ADMINISTRATIVE PROCEEDING
FILE NO. 3-1868

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

THE SUSQUEHANNA CORPORATION

File No. 1-5515-2A

INITIAL DECISION

August 5, 1969
Washington, D.C.

Sidney Ullman
Hearing Examiner

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APPEARANCES: Thomas N. Holloway, Calvin K. Huge, H. Grady Thrasher, III, and Walter D. Vinyard, Jr., Attorneys for the Division of Corporation Finance.

Charles S. Rhyne and David M. Dixon of Rhyne and Rhyne, 400 Hill Building, Washington, D.C. 20006, Attorneys for the Respondent,The Susquehanna Corporation.

BEFORE: Hearing Examiner Sidney Ullman

NATURE OF THE PROCEEDINGS.

These public proceedings were instituted against the respondent, The Susquehanna Corporation ("Susquehanna"), by order of the Commission dated February 3, 1969 ("Order"), issued pursuant to Section 15(c)(4) of the Securities Exchange Act of 1934, as amended, ("Exchange Act").[1/] The proceedings involve an allegedly improper statement made by Susquehanna and filed with the Commission with regard to the acquisition by Susquehanna of common stock of Pan American Sulphur Company ("PASCO"), as a result of a tender offer. The Order states that the Division of Corporation Finance ("Division") has alleged that Susquehanna failed to comply with Section 13(d) of the Exchange Act by filing a Schedule 13D containing materially misleading statements and omitting material information required to be stated therein, as more specifically set forth in a Statement of Matters prepared by the Division and attached to the Order. The Order called for a public hearing to determine whether Susquehanna has failed to comply with the provisions of Section 13(d) and with the rules and regulations issued thereunder by the Commission, and if so, whether an order requiring compliance should be issued.

Section 13(d) is a relatively recent statutory enactment, having become effective on July 29, 1968 as an amendment to the Exchange Act.[2/]

1/ Section 15(c)(4) reads as follows:

"(4) If the Commission finds, after notice and opportunity for hearing, that any person subject to the provisions of section 12, 13, or subsection (d) of section 15 of this title or any rule or regulation thereunder has failed to comply with any such provision, rule, or regulation in any material respect, the Commission may publish its findings and issue an order requiring such person to comply with such provision or such rule or regulation thereunder upon such terms and conditions and within such time as the Commission may specify in such order.

2/ Public Law 90-439, 90th Cong., S. 510, 82 Stat. 454.

The Section, together with a companion Section 14, pertains to corporate take overs and tender offers which might provide a shift or change in corporate control. The purpose of the sections is broadly indicated by the title of the legislative enactment: "An Act providing for full disclosure of corporate equity ownership of securities under the Securities Exchange Act." One specific purpose was to require disclosure of material information to stockholders of a public company when a person or group was seeking to acquire or had acquired a substantial block of its equity securities by a cash tender offer or through open market or privately negotiated purchases.[3/] As pertinent here, Subsection 13(d)(1) of the amended statute provides that any person who, after acquiring the beneficial ownership of any equity security of a class registered pursuant to Section 12 of the Exchange Act, is the beneficial owner of more than 10 percent of such class shall, among other actions, file with the Commission within 10 days after such acquisition a statement containing particularized information and such additional information as the Commission may by rules and regulations prescribe. And the portion of the statute directly involved in this proceeding is contained in Subsection 13(d)(1)(C), which provides that if the purpose of the purchases or prospective purchases of the securities is to acquire control of the business of the issuer, such filing must include a statement of

> "C) . . . any plans or proposals which such person may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;"

Subsection 13(d)(2) of the statute further provides that if any material

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3/ See the legislative history and reports: Report No. 550 of the Committee on Banking and Currency, United States Senate, to accompany S. 510; Report No. 1711, Committee on Interstate and Foreign Commerce of the House, to accompany S. 510.

change occurs in the statement filed with the Commission, an amendment thereto shall be filed in accordance with the Commission's rules and regulations. Rule 13d-1 of the Commission's General Rules and Regulations under the Exchange Act describes, substantially in the language of the statute, the persons who are required to disclose and file with the Commission the information required by Schedule 13D. 4/

