IN THE MATTER OF

THE SUSQUEHANNA CORPORATION

File No. 3-1868. Promulgated July 17, 1970

Securities Exchange Act of 1934—Section 15(c)(4)

TENDER OFFER

Failure to Disclose Plan or Proposal in Schedule 13D

Where tender offeror filed Schedule 13D pursuant to Section 13(d) of Securities Exchange Act of 1934 and Rule 13d-1 thereunder, stating that it had no plan or proposal to make major change in business or corporate structure of target company, although it planned to use substantial cash assets of target company to effect acquisitions or mergers, *held*, tender offeror failed to comply with cited provisions in material respect and must amend its Schedule 13D statement to disclose such plan.

PRACTICE AND PROCEDURE

Motion to Dismiss Proceedings

Motion by respondent to dismiss proceedings on grounds that Commission prejudged issues by filing legal memoranda as *amicus curiae* in injunction action against respondent based on substantially same charges of violation of tender offer provisions, and that Court's dismissal of action barred Commission proceedings on principle of *res judicata* or collateral estoppel, *denied*, where memoranda expressed views solely as to remedies available to Court should violations be found, and Commission was not party or in privity with any party to that action.

APPEARANCES:

Thomas N. Holloway and *Walter D. Vinyard, Jr.*, for the Division of Corporation Finance of the Commission.

Charles S. Rhyne, Courts Oulahan, and *David M. Dixon,* of Rhyne & Rhyne, for The Susquehanna Corporation.

FINDINGS AND OPINION OF THE COMMISSION

Following hearings in these proceedings pursuant to Section 15(c)(4) of the Securities Exchange Act of 1934, the hearing examiner filed an initial decision in which he concluded that The Susquehanna Corporation, in connection with a cash tender offer to the stockholders of Pan American Sulphur

Company ("PASCO" or "Pan American"), had failed to comply with Section 13 of the Act and rules thereunder in that it filed a Schedule 13D statement, as amended on December 20, 1968, containing materially false and misleading statements and that an order requiring compliance should be issued.[1] We granted Susquehanna's petition for review, briefs were filed by Susquehanna and our Division of Corporation Finance, and we heard oral argument. Our findings are based upon an independent review of the record.

Susquehanna is engaged in diversified fields, including mining, electronics, building materials, and research and development in various areas. Pan American has substantial interests in sulphur and phosphate companies in Mexico, and, at the time of the tender offer, had about $170 million of assets, of which about $58 million was in cash or its equivalent, and no significant debt. Its common stock is listed on the New York Stock Exchange.

Susquehanna's tender offer was made on November 26, 1968 to acquire 1,800,000 shares or about 38 percent of the approximately 4,751,000 outstanding shares of the common stock of PASCO at a price of $40 per share. As of December 11, 1968, more than the number of shares sought had been tendered, and Susquehanna's amended Schedule 13D statement filed on December 20 reported the purchase of the 1,800,000 shares.[2] That statement represented, as did the original statement filed on November 25, 1968, that if working control of PASCO were achieved as expected it was contemplated that the business of PASCO would be conducted as "natural resources" subsidiary of Susquehanna. The statement further declared:

> "Susquehanna does not plan or propose to liquidate Pan American, to sell its assets to, or merge it with, any other person, or to make any other major change in its business or corporate structure. However, if, at some subsequent time, it should appear the interests of the Pan American stockholders would be better served by any of the foregoing courses of action, Susquehanna may propose or adopt such course." [3]

[1] Under Section 15(c) (4) of the Act, we may, if we find material non-compliance with Section 13 or any rule thereunder, require compliance upon such terms and conditions as we may specify.

[2] In its statement Susquehanna reserved the right to purchase additional PASCO stock on the New York Stock Exchange or otherwise.

[3] Under Section 13(d) (1) (C) of the Act and Rule 13d–1 thereunder, Susquehanna, after obtaining more than 10 percent of PASCO's common stock for the purpose of acquiring control, was required to file a Sechdule 13D statement disclosing "any plans or proposals . . . to liquidate such issuer, to sell its assets to or to merge it with any other persons, or to make any other major change in its business or corporate structure." The initial Schedule 13D statement was filed pursuant to Section 14(d) of the Act and Rule 14d–1 which require such filing at the time a tender offer for more than 10 percent of the target company's stock is first published or given to the security holders.

