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SECURITIES REGULATION— CORPORATE MISMANAGEMENT NOT ACTIONABLE UNDER SECTION 14(a)

*Golub v. PPD Corp.*¹

On July 9, 1976, PPD Corporation and Anta Corporation entered into an agreement providing that PPD sell its assets to Anta, and that Anta assume substantially all of the debts of PPD. It was further agreed that the name of PPD would be changed to GCI, Inc. Meanwhile, Anta was to form a new corporation² to receive the assets and continue the business formerly conducted by PPD. The agreement was subject to the approval of the shareholders of the selling corporation.³ This group consisted of investors among the general public who owned eighteen percent and the individual defendants⁴ who owned the remaining shares. The individual defendants either held positions on the Board of Directors, were officers, or both.⁵ On August 27, 1976, notice was given that a shareholders' meeting would be held on September 16th for the purpose of putting the proposed agreement to a vote. The notice included a proxy statement that set out in great detail the bonuses to be paid to any officers in the management of PPD who decided to remain in the employ of the Anta-formed successor.⁶ The proxy statement noted that management was in favor of the proposed sale; it added that because of the controlling ownership of the officers and directors, approval was a foregone conclusion. The meeting was held and the sale approved by 99.4% of the voting shares.

1. 576 F.2d 759 (8th Cir. 1978), *aff'g* 435 F. Supp. 564 (E.D. Mo. 1977).

2. The newly-formed corporation was also named PPD Corporation. For ease of discussion, the corporation in which the plaintiffs were shareholders (the predecessor, subsequently named GCI, Inc.) will be referred to as PPD Corporation.

3. A similar agreement was used in *Farris v. Glen Alden Corp.*, 393 Pa. 427, 143 A.2d 25 (1958). In that case, List Industries was to sell its assets to Glen Alden in exchange for Glen Alden stock. The court, on the basis that List was the larger company, looked to the substance of the transaction and ignored its form. The court held that the sale was a disguised merger, and gave appraisal rights to the plaintiff minority shareholders.

4. The individual defendants who were officers and owned stock were A. Sam Gittlin, B. Morton Gittlin, and Robert Schwartz. Robert B. Winkel was a defendant-officer, but owned no stock. 576 F.2d at 762.

5. A. Sam Gittlin was honorary Chairman of the Board, Chairman of the Executive Committee, and Treasurer. B. Morton Gittlin was active Chairman of the Board and Chief Executive Officer. Robert G. Schwartz was Secretary and Executive Vice President. Robert B. Winkel was President. *Id.*

6. Additionally, the new corporation had to meet certain profitability targets in order for the bonuses to be paid. *Id.*

The plaintiffs, a group of minority shareholders, either dissented or abstained in the voting.⁷

The plaintiffs brought this action on behalf of themselves and all other minority shareholders of PPD in federal district court in Missouri. They alleged violations of sections 10(b) and 14(e) of the Securities Exchange Act of 1934, specifically that the proxy statement failed to disclose management's motivations for approval of the sale or to characterize the bonus as a premium for stock ownership. The plaintiffs further asserted a cause of action, pendent to the federal claim, under the statutory and common law of New Jersey for breach of fiduciary duty, and sought declaratory and equitable relief. The defendants moved to dismiss the complaint, supporting the motion with relevant documents. The district court treated this motion as one for summary judgment⁸ and dismissed the suit without prejudice. The plaintiffs' motion to file an amended complaint was also dismissed on the ground that the complaint failed to state a federal claim upon which relief could be granted,⁹ even though the plaintiffs had changed their theory from section 14(e) to 14(a)¹⁰ and had alleged scienter as required by section 10(b).¹¹ On appeal, the Eighth Circuit considered the district court's rulings on both motions in light of all three sections of the Securities Exchange Act as well as the rules promulgated under those sections.¹² Noting that the sections are aimed at the same general

7. On September 11, 1976, the plaintiffs had written a letter to the defendants, and took the same position they took in their suit. At the shareholders' meeting the Castens and A.M. Investment Corp. abstained while Golub voted against the measure. *Id.* at 763.

8. FED. R. CIV. P. 56. In this context, the standard to apply is that reasonable minds could not differ as to the materiality of the misstatement or omission. *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 603 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975); *Swanson v. American Consumer Indus., Inc.*, 415 F.2d 1326, 1330 (7th Cir. 1969); *Berman v. Thomson*, 312 F. Supp. 1031, 1034 (N.D. Ill. 1970).