While Section 13 and Rule 13d-1, as indicated above, require the filing of a statement, as Schedule 13D, by a person who has acquired 10 percent of a class of a registered equity security, the companion Section 14 and Rule 14d-1 also require the filing of Schedule 13D by a person making a tender offer if, after consummation thereof, such person would own 10 percent of the class of such security. The common stock of PASCO is traded on the New York Stock Exchange and it is a registered equity security covered by the statute. Accordingly, since Susquehanna proposed to acquire 1,800,000 shares of the 4,751,342 shares of the issued and outstanding shares of PASCO, it filed with the Commission a Schedule 13D on November 25, 1968 in connection with the proposed tender offer. The cover sheet of the Schedule states that it is filed pursuant to both Sections 13(d) and 14(d) of the Exchange Act, as amended. Thereafter, Susquehanna filed amendments to the Schedule 13D on November 26, December 9, 12, and 20, 1968. The amendment of December 9 states, in part, that "Susquehanna has already purchased 1,348,166 shares of Pan American Common Stock tendered under this Offer." The amendment of December 12 indicates that its purpose is to state that "pursuant to the terms of Susquehanna's Tender Offer, 1,894,101 shares had been tendered at 5:00 p.m., December 11, 1968. Susquehanna has determined that it will accept and purchase 1,800,000 shares of Pan American, pursuant to the Offer . . . ." The amendment filed

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4/ Rule 13d-1 was adopted July 30, 1968 by Securities Exchange Act Release No. 34-8370, effective July 30, 1968, and was amended on August 30, 1968 by Securities Exchange Act Release No. 34-8392.

December 20 states expressly that it is filed pursuant to Section 13(d)(1) of the Exchange Act as amended, July 29, 1968. It is this amendment which is the subject of the instant proceedings, for it states in paragraph 2 that Susquehanna has acquired more than 10 percent of the common stock of PASCO pursuant to the tender offer, and it states in paragraph 3 that the information contained in the Schedule 13D filed November 25, 1968 and the amendments thereto "filed pursuant to Section 14d-1 [sic] of the Securities Exchange Act of 1934, as amended, is incorporated by reference in this Schedule, and other than as stated in Item 2 herein, remains unchanged." This amendment was signed on December 19, 1968 by H.R. Korholz, Susquehanna's President and Chairman of its Executive Committee. One of the statements in the Schedule 13D originally filed and thus incorporated by reference in the December 20 amendment is Item 4, which reads as follows:

> "Pan American had 4,751,342 shares of common stock issued and outstanding as of October 31, 1968. Susquehanna through its offer intends to purchase 1,800,000 shares at $40 per share, which, if acquired, should, in the opinion of Susquehanna's Management, give Susquehanna working control of Pan American. If control is achieved, it is contemplated that the business of Pan American will be conducted as a subsidiary of Susquehanna serving as its natural resources arm.
>
> 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.
>
> Susquehanna does not intend to purchase any shares of Pan American other than pursuant to this Offer during the period of this Offer, or any extension thereof. However, at any time after the expiration of this Offer, or any extension thereof, Susquehanna reserves the right to purchase shares of Pan American over the New York Stock Exchange, or otherwise."

It is the accuracy of the second paragraph of Item 4 which the Division challenges in this proceeding. It charges that on December 20, 1968 Susquehanna "planned or proposed" to use some $58,000,000 of Pan American's cash assets to merge it with or to acquire another corporation and thus make a major change in its business and corporate structure, and that the statement to the contrary is false.

Conversely, Susquehanna denies, in its answer to the charges and in its post-hearing documents, that at the time of the filing of the Schedule 13D and of the amendments thereto it had any "plan or proposal" to use the assets of PASCO as suggested by the Division, and it urges that its response to Item 4 of Schedule 13D was accurate. There is relatively little contest between the parties on the facts: the problem before us involves substantially a matter of interpretation of the facts and of the language of the statute and Commission rule.

The hearing was held before me during the period February 25 to February 28, 1969. Thereafter, Division counsel filed proposed findings of fact, conclusions of law and a brief in support thereof; counsel for Susquehanna filed similar documents in support of its position, and counsel for the Division thereafter filed a reply brief. The findings and conclusions herein are based on the record, the documents and exhibits therein, my observation of the several witnesses, and my interpretation and application of the pertinent statutory language to the facts developed at the hearing, as I view them.

Susquehanna and PASCO.

