UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1299

HARRY EDELSON,

Plaintiff-Appellant,

v.

RAYMOND K.F. CH'IEN, PETER YIP HAK YUNG, ASIA PACIFIC ONLINE LTD., AND CHINADOTCOM CORPORATION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, IN SUPPORT OF THE PLAINTIFF - APPELLANT ON THE ISSUES ADDRESSED

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, IN SUPPORT OF THE PLAINTIFF - APPELLANT ON THE ISSUES ADDRESSED

The Securities and Exchange Commission submits this brief as *amicus curiae* in response to the Court's request for the Commission's views. The Commission addresses here two important issues: shareholder rights to assert private rights of action under Section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(d), and whether Section 13(d) applies outside the context of a change in control transaction.

BACKGROUND

A. Section 13(d) of the Exchange Act

Section 13(d) was adopted as part of the Williams Act in 1968. As an amendment to the Exchange Act, the Williams Act was passed in response to a growing use of cash tender offers as a means of gaining control of corporations. *See Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 22 (1977). "Whereas corporate acquisitions by proxy solicitations or by exchange of offers of securities were subject to registration and disclosure requirements at that time, *see* [Exchange Act Section 14(e), 15 U.S.C. 78n(e)], tender offers or acquisitions of substantial amounts of stock having a potential for control were not subject to similar requirements." *Indiana Nat'l Corp. v. Rich*, 712 F.2d 1180, 1183 (7th Cir. 1983). The Williams Act was intended to fill this regulatory void. As stated by Senator Williams:

> This legislation will close a significant gap in investor protection under the Federal securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by cash tender offer or through open market or privately negotiated purchases of securities.

113 Cong. Rec. 854 (1967). *See also* S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4, *reprinted in* 1968 U.S.C.C.A.N. 2811, 2814.

Section 13(d) was intended to alert shareholders of a large accumulation of stock by a party that might potentially affect the company's control. Accordingly,

Section 13(d) requires that "[a]ny person who" acquires "the beneficial ownership of more than 5 per centum" of any class of equity securities required to be registered under Section 12 of the Exchange Act, "shall within ten days after such acquisition" send the issuer and the Commission a statement containing certain information including, "if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer," "any plans or proposals" which the person may have to liquidate the issuer, sell its assets or merge it with any other business, or "to make any other major change to the business or corporate structure."

A person acquiring five percent of a class of stock may fulfil his or her obligations under Section 13(d) by filing either a Schedule 13D or Schedule 13G, 17 C.F.R. 240.13d-102. Schedule 13G is a shorter, less burdensome form originally adopted for use by institutional investors (including banks, investment companies, pension benefit plans, and the like) who purchase securities in the ordinary course of business "and not with the purpose nor with the effect of changing or influencing the control of the issuer." Rule 13d-1(b)(1)(i), 17 C.F.R. 240.13d-1(b)(1)(i). In 1998, the Commission expanded use of Schedule 13G to include individual investors who are "passive investors." At that time the Commission stressed that "[p]ersons unable or unwilling to certify that they do not have a disqualifying purpose or effect because, for example, the possibility exists that they may seek to exercise or influence control, would be ineligible to file Schedule 13G and would be required to file a Schedule

13D." *Amendments to Beneficial Ownership Reporting Requirements,* Release No. 34-39538, 63 F.R. 2854, 2854-56 (Jan. 16, 1998). *See* Rule 13d-1(c)(1), 17 C.F.R. 240.13d-1(c)(1). Schedule 13D requires, among other things, disclosure of "any plan or proposal" which the five percent holder might have concerning "[a]ny change in the present board of directors or management of the issuer." Schedule 13D, Item 4.

B. Facts Alleged in the Complaint 1/

The plaintiff, Harry Edelson, a former director and a shareholder of defendant Chinadotcom (the "issuer"), 2/ a Cayman Islands company based in Hong Kong, brought this action seeking injunctive relief under Section 13(d) and damages under common law. 3/ Defendants are Peter Yip Hak Yung, the CEO of Chinadotcom, Raymond K.F. Ch'ien, Executive Chairman of the company's board, Asia Pacific Online Limited ("APOL")4/ and Chinadotcom. The action arises from the failure to reelect to Chinadotcom's board plaintiff Edelson and fellow board member J. Carter

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1/ Citations to the complaint will generally be to the initial complaint, "Complaint __," and to the Amended Complaint, "Am. Complaint __." As discussed below, the district court dismissed the Section 13(d) claim in both complaints.

2/ Chinadotcom's common stock is traded on NASDAQ (Complaint ¶10; Am. Complaint ¶11).

3/ Edelson's claim for damages alleges that defendants' tortiously interfered with a prospective business advantage.

4/ APOL is a Cayman Island's corporation owned by Yip's spouse and a trust established for the benefit of Yip's children. APOL is alleged to be controlled by Yip (Plaintiff-Appellant's Brief p. 15; Compliant ¶9; Am. Complaint ¶10).

