WACHTELL, LIPTON, ROSEN & KATZ

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To Our Clients:

Freezeouts; State Blue Sky Laws

Halle & Stieglitz v. Kolen, N.Y.L.J. July 31, 1978, p. 6, col. 6 (Sup. Ct., N.Y. Co. 1978) involved a going public high, going private low sequence similar to the Concord Fabrics, case, with the difference that in Halle & Stieglitz the company tendered for its shares rather than attempt a freezeout merger and the plaintiff sold on the tender and was seeking damages on basis of a private right of action under the New York Blue Sky Law. The plaintiff argued that the disclosure in the offer that if the offer was successful the stock would be delisted made the offer coercive and fraudulent in violation of the New York Blue Sky Law proscription of fraud and deception. The court rejected the argument and the coercive tender offer theory, holding that disclosure of the effects of a tender offer does not render the offer fraudulent or deceptive. The court said:

> Therefore, the complaint fails to state a cause of action for violation of [the New York Blue Sky Law]. Perhaps defendants were brutually frank in setting forth with clarity and candor the practical effects upon recalcitrant shareholders of a successful tender offer. But the whole purpose behind the federal regulatory scheme is to encourage full and complete disclosure. The court is unaware of any precedent for the proposition that full advance disclosure of that which a party lawfully intends to do and then does can form the predicate of an action for fraud. The case of People v. Concord Fabrics, Inc., 83 Misc. 2d 120, aff'd. 50-AD 2d 787, relied upon heavily by plaintiffs, is inopposite, inasmuch as it involved a proceeding brought not by individuals but by the attorney-general for injunctive relief.
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> In the case at bar, plaintiffs and the class which they purport to represent could have banded together and rejected the tender offer, thereby ensuring its defeat, or, at

> the very least, they could have sought injunctive relief or possibly could have complained to the attorney-general, requesting that he seek injunctive relief. This was not done. Indeed, plaintiffs accepted the tender offer, the terms of which they now claim were unfair and coercive.

Also implicit in the holding is the principle that a freezeout transaction that is approved by the public shareholders and not crammed down by the insiders, will be sustained.

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