Susquehanna is a Delaware corporation with its principal offices in Alexandria, Virginia. Dr. Arthur W. Sloan is chairman of the Board and

Chief Executive Officer of the corporation, and, as stated above, Herbert R. Korholz is President of the corporation and Chairman of its Executive Committee. The company is engaged in diversified activities, including the mining and processing of uranium ore, the manufacture of electronic equipment and building materials, and research and development in various fields. It has diversified extensively in recent years, to a large extent by acquisition or merger. The common stock of Susquehanna is listed and traded on the American Stock Exchange.

PASCO is a Delaware corporation whose principal activity has been the production of fertilizer and the mining of sulphur in Mexico. Harry C. Webb is President of the corporation. During the relevant period there were outstanding approximately 4,751,000 shares of PASCO common stock. The company had approximately $58,000,000 in cash or cash equivalent assets, substantially as a result of the sale in 1967 of 66 percent of the assets and operations of a Mexican subsidiary, Azufrera Pan Americana, S.A. de C.V., to the Mexican Government and a group of private Mexican investors.

Korholz' interest in PASCO: Susquehanna's Tender Offer.

There can be no doubt that Korholz intended that upon Susquehanna's obtaining control of PASCO, aggressive efforts would be made to use its substantial cash assets to merge it with or acquire another company or companies.

Early in 1968, Korholz became interested in and began a study of PASCO. In June 1968, he met with its President, Webb, in Houston and proposed merger negotiations. In July, however, PASCO rejected and withdrew from such negotiations.

On October 29, 1968, Korholz telephoned Webb in Houston, and the following day he visited with him and other officials of PASCO and advised that Susquehanna planned to make a tender offer for 2,000,000 shares of its stock. He also asked that Susquehanna be allowed to name two persons to vacancies on PASCO's board of directors. At this meeting Webb mentioned PASCO's unsuccessful, continuing (and relatively conservative) efforts at diversification by using its cash assets, a matter which was mentioned in PASCO's 1967 annual report and one which was well known to Korholz.

The tender offer was made on November 25 for a minimum of 1,800,000 shares of common stock at $40 per share, and Susquehanna stated that it would "purchase enough additional shares of Pan American which, in cooperation with certain shareholders of Pan American . . . will give Susquehanna working control of Pan American, the certificate of incorporation of which does not provide for cumulative voting."

Prior to Korholz' discussions with Webb relating to the proposed tender offer, he had conferred with Robert Leopold, Vice President of New York Hanseatic Corporation, Susquehanna's investment banker, concerning the feasibility and expediency of acquiring control of PASCO by means of a tender offer.[5/] Leopold testified that in Korholz' view, among the several factors making PASCO an inviting target for acquisition was the fact that PASCO "was not pursuing an aggressive acquisition policy, that they were sitting on their cash assets, and that someone could come along and undoubtedly make better use of them." The discussions included the possibility of using the assets, on obtaining control of PASCO for the

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5/ New York Hanseatic Corporation ultimately acted as dealer and manager for the tender offer.

acquisition of any of the several companies which were considered.

On November 7, 1968, Korholz and Emmett H. Bradley, an officer of Susquehanna, met in Los Angeles with Richard Joslin Andrews, Vice President of Security Pacific National Bank and another Bank officer with the view to arranging the financing of the proposed tender offer. Korholz stated at this meeting that the $58,000,000 in cash assets of PASCO was not available as collateral for loans by the Bank because he "wished to use the proceeds for additional potential acquisitions down the road". On November 12, following a visit by Korholz to PASCO properties in Mexico at the invitation of Webb, he wrote to Andrews in an effort to convince him of the soundness of the bank loan and stated, in part:

> "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."

On November 13, he wrote Peter H. Vermilye, of State Street Research & Management Company, Boston, Massachusetts, a similar letter for a similar purpose, and the letter included the above-quoted language.

The tender offer was dated November 26 and was scheduled to terminate on December 6. It was thereafter extended to December 12. On November 27, Korholz telephoned Robert D. Bradford, President of American Smelting and Refining Company ("ASARCO"), and when he was unable to speak with Bradford, left the following message with his secretary:

> "During the early part of the year, a short discussion was held with Mr. Tittmann 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

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 Pennzoil.*"

*/ An offer by Pennzoil United, Inc. to stockholders of Asarco was being strenuously fought by Asarco management. Korholz testified, in a pre-hearing investigation conducted by the staff of the Commission, that he thought this was an opportune time for his efforts to obtain control of Asarco.

