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To Our Clients:

Tender Offers; Advisory Agreement
between Investment Banker and Target

In Goldman, Sachs & Co. v. Hydrometals, Inc., N.Y.L.J. Aug. 2, 1978, p. 7, col. 1 (Sup. Ct., N.Y. Co. 1978) a typical agreement between the target of an unfriendly tender offer and an investment banker providing for advisory services in connection with the tender offer was repudiated by the target, after control had passed to the raider, on the ground that the agreement violated the Investment Advisors Act and that the provision in the agreement for percentage compensation based on an increase in the raider's orginal offer rendered the agreement unconscionable as a matter of law. The court granted summary judgment to the investment banker holding that the Investment Advisors Act is not applicable to this type of agreement and that the exigencies of the Saturday Night Special situation and provision for compensation based on an increase in a tender offer price do not make the agreement unconscionable. The court also held that where the target instructs the investment banker not to contact White Knights and the target negotiates a higher price with the raider, the target cannot repudiate the agreement on the ground of nonperformance by the investment banker.

With respect to the Investment Advisors Act the court said:

> The thrust of the Act is aimed at protecting investors, not issuers. (Person v. New York Post Corp., 427 F. Supp. 1297.) Here plaintiff assisted an issuer of securities, its corporate client, by giving tactical and financial advice as to what position the board of directors of the corporation should take vis a vis a proposed takeover bid. The advice was not given to the corporation so that it might purchase, sell or invest in securities for its own account. It was given for the purpose of enabling the board to evaluate the tender offer so that the board in its discretion could make an informed recommendation to its shareholders on the tender offer. The corporation by raising defenses based on the Investment Advisors Act seeks to assert the claims of its shareholders. This it cannot do, (Person v. New York Post Corp., supra.) since the client of the alleged investment advisor is not the

shareholder, but the corporation. (Kusner v. First Pennsylvania Corp., 396 F. Supp. 276.)...

The legislative history, current interpretation and administrative policy all point to the inaplicability of the Investment Advisor's Act to the instant problem.

With respect to unconscionability and nonperformance the court said:

Defendant also raises the defense of unconscionability claiming that the short time frame within which they had to act on this takeover bid compelled them to accept plaintiff's terms including its excessively high fees relative to industry standards....

While defendant operated under the time constraints imposed by Wallace Murray's tender offer, it had considered the services of another investment banking firm E.F. Hutton and had voluntarily refused to pursue inquiries of other firms who sought to provide the services rendered by plaintiff. The decision to retain plaintiff was made with and on the advice of counsel by the full board of directors after some discussion. Most importantly the actual contract fee was the result of bargaining between the parties and reflected a significant reduction in price for the services to be rendered under the circumstances, the general commercial setting was one that does not support defendant's bare allegation of duress. The fact that the bargain is a hard one does not entitle a party to be relieved therefrom since the contract was entered into fairly and voluntarily (Wade v. Austin, supra at 86). The defense of unconscionability is without merit.

By way of defense Hydrometals further contends that plaintiff failed to perform under the contract. At the examination before trial of Joseph v. Mariner, Jr. the former Chairman and Chief Executive of defendant it was conceded that plaintiff performed its services satisfactorily under the contract. Plaintiff was directed by defendant not to contact so called "White Knights" and was not expected to proceed in contravention of Hydrometals' orders. Thus, this defense is not supported by the facts presented and must fail.

M. Lipton