9. The court dismissed the causes of action under state law because of the lack of diversity. *See UMW v. Gibbs*, 383 U.S. 715 (1966).

10. 15 U.S.C. § 78n(a), (e) (1976). Section 14(e) was enacted to regulate abuses connected with tender offers.

11. 15 U.S.C. § 78j(b) (1976). *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), held that an actionable claim under § 10(b) required a showing of scienter.

12. Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) (1976), provides:

Section 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange— . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

evils and are therefore *in pari materia* (on the same subject matter), the court determined that the statutes should be construed similarly. It affirmed the district court's rulings, relying on decisions under section 10(b) and rule 10b-5.¹³

The decision of the court of appeals in *Golub* is based upon an adoption of the policy expressed by the United States Supreme Court in *Santa Fe Industries, Inc. v. Green*.¹⁴ *Green* was a rule 10b-5 case in which the Court held that the federal securities laws were not intended to reach wrongs that essentially comprised corporate mismanagement or breach of fiduciary duty. The Court justified its decision by pointing out that these problems traditionally have been resolved through litigation in state courts, and that the words "manipulative and deceptive" in the federal statute are terms of art, referring to specific prohibited practices.¹⁵ The Court in *Green* held that conduct which met all of the required elements of rule 10b-5, but which was not one of these specific practices, should be

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Section 14(a), 15 U.S.C. § 78n(a) (1976), provides:

Section 14(a). It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

Rule 14a-9, 17 C.F.R. § 240.14a-9 (1978), provides:

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

13. 576 F.2d at 764-65.

14. 430 U.S. 462 (1977).

15. The Supreme Court stated that the "term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors." *Id.* at 476.

litigated in the state courts. Construing the rules and statutory sections *in pari materia*, the *Golub* court applied the rule 10b-5 principles of *Green* to a section 14(a) action. It held that those actions literally within the scope of section 14(a), but which essentially involve breaches of fiduciary duty or corporate mismanagement, do not state a cause of action under the federal statute.¹⁶ The decision in *Golub* is noteworthy because it limits the scope of section 14(a) through the adoption of the broad policy of *Green* with little regard for the narrow rationale of that case.

Central to the logic of *Golub* is the applicability of the principle of *in pari materia*. Under this principle of construction, statutes dealing with the same subject matter should be similarly construed.¹⁷ The court relied heavily on *in pari materia*, interpreting section 14(a) and rule 14a-9 in light of section 10(b) and rule 10b-5. Superficially at least, the statutes do concern the same subject matter. Both sections were enacted in order to bring abuses in the securities field under federal regulation. In accordance with this objective, courts were quick to find implied private causes of action under both sections to gain the enforcement aid of the investing public as private attorneys general. As the court in *Golub* noted, the sections overlap in certain respects;¹⁸ certain conduct may fall within the purview of both sections 10(b) and 14(a). In a general sense, both sections are aimed at disclosure of information relevant to securities transactions.

Closer analysis indicates that the *Golub* court may have applied *in pari materia* too freely. A detailed comparison of sections 10(b) and 14(a) reveals substantial dissimilarity in focus both in the elements required to state a cause of action under each section and in the available remedies. The most significant difference lies in the focus of the two sections and their respective rules. Rule 10b-5 furthers market integrity through the promotion of full disclosure; it prohibits trading on inside information, and while not preventing all market inequities, the rule attempts to insure that all traders have access to the same information. Rule 14a-9 is also aimed at disclosure, but its focus is on abuses in corporate democracy. More specifically, statements in solicitation of proxies are to be free from

16. 576 F.2d at 764. See *St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 562 F.2d 1040, 1048 (8th Cir. 1977), cert. denied, 435 U.S. 925 (1978).

17. *State v. Gerhardt*, 145 Ind. 439, 44 N.E. 469 (1896) (criminal statutes). See also *Merrill v. Fahs*, 324 U.S. 308 (1945); *Farid-Es-Sultaneh v. Commissioner*, 160 F.2d 812 (2d Cir. 1947). These cases considered the applicability of *in pari materia* to the federal tax statutes. *Merrill* held that the estate and gift tax statutes are *in pari materia* and should be similarly construed. But *Farid-Es-Sultaneh* held that the gift and income tax statutes are not to be so construed. The court pointed out the differing aims of the statutes as a basis for the inapplicability of *in pari materia*. This reasoning illustrates the inapplicability of the principle to §§ 10(b) and 14(a).