We find, as did the hearing examiner, that Susquehanna, upon acquiring control of PASCO, planned to use the latter's cash assets to acquire control of, or merge PASCO with, some other company, and thus make a major change in PASCO's business or corporate structure. The evidence on this issue dealt primarily with the activities and statements of Susquehanna's president and chairman of the executive committee, Herbert F. Korholz, prior to and during the tender offer.

In June 1968, Korholz proposed to the president of PASCO a merger of their two companies, but this proposal was rejected. About August 1968 Korholz conferred with an official of Susquehanna's investment banking firm concerning the feasibility of making a tender offer to acquire control of PASCO. That official testified that one of the factors that made PASCO attractive to Korholz was its substantial cash assets which were not being employed in an aggressive acquisition policy. On October 30, 1968, at a meeting with officials of PASCO, Korholz advised them of Susquehanna's plan to make a tender offer, and the president of PASCO outlined his company's unsuccessful efforts to use its cash assets to diversify. On November 6, Korholz and another Susquehanna official discussed those efforts with PASCO's board of directors. On the following day Korholz, in negotiating with a bank official to finance the proposed tender offer, told him that PASCO's cash assets could not be used as collateral because he wished to use the proceeds for "additional potential acquisitions down the road." In a letter to the banker dated November 12, 1968 stressing the soundness of a bank loan to finance the tender offer, Korholz stated:

> "Earnings will be substantially increased when the $60,000,000 cash plus the ability to borrow substantial long term money on Pan American assets is used for acquisition purposes." [4]

The next day, Korholz wrote a letter containing identical language to a research company which had given him an opinion that the tender offer price was too high.

On November 27, the day after the proposed tender offer was first published, Korholz telephoned the president of American Smelting and Refining Company ("ASARCO" or "American

[4] Korholz testified during our staff's investigation:

"What I meant to convey in this letter was that one could take the $60,000,000 in cash, plus their ability to borrow substantial long term money and acquire companies in either related or amenable fields and increase the earnings of Pan American and decrease the risk in their dependency on the foreign asset through an acquisition program. The letter was written to show the possibility that Pan American could represent if it was used intelligently by Susquehanna."

Smelting"), and, being unable to reach him, left the following message for him:

> "During the early part of the year, a short discussion was held with Mr. Tittmann [Chairman of ASARCO's Board] concerning a financial restructuring of ASARCO using a smaller company as a vehicle. My associates and I control a company listed on the New York Stock Exchange [with] approximately 200 million in assets, no bank debts, debentures or preferred stock. The company could be an ideal vehicle for the assets of Asarco. It would insure management and policy continuity since two-thirds of the Board Memberships would be available to Asarco management and the present Board. Terms could be worked out immediately for an exchange superior to those offered by [a named company]."

We agree with the examiner's finding that PASCO was the company Korholz referred to, notwithstanding that PASCO had $170 million instead of $200 million in assets and was not then controlled by Susquehanna. In any event, on December 6, Korholz called PASCO's president and suggested that ASARCO might be a good diversification for PASCO. PASCO's president reacted favorably but was dubious that it could be accomplished because of ASARCO's large size. On December 10, Korholz sent a telegram to ASARCO proposing, subject to the approval of the boards of PASCO and ASARCO, an exchange of specified amounts of PASCO equity and debt securities for ASARCO's outstanding common stock and offering to the incumbent ASARCO directors one-half of the PASCO directorships. It does not appear that ASARCO responded to the offer.

Susquehanna asserts that Korholz' alleged plans with respect to PASCO cannot be attributed to Susquehanna because he was not its chief executive officer, that Susquehanna's Board Chairman and Chief Executive Officer was "the major personality" in the drafting of the Schedule 13D statement, and that neither the shareholders nor directors of Susquehanna knew of or approved the "plan or proposal" found by the examiner. The record shows, however, that Korholz' statements recited above were made in his capacity as president and on behalf of Susquehanna, and that he signed the amended Schedule 13D statement filed on December 20. The official representing Susquehanna's investment banking firm considered him to be the company's spokesman, and PASCO's president stated that throughout his discussion of the tender offer with Korholz, he regarded Korholz as "speaking for and negotiating on behalf of Susquehanna" and as the chief negotiator for Susquehanna. There is no evidence that restrictions had been or would be imposed upon Korholz' plans.