On December 6, Korholz called Webb at Houston and suggested that ASARCO would be a good vehicle as a diversification potential for PASCO and that some thought be given to this suggestion. Webb testified that PASCO was a company with assets of approximately 170 million dollars and ASARCO had assets of approximately 2 billion dollars, and because of the relative difference in size he gave no serious consideration to an acquisition of ASARCO. However, on December 10, Korholz sent a telegram to E.L. McL. Tittmann and to Bradford, respectively the Chairman of the Board and President of ASARCO, proposing an exchange of specified amounts of PASCO equity and debt securities for the outstanding common stock of ASARCO. The telegram offered half of the PASCO directorships to the incumbent directors of ASARCO.[6/]

On December 12, the date of termination of the tender offer, an article in the Wall Street Journal discussed an offer made by PASCO for the acquisition of ASARCO by telegram to the President of ASARCO.

6/ Bradford testified that on June 26, 1968, following a telephone call from Korholz, he had met with Korholz and the latter suggested that the restructuring of ASARCO "through the medium of a smaller company" might be to the advantage of ASARCO. Bradford expressed a lack of interest and that visit ended.

According to Webb's testimony, he called Korholz and protested that such offer had been made on behalf of PASCO without authority, and Korholz responded to the effect that ". . . they should not have treated it in such a manner . . . "; or that " . . . they should not have attached so much significance to it"; and that "He [Korholz] didn't expect this publicity" and was embarrassed by it. At this time both Webb and Korholz knew that more than 1,800,000 shares of PASCO stock had been tendered.

In late January 1969, Webb visited Susquehanna's offices in Virginia and met with Korholz and Bradley. Webb was asked that three members of the Susquehanna group, rather than two as earlier requested, be put on PASCO's board of directors. He thereafter received a written request from Bradley that Sloan, Korholz and Bradley be added to the board, and at a board meeting on February 20, 1969 the by-laws were amended to increase board membership from 11 to 14 and these men were elected. On the same day, Korholz expressed his view that a major change in board membership would be in the best interests of both companies, that control would be in Susquehanna, and that Mr. Brown, of First National Bank of Boston, a lender of money to Susquehanna for the tender offer, also insisted on a nominee of the Bank being elected to the board. Currently the board is composed of 14 members.

Contentions of the Parties.

Counsel for Susquehanna concede that it was Korholz' intention that when Susquehanna gained control of PASCO, efforts would be made to

use the cash assets for acquisition(s) or merger(s). But they argue that vague and imprecise intentions are not "plans and proposals", as those terms are used in the statute, and they seek to support the accuracy of the statements in Item 4 of Schedule 13D. Conversely, counsel for the Division appear to suggest that because Korholz' intentions and efforts to use the funds were sufficiently definite and well-formed, they constitute a plan which should have been stated in the Schedule 13D and thus disclosed to PASCO stockholders. This same difference of opinion, although not expressed precisely in the same way, appears to have been the central theme of discussions which began in October 1968 between the staff of the Commission and counsel for Susquehanna (who were in close communication with Korholz and other company officials on this matter.) These discussions pertained to the filing of the Schedule 13D, and were held in anticipation of and also subsequent to the commencement of the tender offer. The evidence discloses that the Commission's staff, especially in light of past experience or knowledge of earlier aggressive acquisition activities of Korholz, expressed to Susquehanna's counsel concern and doubts about the accuracy of language which failed to indicate that Susquehanna intended to use the substantial cash assets in efforts to diversify by acquisition or merger. Company counsel, after conferences and discussions on this matter with Korholz and others, eventually filed the Schedule 13D on November 25, 1968 with the Item 4 which is now charged as inaccurate.[7/] Repeated

7/ Whether Susquehanna officials persisted, as late as December 20, 1968 when the filing under Section 13(d) of the Act was made, in their view that the Item 4 statement was accurate, or whether, on the other hand, they neglected to consider seriously the expediency of a change in the language following the acquisition of control of PASCO (at a time when efforts were being made to acquire ASARCO), can only be a matter for conjecture in which I cannot, and fortunately need not indulge.

questioning of the accuracy by the staff resulted in no material change in the language. Thus, the evidence indicates that the staff was insisting that a present intention to use the PASCO assets in connection with an acquisition or merger was required to be disclosed even though no specific acquisition or merger was then being considered, but it was the position of Korholz and other officials of Susquehanna, ultimately reflected in Item 4, that if no arrangements had been made for a specific acquisition or merger the statute did not require a statement of a "plan or proposal."

