, Tactics of Cash Takeover Bids, reprinted in Senate Hearings at 222, 228 ("[T]he size of the premium alone is not the main determinant of success or failure to a cash tender offer").

29/ We have already noted that the extremely short time period here distinguishes this case from Crown Zellerbach Corp. v. Sir James Goldsmith, R-85-173 BRT (D. Nev. May 9, 1985). In that case, the defendant terminated a tender offer but waited approximately eleven days before purchasing shares in the open market.

professionals to whom Hanson's offer was directed understood clearly that Hanson's offer would be available only briefly (see Burch Tr. 87-88, 90). If the purpose of Hanson's purchases was to "block" the Merrill Lynch offer, this objective would be achieved once Hanson had accumulated a 33% stake in SCM. Market professionals were well aware of this fact (see Freeman Tr. at 178-79; Burch Tr. 87-88, 90). Although Hanson did not specify a fixed period of time in which its offer would be open, it was clear to the offerees that the offer, like the classic first-come first-served offer which the Williams Act was intended to eliminate, would be open only until Hanson acquired the number of shares that it wanted (see Burch Tr. 87-88; Freeman Tr. 179).

(e) Pressure on offerees to sell (factor 7)

The record raises a serious question as to whether the SCM shareholders to whom Hanson extended its offer were "pressured to sell" within the meaning of the Williams Act.

There was testimony presented to the district court that sophisticated investors would know that Hanson was unlikely to purchase more than the 33 percent of SCM's shares necessary to block the Merrill Lynch offer (Freeman Tr. 179). Moreover, acquisition of a greater percentage would trigger the "crown jewel lock-up" option and allow Merrill Lynch to purchase SCM's most important assets. Thus, when the second block sale crossed the NYSE ticker at 4 p.m., arbitrageurs and other large holders were able to discern that Hanson had already accumulated a major portion of its total intended acquisition. The opportunity to

take advantage of Hanson's premium offer would be available, if at all, only to those investors who appreciated that Hanson would purchase SCM shares only until the threshold was reached, and who responded quickly before they thought Hanson would stop purchasing (Freeman Tr. at 178-79). Moreover, this pressure was magnified by the absence of disclosure from Hanson as to when it would stop purchasing. Thus, evidence exists to support the district court's conclusion that Hanson's actions created pressure upon the shareholders to sell -- the primary concern to which the Williams Act was directed. 30/

30/ It is irrelevant that Hanson's tactics only affected the investment decisions of professional arbitrageurs. The greater the risk the lower the price the arbitrageurs are willing to pay. Thus, if tactics like those employed by Hanson were held to be lawful, the "costs" associated with those tactics would be passed along from the professional arbitrageurs to ordinary investors. *See, e.g.*, *United States v. Naftalin*, 441 U.S. 768 (1979) (holding that the costs of fraud on financial intermediaries are ultimately passed to investors). Moreover, professional investors are entitled to as much protection under the federal securities laws as other investors. "The speculators and chartists of Wall and Bay Streets are also 'reasonable' investors entitled to the same legal protection afforded conservative traders." *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968) (en banc), *cert. denied*, 394 U.S. 976 (1969). Indeed, the offerees in *Wellman*, 475 F. Supp. at 809-810, consisted solely of market professionals and financial institutions.

Also important is the fact that the other shareholders of SCM were not given the opportunity, as they would have had if Hanson's offer had complied with the Williams Act and Commission rules, to participate in and benefit from the tender offer.

(f) Public announcement and active and widespread solicitation for shares of the issuer (factors 1 and 8)

A major issue remaining for resolution is whether Hanson engaged in an active and widespread solicitation for SCM shares. In Wellman, as noted, the court found active and widespread solicitation of the basis of telephone calls made during the course of one evening. Here, of course, Hanson had announced to the world its intent to take over SCM. By making a conventional tender offer, Hanson encouraged arbitrageurs to enter the market and acquire shares in SCM.

Arbitrageurs typically provide smaller shareholders with an opportunity to sell their shares at premium prices in the open market and to avoid the risk that the tender offer or merger may not be consummated. Following Hanson's tender offer announcements, arbitrageurs in fact acquired large positions in SCM's shares, with one -- Ivan Boesky -- acquiring over 12% of the outstanding shares (see Roth Aff., Appellee Br. Ex. D). Accordingly, by concentrating the SCM shares in the hands of a limited number of shareholders, Hanson's previous announcement of a tender offer set the stage for its subsequent market purchases. 31/

After Hanson announced that it intended to terminate its tender offer, Hanson initiated its purchases by contacting several large arbitrageurs and holders -- Mutual Shares, Mr. Boesky and

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31/ Hanson announced a tender offer for SCM on August 21; an increase in the offering price was announced on September 5; Hanson purchased the shares in the afternoon of September 11 (slip op. 2-3).