Susquehanna concedes that for a "plan" to exist it is not necessary to find bilateral negotiations with another company regarding the assets of PASCO that had reached the point of agreement in principal, and that a plan need not be in writing. But it contends that a plan should be more definite than a mere possibility or hope. It cites Korholz' testimony that in making the tender offer he hoped to obtain control of PASCO in order to make it into a large company, principally through acquisitions but with no specific companies in mind because the cooperation of the PASCO Board was necessary. While recognizing that the record contains references to acquisitions and mergers, Susquehanna points to the testimony of the investment banker official that he and Korholz "discussed a variety of hopes and possibilities," and to a reference in Korholz' letter to the research firm to another possible acquisition by PASCO which it asserts was presented as an additional example of what could be done by PASCO with its cash.

In our opinion, however, in the words of the examiner, "the energy, aggressiveness and persistence of the Korholz efforts to bring to fruition his intentions to put the cash assets to use by acquisition or merger give to his intentions the substance, quality and character of a plan, as the term is used in the statute." The significant consideration is not whether an acquisition or merger was planned with ASARCO or any other specific company, but whether, as found by the examiner, there was a plan to use the cash assets to acquire or merge with any company upon securing control of PASCO. A tender offeror normally is not able to make definite arrangements for an acquisition by or merger of the target company with a third company before control has been obtained. It is therefore not important that ASARCO did not respond to Susquehanna's proposed merger terms or that no specific proposal to acquire another company was made to or accepted by any such company.

A stockholder who is asked to sell his holding to a tender offeror seeking control of his company is entitled to full and accurate information concerning the offeror's plan or intention to use his company's cash assets for acquisitions or mergers in general, so he can determine whether it is in his best interest to accept or reject the offer. To hold otherwise would emasculate the tender offer provisions which reflected Congressional concern that, absent the disclosure they require, one seeking control of a corporation through a tender offer could operate in virtual secrecy and compel the shareholder to make an unin-

formed investment decision.[5] As stated in the report of the Senate Committee on Banking and Currency:

> "At present the law does not even require that he [the tender offeror] disclose his identity, the source of his funds, who his associates are or what he intends to do if he gains control of the corporation. As a practical matter, unless incumbent management explains its position publicly, the investor is severely limited in obtaining all the facts on which to base a decision whether to accept or reject the tender offer."[6]

And a sponsor of the bill, with the approval of his co-sponsor, stated:

> "The stockholders have a right to know who they are dealing with, what commitments have been made, and the intentions and plans of the offeror." [7]

Although the protection afforded by the tender offer provisions is in certain respects analogous to that provided by the proxy provisions of Section 14, the need for protection of the stockholder, as testified by the then Chairman of this Commission, may be greater in the case of the tender offer that in a proxy dispute.[8]

We cannot agree with Susquehanna's further assertion that the non-disclosure of Korholz' alleged "ideas, hopes and vague intentions" were not material enough to constitute a plan or proposal required to be disclosed in the Schedule 13D statement. It cites, as dispositive on this question, *Electronic Specialty Co.* v. *International Controls Corp.*,[9] an injunction proceeding and the first appellate decision dealing with the tender offer provisions. That case held, on the facts there presented, that the disclosure in the Schedule 13D statement that the tender offeror would "give consideration" to merging with the target company was accurate and adequate. With respect to a charge in the complaint that the tender offeror violated Section 14(e) of the Act in that it engaged in fraudulent practices prior to the tender offer in order to deflate the market price of the target company's stock and make the tender offer appear more attractive, the Court of Appeals adopted the test of materiality upon which Susquehanna relies: whether any of the stockholders who tendered their shares would probably not have tendered them if the alleged violation of Section 14(e) had

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[5] S. Rep. No. 550, 90th Cong., 1st Sess., p. 2 (1967).

[6] *Id.* See also 113 Cong. Rec. 24664 (August 30, 1967).

[7] Hearings on S. 510 Before Subcomm. on Securities of Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 44 (1967).

[8] *Id.*, p. 181.

