

May 2, 1978

To Our Clients

Tender Offers; Open Market  
and Private Purchases

Yesterday's decision in Kennecott Copper Corp.  
v. Curtiss-Wright Corp., 78 Civ. 1295 (LFM) (S.D.N.Y. May 1,  
1978) is a further holding rejecting the SEC position in  
the Sun-Becton Dickinson case. The Kennecott case rejects  
open market purchases, even actively solicited open market  
purchases, and privately negotiated purchases from  
sophisticated investors, both separately and in combination,  
as being tender offers within the Williams Act.

The court said:

Kennecott contends that Curtiss-Wright's purchases of  
Kennecott stock between November 23, 1977 and March  
10, 1978 constitute a tender offer within the meaning  
of the statute. Curtiss-Wright purchased 3,287,400  
shares of Kennecott on 43 trading days during that  
period. On 17 of these days, Curtiss-Wright's pur-  
chases exceeded 50% of the daily volume of trading  
on the New York Stock Exchange. While substantially  
all of the stock was acquired on the New York Stock  
Exchange and other national securities exchanges,  
several transactions were not ordinary market purchases.  
While, Weld & Co. ("White, Weld"), Curtiss-Wright's  
broker, solicited 50 Kennecott shareholders off the  
floor of the exchange, consummating sales with willing  
sellers on the floor of the exchange. Further,  
Salomon Brothers, another Curtiss-Wright broker,  
solicited approximately a dozen institutional holders  
of Kennecott, consummating an unspecified number of  
sales off the exchange.

The term 'tender offer' was deliberately left vague  
by Congress and the SEC. It is now well settled,  
however, that the term embraces not only conventional  
tender offers formally announced by communications  
to shareholders, but also more subtle activities

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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.

M. Lipton