18. 576 F.2d at 764.

any material misstatements or omissions. This difference in focus or purpose¹⁹ leads to more subtle differences between the two sections.

A comparison of the language of sections 14(a) and 10(b) illustrates some of these differences. Both statutes include language conferring the power to regulate securities transactions and to promulgate rules,²⁰ as well as providing prohibitions against omissions or misleading statements.²¹ However, section 14(a) and rule 14a-9 lack the words "manipulative and deceptive,"²² determined by the *Green* decision to be terms of art in the context of section 10(b).

As for the elements required to state a cause of action under the two sections, the early cases indicated a common ground, but subsequent cases began to slowly diverge. Formerly under both sections a plaintiff had to allege and show causation; more recent cases presume causation if all other elements are shown.²³ In a section 14(a) action, though, a slight remnant of causation not applicable to 10b-5 suits appears to survive: plaintiffs must show that the solicitation of proxies was a substantial step in the accomplishment of the transaction.²⁴ Both sections also originally required the same mental state. While negligence continues to be sufficient for a cause of action under section 14(a),²⁵ the Supreme Court in *Ernst & Ernst v. Hochfelder*²⁶ determined that a higher level of culpability is required under section 10(b). In fact, at present rule 14a-9 requires only either a

19. The central purpose of § 14(a) is full disclosure. *J.I. Case Co. v. Borak*, 377 U.S. 426, 426 (1964); *Beatty v. Bright*, 318 F. Supp. 169, 171 (S.D. Iowa 1970); *Stedman v. Storer*, 308 F. Supp. 881, 887 (S.D.N.Y. 1969). *Cf.* *Klaus v. Hi-Shear Corp.*, 528 F.2d 225 (9th Cir. 1975) (injunction given against defensive tactics during tender offer).

20. The language which confers power to regulate includes "by the use of the mails or by any means or instrumentality of interstate commerce." *See* note 12 *supra*.

21. *Id.*

22. In *Richland v. Crandall*, 262 F. Supp. 538, 553 n.12 (S.D.N.Y. 1967), the court refused to find that § 14(a) and rule 14a-9 require intent to defraud because of the absence of the terms "manipulative or deceptive."

23. *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969) (§ 10(b)); *Beatty v. Bright*, 318 F. Supp. 169 (S.D. Iowa 1970) (§ 14(a)); *Kaminsky v. Abrams*, 281 F. Supp. 501 (S.D.N.Y. 1968) (§ 14(a)); *Barnett v. Anaconda Co.*, 238 F. Supp. 766 (S.D.N.Y. 1965) (§ 14(a)). For a recent § 14(a) case requiring causation, *see* *Smith v. Murchison*, 310 F. Supp. 1079, 1087 (S.D.N.Y. 1970).

24. *Cole v. Schenley Indus., Inc.*, 563 F.2d 35 (2d Cir. 1977); *Popkin v. Bishop*, 464 F.2d 714 (2d Cir. 1972); *Goldberger v. Baker*, 442 F. Supp. 659 (S.D.N.Y. 1977); *Phillips v. Topin*, 403 F. Supp. 89, (S.D.N.Y. 1975), *rev'd on other grounds*, 548 F.2d 408 (2d Cir. 1976); *Berman v. Thomson*, 312 F. Supp. 1031 (N.D. Ill. 1970).

25. *Puma v. Marriott*, 363 F. Supp. 750 (D. Del. 1973), *aff'd mem.*, 503 F.2d 1399 (3d Cir. 1974). Negligence was recognized through the use of constructive knowledge as sufficient in § 14(a) actions in *Norte & Co. v. Huffines*, 304 F. Supp. 1099 (S.D.N.Y. 1968).