[9] 409 F.2d 937 (C.A. 2, 1969).

not occurred. However, even apart from the question whether that test, applied in determining whether an injunction should issue, is appropriate in an administrative proceeding pursuant to Section 15(c)(4) based on an alleged failure to comply with Section 13 and Rule 13d–1 "in any material respect,"[10] it would seem that such test is met here. We have already indicated that Korholz' intention to use PASCO's cash assets for acquisitions or mergers was definite and more than a mere idea or hope. If such intention had been disclosed in the 13D statement, a stockholder who tendered his shares might well have been dissuaded from tendering them. Conversely, those who did not tender would probably have tendered their shares if they were opposed to the proposed use of PASCO's cash.[11]

Finally, there is no substance to Susquehanna's argument that it could not have had a plan or proposal to use the cash assets of PASCO for acquisitions or mergers in view of a press release by PASCO filed with us on November 27, 1968 and published in major newspapers. That release stated that PASCO was concerned that many more shares would be tendered than Susquehanna would accept and that PASCO's directors would therefore give serious consideration to using $50,000,000 of its cash to purchase PASCO shares so as to enable as many shareholders as possible to obtain their cash value. It is clear, however, that irrespective of the press release, Susquehanna as we have found did have a plan to use PASCO's cash assets. Moreover, PASCO promised only "serious consideration" of the use of its cash for stock purchases, and it does not appear that any resolution to purchase PASCO stock was approved by the PASCO board between December 11, 1968, when the tender offer was already oversubscribed, and December 20, 1968, when the amended Schedule 13D statement was filed.[12]

We conclude that Susquehanna's plan or intention to use PASCO's cash assets for acquisitions or mergers constituted a

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[10] Tests of materiality applied in proxy solicitation (Section 14), Rule 10b–5, and other cases also cited by Susquehanna, in determining whether the standard of disclosure has been met, are not necessarily applicable in Section 15(c)(4) proceedings based on the failure to make adequate and accurate disclosure of "plans or proposals" as specifically required by Section 13(d)(1). *Cf. S.E.C. v. National Securities, Inc.*, 393 U.S. 453, 466, 468 (1969), which declared that Section 14 and Rule 10b–5 apply to different sets of situations, and the interpretation of one provision cannot affect the interpretation of the other.

[11] Susquehanna's further assertion, that the tendering stockholders were not damaged by any nondisclosure because the present market value of PASCO stock is substantially lower than the price they received, is irrelevant to the question whether Susquehanna's "plan" should have been disclosed.

[12] Susquehanna is not aided by pointing to the testimony of a staff member that he could not say the Schedule 13D statement was "wrong" because he "didn't know." The record shows that this testimony related to the staff's limited knowledge of the facts at the time conferences were being held with counsel for Susquehanna on various proposed drafts of its Schedule 13D statement.

"plan or proposal" within the meaning of the tender offer provisions, irrespective of whether such plan was directed to a specific company. We further conclude that such plan rendered materially false and misleading Susquehanna's Schedule 13D statement that it did not plan to merge PASCO with any other person or make any other major change in its business or corporate structure, and that it might propose or adopt such course at some subsequent time if in the interests of PASCO's stockholders. The latter statement, by describing Susquehanna's intention with respect to merger or acquisition in terms of a future possibility conditioned on the interests of PASCO's stockholders, misrepresented its actual intention on December 20, 1968, to adopt such a course of action as soon as it was in a position to do so.

The statutory and rule provisions governing *tender* offers specifically require disclosure of "*any* plans or proposals" (emphasis added), regardless of their materiality or completeness.The same requirements would not necessarily apply in the case of *exchange* offers (or of any offer to sell securities) which are governed by the provisions of the Securities Act of 1933 and the Commission's rules promulgated thereunder. Where the offeror is essentially urging the offeree to acquire securities, there may be some tendency to make exaggerated claims about the merits of the securities and the issuer, including the company's prospects and plans. In the case where the offeree is being asked only to sell securities, there may be an opposite tendency to understate the prospects of the offeree's company and hence to limit disclosure of any plans or proposals to make use of that company's assets or alter its corporate structure. Neither tendency is to be encouraged. The interests of full and fair disclosure require an honest presentation of the relevant facts within the framework of the applicable statutory provisions and Commission rules. We do not imply that a tender offeror must set forth specific details of a plan or proposal. If the specifics have not been formulated, a statement to that effect should be included in the schedule. Similarly, if it appears to the tender offeror that its plan or proposal may not be consummated or that the plan or proposal is contingent upon the happening of another occurrence (such as obtaining additional financing or the approval of shareholders), such facts should be set forth in the schedule. *See* Rule 12b–20 under the Securities Exchange Act of 1934.