The Division's position is now argued in its brief in somewhat similar vein. It urges that the requirement for disclosure of pertinent information to stockholders of a corporation over which persons seek to acquire or have acquired control pertains to information upon which a stockholder can base an informed investment decision regarding retention or disposition of his stock, and citing the Senate Hearings on S. 510 at page 44, the Division quotes from a statement by Senator Kuchel, as follows:

> "The stockholders have a right to know who they are dealing with, what commitments have been made, and the intention and plans of the offeror. Our securities markets must be founded not on those whom [Thomas] Jefferson termed "gambling scoundrels" who operate in "great mystery" but on those shareholders who make informed decisions based on disclosure of pertinent facts."

The Division might also have quoted from a statement by Senator Williams, Chairman of the Subcommittee on Securities of the Committee on Banking and Currency, and a co-sponsor of S. 510, which he made during Senate consideration of the Bill and immediately prior to its passage, in support of the need for legislation:[8/]

> "By use of cash tender offer the person [now] seeking control can operate in almost complete secrecy. He need not state

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8/ Congressional Record, August 30, 1967, p. 24664.

> the source of the funds; who his associates are; why he wants control of the corporation; and what he intends to do with it if he gains control."

The Division urges that the recent decision by Judge Roberts of the United States District Court for the Western District of Texas, San Antonio Division, supports its position that Korholz' intentions constitute a plan or proposal which should have been disclosed. Litigation was instituted by PASCO against Susquehanna to enjoin certain actions and the voting of the 1.8 million shares of PASCO stock on the grounds that Susquehanna had failed to comply with the disclosure requirements of the Act and the rules and regulations thereunder inasmuch as the Schedule 13D statements were false and misleading. In his memorandum and order dated May 8, 1969 Judge Roberts stated:

> "To sustain the issuance of temporary injunction, pendente lite, PASCO must show a reasonable probability that it will ultimately succeed at the trial in establishing a violation of the statutes; it must show a reasonable probability that the 13D statements were false and misleading in a material manner. Electronics Specialty Co. v. International Controls Corp., 296 F. Supp. 462, 469 (SDNY 1968). After a careful review of the evidence adduced in this case, the Court is of the Opinion that PASCO has sustained its burden of proof. There is a reasonable probability that PASCO can prove Susquehanna had undisclosed intentions to merge PASCO with another company as soon as control was obtained." 9/

The quoted language suggests that Judge Roberts took the position that Korholz' intentions, as suggested by affirmations or evidence in that proceeding, might constitute a plan or proposal within the meaning and intent of the statute. No discussion of the statutory words and no dissertation on the semantics are included in the opinion. (I have taken official notice of the fact that the case is now on appeal by Susquehanna

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9/ Civil Action No. SA-69-CA 67.

Conversely, earlier actions commenced in U.S. District Courts in Boston and Los Angeles by PASCO against Susquehanna and involving issues similar to those in the pending Texas litigation had been dismissed on consent of the parties.

to the Court of Appeals for the Fifth Circuit).

Fortunately, it is not necessary, in reaching a decision on the meaning of "plan or proposal," to consider the question in a vacuum. The evidence of Korholz' intentions regarding the use of the PASCO assets is substantial: it reveals more than a vague or imprecise intention to use the funds. Just as he planned to use PASCO as "the natural resources arm" of Susquehanna "If control is achieved", as stated in Item 4 of the Schedule, so did he also plan to use its assets to accomplish a merger or acquisition on achieving control. At some point during the course of the development and intensification of his interest in acquiring control of PASCO, his intentions to use the substantial cash assets in such manner became sufficiently definite and resolute to support the position of the Division that he had a "plan or proposal" which sould have been disclosed to the stockholders, and which, therefore, should have been stated in the Schedule 13D amendment of December 20.

