

May 1, 1978

To Our Clients

Tender Offers; Open Market  
and Private Purchases

The April 27, 1978 decision in Financial General Bankshares, Inc. v. Lance, Civ. No. 78-0276 (D.D.C) that the purchase of 20% of the shares of a company in a combination of ordinary brokerage transactions and privately negotiated purchases at a premium from sophisticated investors was not a "tender offer" within either the Williams Act or the Virginia Takeover Act is a clear precedent sustaining the legality of the purchase program typified by the Sun Company purchase of 34% of Becton Dickinson.

The court said:

The courts have consistently held that open market purchases made without widespread public knowledge of the purchasers' intention do not constitute a tender offer. See, e.g., Nachman Corp. v. Halfred, Inc., [1973-74 Transfer Binder] Fed. Sec. L. Rep. (CCH ¶ 94,455 at 95,592 (N.D. Ill. 1973)).

Plaintiff has also failed to show the widespread solicitation that is characteristic of a tender offer. The evidence indicates that at most ten FG shareholders were solicited by defendants. While these shareholders held a substantial percentage of FG stock, they were sophisticated investors who had decided to sell because they were dissatisfied with FG management. Yet, because these shareholders received above-market prices for their stock, plaintiff argues that the series of private transactions in which they sold their stock amounted to a tender offer. Plaintiff offers no support for this contention, and it is clear that privately negotiated transactions at premium prices, without more, are not a tender offer. See Nachman Corp. v. Halfred, Inc., supra at 95,592.

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Plaintiff has not shown "an active widespread solicitation of public shareholders." Cattlemen's Investment Co. v. Fears, 343 Supp. 1248, 1251-52 (W.D. Okla. 1972). The Court concludes that on the facts as alleged in plaintiff's complaint and developed after extensive discovery, defendants are entitled to summary judgment on plaintiff's cause of action under section 14(d). See D-Z Investment Co. v. Holloway, [1974-75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,771 (S.D.N.Y. 1974); Nachman Corp. v. Halfred, Inc., supra.

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Section 13.1-529(b)(i) of the [Virginia Takeover] Act exempts "[a]n isolated offer to purchase shares from individual stockholders and not made to stockholders generally." As discussed by the Court in concluding that defendants are entitled to summary judgment on plaintiff's section 14(d) tender offer claim, the efforts by defendants to acquire FG stock can hardly be deemed to constitute "an offer ... made to stockholders generally." The evidence shows that defendants acquired stock through normal open market purchases and through privately negotiated purchases from a small number of FG shareholders.

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