Beese. 5/ Until their removal, Edelson and Beese were the only independent, non-management United States based directors serving on the board of Chinadotcom and were two of the three members of the board's audit committee. At the time of his removal from the board, the plaintiff personally owned approximately 480,000 shares of Chinadotcom stock, with vested options to acquire approximately 185,000 additional shares. He also beneficially owned approximately 165,000 more Chinadotcom shares through affiliated funds (Complaint ¶6; Am. Complaint ¶7; Brief p. 11 n.6).

Edelson and Beese openly disagreed with Yip and Ch'ien concerning the governance of Chinadotcom. In particular, Edelson alleges that he questioned the motives of Yip and Ch'ien in connection with a company-sponsored stock repurchase program. Yip had acquired 4.3 million shares of Chinadotcom in a private transaction at a price of $2.50 per share. Following Yip's purchase, it is alleged that in the Spring of 2003 Yip argued forcefully in favor of the company-sponsored buy back of Chinadotcom stock at $3.75 per share and that Edelson and Beese forcefully opposed the move (Complaint ¶¶17-23; Am. Complaint ¶¶18-25).

Edelson was not reelected to Chinadotcom's board during the election of directors conducted at the company's Annual General Meeting on June 17, 2003.

5/ The Honorable J. Carter Beese served as a member of the Commission from 1992 to 1994. He is not party to this action.

The complaint alleges that Edelson's failure to be reelected was the result of a plan formulated by Yip and Ch'ien to oppose the reelection of Edelson and Beese to the board. In order to accomplish this objective, Yip and Ch'ien allegedly concealed their opposition to the reelection of Edelson and Beese by purporting to concur with the board's recommendation to the shareholders that Edelson and Beese be reelected to the board (Compliant ¶¶24-25; Amended Complaint ¶¶25-26). Then, during the election, Yip and Ch'ien voted their shares to defeat the reelection of Edelson and Beese to the board (Complaint ¶¶24-26; Am. Complaint ¶¶25-27).6/ The shares voted by Yip constituted 83 percent of the shares voted to defeat Beese and 58 percent of the shares voted to defeat the plaintiff (Plaintiff-Appellant's Brief pp. 16-17; Complaint ¶28; Am. Complaint ¶29).

C. Proceedings Below

On October 15, 2003, Edelson filed this action against Yip, Ch'ien, APOL, and Chinadotcom. Edelson seeks an order declaring the June 2003 election null and void and ordering a new election in which he is to participate, with the cost of the election borne by Yip, Ch'ien, and APOL (Complaint pp. 15-16; Am. Complaint pp. 18-19). Edelson contends that Yip violated Section 13(d) because he did not disclose his plan

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6/ The shares beneficially owned by Yip and voted by him to defeat Edelson's reelection constituted approximately 19 percent of the outstanding shares of the company. These shares included 16,135,686 shares owned by APOL. (Plaintff-Appellant's Brief p. 15; Complaint ¶9; Am. Complaint ¶10).

to influence the control of Chinadotcom by voting his stock to change the composition of the Chinadotcom's existing board (Complaint ¶30; Am. Complaint ¶31). Specifically, Edelson notes that when Yip purchased the 4.3 million shares on behalf of APOL on January 14, 2003, he filed a Schedule 13G short-form as a passive investor, and, as required for Schedule 13G filers, Yip certified on the Schedule 13G that the APOL shares beneficially owned by him were "not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities." Edelson contends that once Yip decided to vote against Edelson and Beese, Yip could no longer make such a certification and was required to then file a Schedule 13D and comply with that form's requirement that he disclose any "plans or proposals" to make "[a]ny change in the present board of directors" (Complaint ¶30; Am. Complaint ¶31).

Edelson contends that had Yip made the required Section 13(d) disclosure, shareholders, including Edelson, would have been alerted to the alleged plan to oust him from the board and could have waged a proxy contest to maintain his position on the board (Complaint ¶34; Am. Complaint ¶36). As a result of Yip's concealment of his plans, Edelson argues, Chinadotcom's shareholders were effectively disenfranchised because they were led to believe the election was uncontested.

The plaintiff filed a motion for a preliminary injunction at a time when Yip and Ch'ien had yet to be served, and the sole defendant before the court was

Chinadotcom. 7/ Chinadotcom argued that Edelson cannot show his entitlement to preliminary injunctive relief because he cannot demonstrate that he is likely to prevail on the merits. It noted that Edelson's complaint fails to allege any misconduct by Chinadotcom, but states only that Chinadotcom was named as a defendant "in order to assure a complete adjudication of this issue, and so that a binding and effective injunctive relief may be granted" (Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, p. 6 (*citing* Complaint ¶37)). Since Chinadotcom committed no violation of Section 13(d), defendant argued that the plaintiff may not seek injunctive relief from Chinadotcom.

Chinadotcom also argued that Edelson cannot succeed on the merits because he lacks standing to bring a private action under Section 13(d). Specifically, defendant noted that at the time of the alleged wrongdoing, Edelson was a member of the board of Chinadotcom and that "[c]ourts have specifically held that ex-directors do not have standing to assert a Section 13(d) claim" (Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, p. 7 (*Citing Mates v. N. Am. Vaccine, Inc.*, 53 F. Supp. 2d 814 (D. Md. 1999) and *Nowling v. Aero Srvc. Int'l. Inc.*, 752 F. Supp. 1304 (E.D. La. 1990))).