26. 425 U.S. 185 (1976).

material misstatement or a material omission,²⁷ while rule 10b-5 requires inside information, materiality, a purchase or sale of stock, and scienter.²⁸ This difference in the elements has been recognized by the courts; in one case, a judgment rendered under section 14(a) was held not to have *res judicata* effect on a second action under section 10(b).²⁹

Sections 10(b) and 14(a) may also be compared with respect to the remedies³⁰ appropriate once a violation has been found. A section 10(b) violation would appear easily compensable by monetary damages, computed by a difference in stock market prices. In fact, injunctive relief is highly questionable under this section; it may be ruled out by the purchase requirement.³¹ A few cases have held that under special circumstances, such as a short-form merger, injunctive relief would be appropriate because a purchase would otherwise inevitably occur.³² In contrast, a section 14(a) violation which resulted in approval of a merger would seem best rectified by the equitable remedy of rescission, although as an alternative remedy damages may be appropriate.

Despite these important differences between sections 10(b) and 14(a), the court of appeals in *Golub* applied the principle of *in pari materia* to affirm the district court's entry of summary judgment against the plaintiffs. It set out the policies underlying the construction of rule 10b-5 in *Green*: shareholders damaged by mere corporate mismanagement should litigate in the traditional forum of the state courts, and the federal interest is satisfied when the material facts are fully and fairly disclosed.³³ Employing

27. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Leighton v. AT&T*, 397 F. Supp. 133 (S.D.N.Y. 1975); *Berman v. Thomson*, 312 F. Supp. 1031 (N.D. Ill. 1970). See also *Kohler v. Kohler*, 319 F.2d 634, 637 (7th Cir. 1967).

28. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

29. *Cramer v. General Tel. & Elecs.*, 443 F. Supp. 516 (E.D. Pa. 1977), *aff'd*, 582 F.2d 259 (3d Cir. 1978).

30. The remedies available are compared in *Evans v. Armour & Co.*, 241 F. Supp. 705 (E.D. Pa. 1965) (merger case, shareholders' meeting enjoined). See also *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). In *Evans*, the court noted that the Pennsylvania statute giving appraisal rights, by its very existence, could give rise to an inference that a court has no power to issue an injunction. However, the court stated that an injunction would be appropriate to effectuate the broad purposes of the federal statute.

31. *General Time Corp. v. Talley Indus., Inc.*, 403 F.2d 159 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969); *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

32. *Vine v. Beneficial Fin. Co.*, 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967). See also *Popkin v. Bishop*, 464 F.2d 714 (2d Cir. 1972) (injunction in merger case under rule 10b-5); *Kahan v. Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970) (plaintiff seeking injunctive relief has standing if he can establish causal connection between violations and his injury).

33. 576 F.2d at 764.

the same logic with respect to rule 14a-9, the court concluded that the federal interest was over because there had been full disclosure.³⁴

34. *Id.* at 765. The court of appeals in *Golub* concluded that the federal interest was satisfied on the premise that there had been full disclosure. However, the court did not fully analyze this issue, especially with regard to the materiality of the alleged omission. The court simply held that plaintiffs were not entitled to a characterization of the bonuses as a premium attributable to stock ownership, without discussing the possibility of this "characterization" as a material "fact." Courts have stated that materiality is a mixed question of law and fact, or the application of a legal standard to a particular set of facts. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976); *Imperial Supply Co. v. Northern Ohio Bank*, 430 F. Supp. 339 (N.D. Ohio 1976). However, there is support for the holding in *Golub* that the defendant's true motivations need not be disclosed. *Joyce v. Joyce Beverages, Inc.*, 571 F.2d 703 (2d Cir.), *cert. denied*, 437 U.S. 905 (1978); *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1084 (2d Cir. 1977) (§ 14(a) imposes no duty to reveal conflicts of interest); *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 795 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970); *Rodman v. Grant Foundation, FED. SEC. L. REP. (CCH) ¶ 96,599 (S.D.N.Y. 1978)*; *Altman v. Knight*, 431 F. Supp. 309 (S.D.N.Y. 1977); *Tyco Laboratories, Inc. v. Kimball*, 444 F. Supp. 292 (E.D. Pa. 1977); *Stedman v. Storer*, 308 F. Supp. 881 (S.D.N.Y. 1969). Other courts have reached similar results by holding that the purpose of both rule 14a-9 and rule 10b-5 is full disclosure, not a dispassionate presentation of conflicting interpretations of the facts. *Lavin v. Data Sys. Analysts, Inc.*, 443 F. Supp. 104 (E.D. Pa. 1977), *aff'd mem.*, 578 F.2d 1374 (1978); *Abramson v. Nytronics, Inc.*, 312 F. Supp. 519, 524 (S.D.N.Y. 1970).