Susquehanna's argument that because of a prior unfortunate experience with Atlantic Research, one of Susquehanna's earlier mergers which resulted in costly lawsuits because of alleged "overstatement" of prospects, Korholz and other Susquehanna officials were reluctant to state in Item 4 that any plan or proposal for acquisition or merger existed, and that the language ultimately adopted accurately reflected the thinking of Susquehanna officials even on December 20, 1968, is not persuasive. It would seem that an appropriate caveat covering the possibility that no merger or acquisition might actually eventuate could have been devised to protect Susquehanna against suits by stockholders or members of the investing public, particularly

in light of the rather persistent urging and insistence by the staff of the Commission that the acquisition or merger intentions should be disclosed in the Schedule 13D. (Conversely, consider the dearth of material information to the stockholders of PASCO had ASARCO in fact accepted the Korholz offer for merger).

In my view, 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, and this is so even though fruition might never be achieved.[10/] I cannot adopt the argument that "only those 'intentions' which . . . have reached the stage of possibly coming to fruition, should be and can be included in Item 4 as 'plans or proposals'". To impose upon an administrative agency the burden of evaluating (and proving) the possibility of corporate management achieving the implementation of merger or acquisition intentions would in too many situations negate the language of the statute.

Accordingly, I conclude that Korholz' intentions had transcended the vague and amorphous status ascribed to them by Susquehanna in terming them "merely ideas and hopes". Indeed, counsel argue that with the burden of proof upon it (and the Division does bear the burden), the

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10/ The evidence indicated other efforts by Korholz with regard to such use of PASCO cash assets. For example, Webb testified that probably on October 30, 1968 Korholz mentioned Hecla (Mining Company) as a possible candidate for takeover by PASCO inasmuch as Golconda (Mining Corporation) owned a large block of Hecla stock and, in turn, someone in Susquehanna owned a hugh interest in Golconda.

See also Korholz' language in the letters to Andrews and Vermilye referring to an increase in earnings "when" rather than "if" the $60,000,000 is used for acquisition.

Division has failed to prove that the "ideas" or "hopes" of Korholz "have been approved by, or adopted by, and are therefore corporate plans or proposals of Susquehanna as a corporation," and that "No evidence of corporate action or approval was offered by the Division." Counsel also argue that "Korholz is not the Chief Executive Officer of Susquehanna. He is not the largest stockholder in Susquehanna. He cannot be said to have the power to bind the corporation on any matter by the mere oral expressions of hopes, ideas, possibilities or options which are referred to in the record herein." In light of my view of the statutory purpose and intent and my evaluation of Korholz' important position in Susquehanna, especially with regard to acquisitions and mergers, I do not believe it necessary to discuss in detail my summary rejection of these arguments.

Counsel's brief goes so far as to suggest that it may be the intention of Congress that corporate approval must be proved "before the mere statements, ideas or hopes of a second ranking corporate official becomes [sic] plans or proposals of the corporation," and it poses the question whether "Since all major action obviously requires Board of Directors' approval does the absence of proof of that approval still render a second ranking corporate official's ideas, hopes and dreams official corporate action"? I suggest that the questions fail to give adequate recognition to the purpose of the statute, to its practical aspects, and to the ingenuity of those who might wish to avoid its requirements or render it ineffectual. 11/

11/ Cf. SEC v. Capital Gains Bureau, 375 U.S. 180 (1963). At page 200 the Court said:

> "To impose upon the Securities and Exchange Commission the burden of showing deliberate dishonesty as a condition precedent to protecting investors through the prophylaxis of disclosure could effectively nullify the protective purposes of the statute. ***"

I cannot agree with Susquehanna's argument that its failure to state its intentions to use the assets of PASCO by merger for acquisition is supported by the decision in Electronics Specialty Co. v. International Controls Corp., CCH Fed. Sec. L. Rep. ¶92,342 at p. 97,627 (C.A. 2, 1969). Neither the language of the court which is quoted in Susquehanna's brief nor the decision itself supports this position, for the essential facts found and the conclusion reached by the court on the issue of a violation vel non of Section 14(c) of the Act by International Controls Corp. ("ICC") in filing a Schedule 13D differ drastically from the facts and conclusion which I reach here. As the Court of Appeals said at 97,634,

> "It would be as serious an infringement of [Rule 14d-1(c) & Schedule 13-D] to overstate the definiteness of the plans as to understate them."