Slifka & Co. -- and purchasing their shares (from Mutual Shares and Mr. Boesky) for cash at a premium over market (Pirie Tr. 248, 249, 253). There was sufficient evidence for the district court to find that, once the cash purchase of 383,000 shares from Mutual Shares crossed the NYSE ticker, other large holders understood that Hanson was acquiring shares in the market (Freeman Tr. 177-79; Miller Tr. 138-39). One fact to be developed in the district court is whether the ticker print of the 383,000 cash settlement transaction had the effect of announcing to sophisticated shareholders that Hanson was acquiring shares, notwithstanding its press release purporting to end its tender offer. This issue may depend on how the print of the trade would be interpreted by sophisticated securities professionals. Indeed, one SCM arbitrageur expert acknowledged that the professional investors holding the shares would interpret the sales as acquisitions by Hanson designed to defeat the tender offer by Merrill Lynch (Freeman Tr. 178-79). The district court could conclude from the record that Hanson's purchases and the ticker print were perceived by the market professionals as a solicitation to purchase their shares. 32/

32/ The preexisting tender offer and the fact that Hanson's identity was readily apparent distinguish this case from Ludlow Corp. v. Tyco Laboratories, Inc., 529 F. Supp. 62 (D. Mass. 1981). In Ludlow, the district court concluded that a message placed on Autex, an electronic system which disseminates securities information to subscribing investors indicating a readiness to purchase shares, was not a general solicitation. The court was primarily persuaded by testimony that the purchaser could not be clearly identified from the message. In this case, the testimony indicates that sophisticated investors in the market knew Hanson was in fact the purchaser (see Freeman Tr. 179).

Hanson takes the position (Br. 23) that "six privately negotiated transactions and one open market purchase" cannot, as a matter of law, constitute a tender offer. Hanson's position is not an accurate statement of the law. As noted in Wellman, the focus is not on the number of sellers but upon the number of parties solicited combined with the number of shares they represented. In Wellman, for example, shares were solicited from 30 institutions and 9 individuals, major holders of the target's shares. The court held this sufficient to constitute a widespread solicitation, noting that there need not be "widespread public solicitation of the general body of shareholders." 475 F. Supp at 824.

If the evidence developed at trial demonstrates that the ticker print of the cash sale of 383,000 shares was, in effect, a signal of Hanson's buying interest, then Hanson could be viewed as soliciting holders of large blocks of shares. Hanson had no need to extend its solicitation beyond the arbitrageurs, given the heavy concentration of SCM stock in their hands and the need only to acquire a "blocking" position. 33/

33/ The total number of shareholders solicited is not yet clear. A critical fact that needs to be developed in the district court is whether the arbitrageurs, upon becoming aware of Hanson's willingness to purchase a large number of SCM shares at a premium, solicited smaller shareholders to compile a block of shares to tender to Hanson and whether this result was contemplated by Hanson. See Crane Co. v. Harsco Corp., 511 F. Supp. 294, 303 (D. Del. 1981). If such activity occurred, it would entail the same market pressures as Congress intended to regulate in adopting the Williams Act tender offer provisions.

(footnote continued)

(g) Offer contingent on tender of fixed number of shares (factor 5)

On the present record, it appears that Hanson's purchases from the arbitrageurs were not explicitly conditioned on the tender of a fixed number of shares. 34/

33/ (continued)

Moreover, the general solicitation could continue even after the sale transaction. It is not uncommon for arbitrageurs to sell shares not actually owned and to deliver borrowed shares. Arbitrageurs can then buy in the open market to replace the borrowed shares.

34/ The Commission has long recognized that a tender offer need not always be conditioned upon the acquisition of a minimum number of shares. One month after the Williams Act was passed, the Commission construed the term "tender offer" to include "special bids" made through facilities of a national securities exchange. Securities Exchange Act Release No. 8392 (Aug. 30, 1968), 33 Fed. Reg. 14109 (1968). A "special bid" is an announcement on the market tape to potential open market sellers that the bidder will buy a specified number of shares on the open market at a particular price for a specified period of time. *See* NYSE Rule 391; American Stock Exchange Rule 560.

Unlike a conventional tender offer, the special bid is not contingent on the bidder's receipt of a minimum number of shares and the shares "tendered" are purchased immediately at the offer price until the number of shares sought have been acquired or the bid withdrawn. They cannot be returned if the specified block is not accumulated. *See generally* Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1261, 1263, 1270-71 (1973). The Commission reasoned that special bids are "tender offers" because they exert pressure, like conventional tender offers, on shareholders to decide quickly or lose the opportunity to sell pursuant to the bid. *See* Practicing Law Institute, *Texas Gulf Sulphur -- Insider Disclosure Problems*, 366 (J. McCord & I. Cohen, eds. 1968) (remarks of Alan B. Levenson, Exec. Asst. Director of SEC Div. of Corp. Fin.).

CONCLUSION

For the foregoing reasons, a substantial question exists whether Hanson's purchases of 25 percent of SCM stock immediately following its purported termination of its tender offer violated Sections 14(d) of the Williams Act and Commission rules promulgated thereunder.

Respectfully submitted,

DANIEL L. GOELZER
General Counsel

LINDA D. FIENBERG
Associate General Counsel

DAVID A. SIRIGNANO
Assistant General Counsel

MICHAEL S. SMITH
Special Counsel

MARTHA H. McNEELY
J. ROBERT BROWN, Jr.
Attorneys

Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

Of Counsel
PAUL GONSON
Solicitor

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