The standard for materiality is an "elusive concept" and it has been defined in amorphous terms such as "fair accuracy." *General Time Corp. v. Talley Indus., Inc.*, 403 F.2d 159, 162 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969). *See also DASHO v. Susquehanna Corp.*, 461 F.2d 11 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972). Materiality has been expressed often in terms of influence on the investor, even though causation need not be shown. The earlier standard was a substantial likelihood that the facts *might* affect the judgment of a reasonable investor. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153 (1972); *Mills v. Electric Auto-Lite, Co.*, 396 U.S. 375, 384 (1970); *General Time Corp. v. Talley Indus., Inc.*, 403 F.2d 159, 162 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969); *McDonough v. Champburger Corp.*, 488 F.2d 948, 953 (5th Cir. 1974); *Berman v. Thomson*, 312 F. Supp. 1031, 1033 (N.D. Ill. 1970). The later standard is stronger: a substantial likelihood that it *would* affect the reasonable investor. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 50 (1977); *Perelman v. Pennsylvania Real Estate Inv. Trust*, 432 F. Supp. 1298, 1300-01 (E.D. Pa. 1977). *See also TSC Indus., Inc. v. Northway Inc.*, 426 U.S. 438, 449 (1976); *Cole v. Schenley Indus., Inc.*, 563 F.2d 35, 40 (2d Cir. 1977) (actual significance in investor's mind); *Swanson v. American Consumer Indus., Inc.*, 415 F.2d 1326, 1330 (7th Cir. 1969); *Imperial Supply Co. v. Northern Ohio Bank*, 430 F. Supp. 339, 357-58 (N.D. Ohio 1976); *Missouri Portland Cement Co. v. Cargill, Inc.*, 375 F. Supp. 249, 269 (S.D.N.Y.), *modified*, 498 F.2d 851 (2d Cir. 1974) (likelihood of reliance); *Puma v. Marriott*, 363 F. Supp. 750, 757 (D. Del. 1973), *aff'd mem.*, 503 F.2d 1399 (3d Cir. 1974) ("not trivial"); *Richland v. Crandall*, 262 F. Supp. 538, 553 (S.D.N.Y. 1967). The *Perelman*, *Cole* and *Swanson* cases, as well as *Stedman v. Storer*, 308 F. Supp. 881, 887 (S.D.N.Y. 1969), are specifically concerned with materiality of omissions.

The extent of the federal interest in transactions which involve both violations of securities laws and breaches of state fiduciary duties was severely limited by the Supreme Court in *Green*, thus keeping with the present Court's preference for state law. While this preferential policy is applicable to many areas of the law, the means used in *Green* to reach a conclusion consistent with this policy were quite specific. Although the Supreme Court noted that there had been no misstatements or omissions,³⁵ this was not central to the holding nor to the reasoning behind it. The Court instead interpreted the provisions of section 10(b) as terms of art referring to specific practices such as wash sales and matched orders.³⁶ Succinctly stated, the Court's dialectic was that the use of the terms "manipulative and deceptive" shows a congressional intent to reach only those specific practices bearing on market integrity, and therefore any other transactions should be governed by state law. The extent of the federal interest is limited to transactions involving the specific practices.³⁷

Although section 14(a) lacks the terms of art present in section 10(b), there is authority for the extension of the holding of *Green* to section 14(a). It has been observed that no case has "held that the proxy rules are violated because management has allegedly mismanaged the company, and the proxy statement does not say so."³⁸ *Perelman v. Pennsylvania Real Estate Investments Trust*³⁹ explicitly held that the decision rendered in *Green* was

court was affirmed. The applicable standard in this context is that reasonable minds could not differ as to the materiality of the omission. Both courts must have so concluded. See note 8 *supra*. An analogy can be made to a rule 10b-5 case in which there was no purchase or sale of securities. *In re Penn. Cent. Sec. Litigation*, 347 F. Supp. 1327 (E.D. Pa. 1972), *modified*, 357 F. Supp. 869 (E.D. Pa. 1973), *aff'd*, 494 F.2d 528 (3d Cir. 1974). However, it has been held self-evident that the fact of working control ownership is material. *Colonial Realty Corp. v. Baldwin-Montrose Chem. Co.*, 312 F. Supp. 1296 (E.D. Pa. 1970). The granting of summary judgment on the issue of materiality has been expressly rejected on the grounds that this issue is a mixed question of law and fact. *Imperial Supply Co. v. Northern Ohio Bank*, 430 F. Supp. 339 (N.D. Ohio 1976). See *TSC Indus., Inc., v. Northway Inc.*, 426 U.S. 438 (1976); note 41 *infra*.