It goes almost without saying that falsity in responding to a requirement for disclosure of material information which Congress deemed essential to be furnished to stockholders in connection with a tender offer would be equally offensive, whether arising out of overstatement or out of understatement of plans to merge a target company with the offeror company. The Court of Appeals found, under the facts of that case and contrary to findings of the lower court, that in describing its plans or proposals to merge the target corporation, a statement by the offeror corporation in the Schedule 13D to the effect that it would "give consideration" to a merger of the target corporation with the offeror corporation if control were achieved, was not an inaccurate statement. Conversely, I need

not, at this point, reiterate my view that the evidence in the instant proceeding discloses inadequacy and inaccuracy in Susquehanna's Item 4 response in its Schedule 13D. I might also note that the Appellate Court's mention of the "punctilious regard" which the President of the offeror corporation had for the authority of the corporation's board of directors was the subject of evidence. At several meetings the board of ICC had imposed upon the President limitations and restrictions with regard to the tender offer. Although there is no reason to doubt that Korholz had similar regard for the authority of Susquehanna's board of directors, there is no evidence indicating that limitations or restrictions had been or would be imposed upon him by the board in connection with the plans which he had for the use of PASCO's cash assets. And I find that he was indeed a dominant personality within the Susquehanna organization.

Alleged Prejudgment by the Commission.

It is asserted on behalf of Susquehanna that a memorandum brief amicus curiae submitted by the Commission in the Texas litigation instituted by PASCO against Susquehanna indicates that the Commission has prejudged the issues in these proceedings and is disqualified from continuing them. Susquehanna argues that the similarity of issues in the two proceedings requires the conclusion that due process cannot be afforded respondent except by dismissal of the instant proceedings.

I believe that the reply of the Division disposes of the argument. Recognizing that certain of the matters charged in the PASCO complaint

are also involved in the instant administrative proceedings, the Commission's brief, filed by the General Counsel states:

> "The Commission submits this memorandum to express its views solely on the question of appropriate remedies for violation of the corporate takeover and tender offer provisions of the Exchange Act, assuming this Court should find there have been violations by Susquehanna of these provisions."

Accordingly, the Commission took no position on the factual issues in the litigation, and the brief was addressed solely to the remedies available and appropriate in the event the court should find a violation of the Act. I conclude, as argued by the Division, that although the brief was filed on motion of the Commission rather than at the request of the Court, the filing no more deprived the Commission of jurisdiction in the instant proceedings and no more indicated its prejudgment of the issues herein than did the Commission's issuance of the Order which instituted these proceedings. Cf. Federal Trade Commission v. Cement Institute, 333 U.S. 683, 693-94, 700-703 (1948); Pangburn v. Civil Aeronautics Board, 311 F.2d 349, 356 (C.A. 1, 1962); 2 Davis, Administrative Law Treatise, Section 13.02.

Conclusions of Law.

From the above, I conclude that Susquehanna has failed to comply with the provisions of Section 13 of the Exchange Act and the rules and regulations thereunder and that an order requiring compliance should be issued.

I conclude that the statement in Item 4 was false and misleading in a material respect in failing to state that Susquehanna planned to use

the cash and cash equivalent assets of PASCO, upon acquiring control, to merge PASCO with another company or to acquire control of another company and thus make a major change in PASCO's business and corporate structure, and that the response in Item 4 was false and misleading in a material respect in stating the contrary.

I conclude that such omission and misstatement violated Section 13(d) of the Act and Rule 13d-1 of the Commission's General Rules and Regulations thereunder.

Accordingly, IT IS ORDERED that Susquehanna file with the Commission, within 20 days from the date of this order nunc pro tunc as of December 20, 1968, an appropriate amendment to the Schedule 13D in accordance with the requirements of the statute and the rules of the Commission.

This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Commission's Rules of Practice.

Pursuant to Rule 17(b) of the Commission's Rules of Practice, a party may file a petition for Commission review of this initial decision within 15 days after service thereof on him. Pursuant to Rule 17(f) this initial decision shall become the final decision of the Commission as to each party who has not, within 15 days after service of this initial decision upon him, filed a petition for review pursuant to Rule 17(b), unless the Commission pursuant to Rule 17(c) takes action to review this initial decision as to a party. If any party timely files a petition

for review or if the Commission takes action to review as to a party, this initial decision shall not become final with respect to that party. 12/

Sidney Ullman
Hearing Examiner

August 5, 1969

12/ All proposed findings and conclusions submitted by counsel for the parties have been considered, as have their respective arguments. To the extent that the proposed findings and conclusions are in accord with the views set forth herein they are accepted, and to the extent that they are inconsistent therewith they are rejected.