WACHTELL, LIPTON, ROSEN & KATZ

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To Our Clients:

TARGET COMPANY MAY SELL DIVISION
TO DEFEAT A TENDER OFFER

In the Brunswick litigation, the court today denied an injunction sought by Whittaker to prevent the sale of the Sherwood Medical Division of Brunswick to American Home Products and expressly held that "a sale of a substantial asset by a [target] corporation in the face of a hostile tender offer standing alone is not a violation of Section 14(e)." The court notes that the front end of the American Home offer is greater than the front end of the Whittaker offer and that the sale is at a higher price than the asset was valued at by Whittaker. In the Mobil v. Marathon case the Sixth Circuit had noted that the exercise price of the Yates Field option granted by Marathon to U.S. Steel was less than what a competing offeror might value that property. The court in the Brunswick case emphasized that the Sixth Circuit had found the lock-up option in Mobil (which was to be exercised only if a third party gained control of Marathon) to be a manuipulation affecting the market for Marathon shares by "artificial" means while the outright sale of Sherwood was not such an artificial manipulation of the market.

In rejecting Whittaker's contention that the Sherwood sale constituted a breach of fiduciary duty by the Brunswick directors, the court found that the Brunswick board (ten of whose twelve directors are outsiders) was independent as well as financially sophisticated, that Whittaker had not made a sufficient showing that the primary motive of the directors was to retain control and that, even assuming that the facts established a sufficient basis for shifting the burden of persuasion on this point, Brunswick had established that the proposed transaction was within the bounds of valid business purposes. Thus, the court applied the business judgment rule to the Sherwood sale and held that in the absence of a showing of bad faith or gross abuse of discretion, the board of directors of a target company enjoys a presumption of sound business judgment which will not be disturbed if its decisions can be attributed to any rational business purpose. The court also held that in

exercising their business judgment the directors may sell an asset that will make the target less attractive to the raider even though they know that this will cause the raider to withdraw its tender offer.

The court also found that the sale of Sherwood, which in 1981 had contributed one-third of Brunswick's after-tax earnings, was not a sale of "substantially all" of the corporation's assets such as requires shareholder approval under Section 271 of the Delaware Corporation Code. The court said Section 271 did not apply because Sherwood is not "qualitatively vital to the operation of the corporation" and its sale does not "strike at the heart of the corporate existence and purpose" (quoting from Gimbel v. Signal Companies, Inc., 316 A.2d 599, 606 (Del. Ch.), aff'd on other grounds, 316 A.2d 619 (Del. 1974).

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