35. 420 U.S. 462. The Supreme Court pointed out that the "information statement" distributed in connection with the short-form merger disclosed the price, and minority shareholders could either accept that price or seek an appraisal. The choice was presented with all relevant information.

36. See note 15 *supra*.

37. The federal courts have frequently accepted the contention that the federal interest is satisfied once there has been full disclosure of all relevant information. *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970); *Swanson v. American Consumer Indus., Inc.*, 415 F.2d 1326 (7th Cir. 1969); *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969); *Leighton v. AT&T*, 397 F. Supp. 133 (S.D.N.Y. 1975); *Abramson v. Nytronics, Inc.*, 312 F. Supp. 519 (S.D.N.Y. 1970).

38. *Markewich v. Adikes*, 422 F. Supp. 1144, 1147 (E.D.N.Y. 1976). See *Levy v. Johnson*, FED. SEC. L. REP. (CCH) ¶ 95,899 (S.D.N.Y. 1977); *Walner v. Friedman*, 410 F. Supp. 29 (S.D.N.Y. 1975).

39. 432 F. Supp. 1296 (E.D. Pa. 1977). See *Barnett v. Anaconda Co.*, 238 F.

applicable to section 14(a) cases. The rationale turned on the principle expressed in *Cort v. Ash*: unless fiduciary responsibilities are established by federal statute, the appropriate remedy for any breach lies in state law.⁴⁰ However, like *Golub*, *Perelman* adopted the general policy of the *Green* case without consideration of its rationale. More importantly, the policy of *Green* was used in *Perelman* only to deny summary judgment for the plaintiff in a case where materiality of the alleged omission was doubtful at best.⁴¹

Authority also may be found for applying *Green* to section 14(a) by an extension of cases which examine the overlap between sections 10(b) and 14(a). As the court in *Golub* noted, the "manipulative, or deceptive device [used] . . . in violation of Rule 10b-5 may be a deceptive, inaccurate, or insufficient proxy statement prohibited by Rule 14a-9."⁴² Some courts have spoken of deficient proxy statements entirely in terms of rule 10b-5;⁴³ the policy of *Green* thus might be adapted to section 14(a) on the basis that the situations covered by the two sections are quite similar, even though the elements required to state a cause of action are not. These recent cases indicate a judicial climate favorable to the application of *in pari materia* to sections 10(b) and 14(a).

The goal of any method of statutory construction, including the use of *in pari materia*, is to ascertain the intent of the enacting body with respect to the problem presented to the court. *Green* held that the congressional

Supp. 766 (S.D.N.Y. 1965). In *Barnett*, the court used reasoning similar to that in *Green* to dismiss a claim under § 14(a). The court stated that while "Congress . . . intended to protect a broad spectrum of investors' rights, . . . it did not preempt the whole field of corporate affairs and transform the federal courts into a general forum to oversee them." *Id.* at 770.

40. 422 U.S. 66, 84 (1975).

41. The plaintiff alleged that if certain relationships—including surety agreements—had been known, that particular trustee would not have been elected. The *Perelman* case is also notable for its discussion of the materiality of omissions; it stated that "there is no contention by plaintiff that the inclusion of those facts would be necessary in order to make the statements therein not false or misleading." 432 F. Supp. at 1304. This standard of materiality is almost identical to rule 14a-9. See note 12 *supra*. See also *Rosenblatt v. Northwest Airlines, Inc.*, 435 F.2d 1121 (2d Cir. 1970); *General Time Corp. v. Talley Indus., Inc.*, 403 F.2d 159 (2d Cir. 1968), *cert denied*, 393 U.S. 1026 (1969); *Gould v. American-Hawaiian Steamship Co.*, 535 F.2d 761 (3d Cir. 1976); *Ash v. Brunswick Corp.*, 405 F. Supp. 234 (D. Del. 1975); *CMC Corp. v. Kern County Land Co.*, 290 F. Supp. 695 (N.D. Cal. 1968). The *Perelman* court also held that *Green* and *Superintendent of Ins. v. Banker's Life & Cas. Co.*, 404 U.S. 6 (1971), are applicable to § 14(a).