OTHER MATTERS

Susquehanna urges that these proceedings should be dis-

missed on two grounds. It contends: (1) that this Commission prejudged the issues herein in a memorandum of law and statement filed on its own initiative as *amicus curiae* in an injunction proceeding instituted by PASCO against Susquehanna in March 1969[13] in which PASCO alleged that the Schedule 13D statement was false and misleading (in substantially the same respects charged in the instant proceedings) and sought to enjoin the voting of the shares purchased by Susquehanna pursuant to its tender offer; and (2) that the reversal of the preliminary injunction granted in that proceeding and dismissal of PASCO's suit[14] bars any adjudication of the instant proceedings on the ground of *res judicata* or collateral estoppel.[15] We do not agree with these contentions.

No prejudgment was involved. This Commission, as the federal agency primarily responsible for the administration and enforcement of the securities laws, properly sought to assist the lower Court on the question of appropriate remedies for violation of the tender offer provisions should such a violation be found,[16] and limited its expression of views in that Court solely to that question, and on appeal to questions raised by Susquehanna as to this Commission's enforcement processes.[17] Nor is the decision in that case dispositive of the instant proceedings. Although the issues raised by PASCO in its injunction complaint and by the Division in the Statement of Matters herein are essentially the same, neither the doctrine of *res judicata* nor of collateral estoppel is applicable because this Commission was not a party to the injunction suit or in privity with any of the parties and has no standing to seek review of the decision in the case.[18] The instant proceedings are the first which present for our decision the merits of a matter as to which the Congress has vested primary responsibility in the Commission,[19] and it is appropriate that we decide the issues.

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[13] Civil Action No. SA 69 CA 67 (W.D. Tex).

[14] C.A. 5, March 13, 1970.

[15] This contention was made in a motion to dismiss the present proceedings filed after the Court of Appeals decision. The Division filed a brief in reply.

[16] *Cf. Pangburn* v. *C.A.B.*, 311 F.2d 349, 348 (C.A. 1, 1962).

[17] Susquehanna quotes statements in the *amicus curiae* memorandum which assertedly assume violations of the tender offer provisions by Susquehanna. It is clear from the context, however, that the memorandum was only speaking generally concerning the harm to investors resulting from any such violations.

[18] See *Boeing Airplane Co.* v. *Aeronautical Industrial District Lodge*, 91 F. Supp. 596 (W.D. Wash., 1950), *aff'd* 188 F.2d 356 (C.A. 9, 1951), *cert. denied* 342 U.S. 821. See also *June* v. *George Peterson Co.*, 155 F.2d 963, 965–6 (1946): "In order to interpose the defense of res judicata successfully, there must be an identity of parties, subject matter and cause of action . . . The essence of estoppel by judgment [collateral estoppel] is that some like question or fact in dispute has been judicially determined by a court of competent jurisdiction between the same parties or their privies."

[19] See S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967); S. Rep. No. 379, 88th Cong., 1st Sess. 66 (1963).

We also note that in dismissing the injunction suit the Court stated PASCO's contention to be that Susquehanna did not disclose in its Schedule 13D statements that it intended to merge PASCO with ASARCO, or some other corporation. Although the Court in a footnote expressed disagreement with our hearing examiner's finding that Susquehanna's Schedule 13D statement was false and misleading in a material respect in connection with the planned use of PASCO's cash assets (for acquisition of or mergers with unspecified companies), its discussion in the text was confined to the question whether there was a plan or proposal to merge PASCO with ASARCO, and the Court concluded there was none, stating:

> "The idea for such a merger never got off the ground. It subsisted for a mere two days when PASCO's management repudiated it."

As previously indicated, our conclusions herein do not rest on any finding that Susquehanna had a plan or proposal to merge PASCO with ASARCO, or that such plan should have been disclosed, but rather on the overall plan with respect to the use of PASCO's assets.

CONCLUSION

On the basis of the foregoing, we conclude that Susquehanna's Schedule 13D statement as amended on December 20, 1968, failed to comply with Section 13(d) of the Act and Rule 13d–1 thereunder in material respects.

An appropriate order denying the motion to dismiss and requiring a corrective amendment will issue.

By the Commission (Chairman BUDGE and Commissioners OWENS, SMITH and HERLONG), Commissioner NEEDHAM not participating.