42. 576 F.2d at 764. For other cases which examine this overlap, see *Dasho v. Susquehanna Corp.*, 461 F.2d 11 (7th Cir.), *cert denied*, 408 U.S. 925 (1972); *Goldberger v. Baker*, 442 F. Supp. 659 (S.D.N.Y. 1977); *Colonial Realty Corp. v. Balwin-Montrose Chem. Corp.*, 312 F. Supp. 1296 (E.D. Pa. 1970).

43. *McDonough v. Champburger Corp.*, 488 F.2d 948 (5th Cir. 1974); *Roth v. American Metal Climax, Inc.*, 458 F.2d 255 (5th Cir.), *cert. denied*, 409 U.S. 874 (1972).

intent reflected by the language of section 10(b) is to cover certain specific practices and leave others to be litigated in the state courts. A congressional intent to cover a wider, unspecified range of problems inherent in proxy statements is indicated by the differing language of section 14(a). Courts have held that this difference in language required the use of different jury instructions,⁴⁴ and that a judgment under one section has no *res judicata* effect on the other.⁴⁵ Another example of statutory construction along these lines concerned the Williams Act, or section 14(e).⁴⁶ This section adopted the language of section 10(b) almost verbatim, and the section was held to have required the same elements as section 10(b) because the enactment "accepted the precedential baggage these words have carried over the years."⁴⁷ The language of section 14(a) is quite different, and it is not necessarily appropriate to infer that Congress had a similar intent in its enactment, especially to infer a desired relegation to state law of the policing of proxy statements.⁴⁸

While conflicts involving corporate mismanagement have been litigated in the state courts, the area of proxy statements has been traditionally relegated to federal remedies. Federal regulation of proxy statements reflects the strong federal interest, acknowledged consistently by the courts,⁴⁹ in disclosure. Even *Green* explicitly recognized this interest.⁵⁰ Cases decided since *Green* have held that if the allegations which give rise to the claim for corporate mismanagement state a federal securities claim under section 14(a), the federal courts may resolve breach of fiduciary duty cases.⁵¹

The *Golub* court added as a basis for dismissal of the plaintiffs' action that the proxy statement was fully adequate under section 14(a) and rule

44. *Richland v. Crandall*, 262 F. Supp. 538 (S.D.N.Y. 1967).

45. *Cramer v. General Tel. & Elecs.*, 443 F. Supp. 516 (E.D. Pa. 1977), *aff'd*, 582 F.2d 259 (1978).

46. 15 U.S.C. § 78n(e) (1976).

47. *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 945 (2d Cir. 1969), *cited with approval in Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974).

48. Although somewhat dated, the broad holding in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), appears quite viable. *Borak* held that the proxy rules impliedly create a private cause of action, and that the federal courts may award whatever remedy will effectuate the broad purposes of the statute. These holdings, along with the well-recognized federal interest in full disclosure, present strong arguments for federal policing of proxy statements.

49. *See note 37 supra.*

50. 430 U.S. at 463.

51. Although the Supreme Court in *Green* instructed that breach of fiduciary duty and corporate mismanagement cases be litigated in the state courts, the pendent jurisdiction of the federal court will permit it to resolve some of these conflicts. *See note 9 supra.* *See also Biesenbach v. Guenther*, 446 F. Supp. 98 (E.D. Pa.), *aff'd*, 588 F.2d 400 (3d Cir. 1978); *Tyco Laboratories, Inc. v. Kimball*, 444 F. Supp. 292 (E.D. Pa. 1977); *Leighton v. AT&T*, 397 F. Supp. 133 (S.D.N.Y. 1975).

14a-9.⁵² This determination necessarily involved a consideration of materiality.⁵³ However, if the discussion above⁵⁴ is correct, a logical extension of *Green* would make the materiality consideration a superfluous argument. *Green* stands for a policy of preference—had there been no claim at all stated within the purview of rule 10b-5, the Supreme Court would not have had to strictly construe the language of section 10(b). *Green* requires that a federal claim under section 10(b) which consists of an allegation of corporate mismanagement be dismissed. The non-material argument therefore is unnecessary. Even if there was an arguably material omission, an extension of *Green* to section 14(a) would still mandate a dismissal from federal court where the omission was one of corporate mismanagement.

The decision in *Golub* is consistent with the present Supreme Court's disinclination to permit federal litigation of conflicts traditionally resolved by the states. The case severely limits the scope of section 14(a). The Eighth Circuit's use of the notion of preference for state litigation as expressed in *Green* means that section 14(a) will be available only in the more obvious cases of material misstatements or omissions. This does little to further the congressional intent that statements for solicitation of proxies fully and fairly disclose all material facts. *Green* limits rule 10b-5 actions to those which truly affect market integrity. But while a transaction which literally falls within the ambit of rule 10b-5 may not affect the market integrity, almost any conceivable section 14(a) violation would impact adversely on the integrity of corporate democracy. This is apparent even if the proxies were not necessary to accomplish the transaction, but were solicited as a matter of grace.

Another important aspect of the *Golub* decision is that the court's unquestioning adoption of the policy of preference for a state cause of action side-stepped some very difficult issues. Had a federal claim been recognized, the issue of whether an action will or should lie when the defective proxy statement is used but the proxies solicited are not necessary to obtain the number of votes required would have to be addressed.⁵⁵ The court avoided the need to decide a problem it recognized in the opinion: whether the bonus could be characterized as a premium for the ownership of a control block of stock.⁵⁶ Further, the opinion permitted the court to ignore for

52. 576 F.2d at 765.

53. See note 34 *supra*.

54. See text accompanying notes 15 & 16 *supra*.

55. See cases cited note 24 *supra*. *Popkin v. Bishop*, 464 F.2d 714, 717 (2d Cir. 1972), specifically noted that the ability to push through a merger cannot by itself defeat a claim for federal injunctive relief. Even if solicited only as a matter of grace, equity would seem empowered to recognize a defective proxy and possibly grant rescission. *SEC v. National Sec., Inc.*, 393 U.S. 453, 456, 463-64 (1969). See also *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

56. *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955). This case shows the state law remedy sought by the disappointed plaintiffs of Birnbaum, v Newport

the most part some of the tougher questions of materiality of misstatements or omissions.

The plaintiffs in *Golub* were placed in an unenviable position by the decision. It was of little consolation that the court noted the "plaintiffs are free to pursue that claim in an appropriate forum."⁵⁷ The claim referred to is concededly only a "possible . . . claim . . . under applicable state law."⁵⁸ Under the facts as given in this case, though, it may be especially difficult to state a claim for breach of fiduciary duties. A claim against defendants in their capacity as officers is easily countered by a reasonable business purpose;⁵⁹ a claim against them as majority shareholders is recognized in only a few states as yet.⁶⁰ It is likely that many minority shareholders will find themselves in a similar position if *Golub* is followed: they will have no remedy. *Golub* clearly illustrates the problems inherent in the adoption of the policy of *Green*, leaving an example of an action which affects the integrity of corporate democracy but is actionable in neither federal nor state court.

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Steel Co., 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952). After their federal claim was rejected in *Birnbaum*, plaintiffs pursued and recovered on a state law claim in *Perlman* for breach of fiduciary duties. The recovery was based upon a characterization of the excess selling price as a premium for ownership of a control block of stock.

57. 576 F.2d at 765.

58. *Id.*

59. *Bryan v. Brock & Blevins Co.*, 490 F.2d 563 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974); *Sinclair Oil Corp. v. Levi*, 280 A.2d 717 (Del. 1971); *Gottfried v. Gottfried*, 73 N.Y.S.2d 692 (1947); *Heller v. Boylan*, 29 N.Y.S.2d 653 (1941); *New York Trust Co. v. American Realty Co.*, 244 N.Y. 209, 155 N.E. 102 (Ct. App. 1926).

60. *Bryan v. Brock & Blevins Co.*, 490 F.2d 563 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974); *Debaun v. First Western Bank & Trust Co.*, 46 Cal. App. 3d 686, 120 Cal. Rptr. 354 (1975) (liability found for majority shareholder who negligently sold to corporate pirate); *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969) (liability where majority shareholder chose merger over stock split to the exclusion of minority shareholders).