7/ Both Yip and Ch'ien were served after adjudication of this matter. Neither is a party to this appeal.

Finally, defendant argued (*see* Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, p. 8) that Section 13(d) is inapplicable in the context of this case because, in the defendant's view, the vote to oust Edelson did not take place within the context of a contest for the control of Chinadotcom, and does not apply to a vote to change directors. Defendant argued:

> On this question, case law explaining the purpose behind Section 13(d), the text of the statute and the implementing rules, and recent amendments proposed by the SEC [8/]

8/ The release to which the defendant refers as supporting its position that voting to remove a director does not implicate a control purpose is *Security Holder Director Nominations*, Release No. 34-48626, 68 F.R. 60784, 60805 (Oct. 23, 2003), which states in pertinent part:

> We believe that formation of a security holder group solely for the purpose of nominating a director pursuant to proposed Exchange Act Rule 14a-11, the nomination of a director, soliciting activities in connection with such a nominee, or having a nominee elected as a director under the proposed procedure, should not be viewed as having a purpose or effect of changing or influencing control of the company. We therefore believe that beneficial owners who engage in these activities should be permitted to report on Exchange Act Schedule 13G, rather than Exchange Act Schedule 13D.

The basis for the Commission's statement was that security holder or security holder group compliance with detailed conditions that were part of the proposed rule would preclude use of the proposed director nominating procedure to nominate a director if the nominating person or group intended to change or influence control of the company. The proposed rule has not been adopted by the Commission, and the Commission can express no opinion has to whether or not the proposed rule will be adopted.

> are clear: the fact that a shareholder intends to vote its shares in favor or against a director does *not* mean that the shareholder has "the purpose or effect of changing or influencing the control of the issuer of the securities."

(Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, p. 8.)

The district court dismissed Edelson's Section 13(d) claim, holding that Edelson did not have standing to bring a private action under Section 13(d). 9/ *See Edelson v. Ch'ien, et al.*, No. 03 C 7320, 2004 WL 422674, at *5-6 (N.D. Ill. Jan. 28, 2004). At the outset, the district court noted that "[t]he threshold inquiry for an implied right of action * * * is to determine whether Congress intended to provide one 'in light of the statute's language, structure, and legislative history.'" 2004 WL 422674, at *4 (*quoting Mallet v. Wis,. Div. of Vocational Rehab.*, 130 F.3d 1245, 1249 (7th Cir. 1997)). The district court noted that in *Indiana Nat'l Corp. v. Rich*, 712 F.2d 1180, 1183 (7th Cir. 1983), this Court observed that the legislative history of Section 13(d) reveals that "'the purpose of the Williams Act was to insure that public shareholders facing a tender offer or the acquisition by a third party of a large block of shares possibly involving a contest for control be armed with adequate information about the qualifications and intentions of the party making the offer or acquiring the shares.'" 2004 WL 422674, at *4 (*quoting Indiana Nat'l. Corp. v. Rich*, 712 F.2d at 1183).

9/ The court granted Edelson's motion to amend his compliant, but then also dismissed the Section 13(d) claim contained in the amended complaint.

Relying on two district court cases *Mates v. N. Am. Vaccine, Inc., supra,* and *Nowling v. Aero Srvc. Int"l, supra,* the district court held that Section 13(d) "was intended to protect the investing public and not * * * 'ex-board members who want to get back at their previous co-fiduciaries for disagreements or squabbles lost along the way'" 2004 WL 422674 at *5 (*quoting Nowling,* 752 F. Supp. at 1313). The court reasoned that, unlike "unsuspecting investors," well-informed members of a corporate board are able to protect themselves because they have access to relevant information not available to investors. *Id.* While recognizing that Edelson complains that Yip and Ch'ien concealed their intention to vote against him, the district court found that Edelson's complaint, nevertheless, "falls short of showing that he is a member of the class that Section 13(d) was intended to protect." 2004 WL 422674, at *5.

The court also found that the injuries that Edelson alleges to have suffered indicate that he brought his claim in the capacity of a former member of the board and not as a shareholder. The court noted that, of the four injuries alleged by Edelson, only one – his claim to have been disenfranchised by the defendant because he and the other shareholders were unaware that the election would be contested – related to his role as a shareholder. But the district court was not persuaded by this alleged injury:

> Although plaintiff claims to have been disenfranchised, he does not claim that his votes were not cast and counted. His injury, therefore, appears to be more appropriately viewed as an injury to a former director and not to a shareholder.

2004 WL 422674, at *5.

Having dismissed Edelson's complaint on this ground, the court declined to rule on whether Section 13(d) only applies to tender offers or contests for control of a company, whether Chinadotcom violated Section 13(d), and whether Chinadotcom was a proper defendant. Nor did the court need to address the proper form of any injunctive or other relief.

ARGUMENT

The issues presented on appeal include: (1) whether Edelson has standing to bring a private action under Section 13(d); (2) whether Section 13(d) is applicable, as defendant argues, only to tender offers or contests for the control of an issuer; (3) whether Yip violated Section 13(d) by not disclosing his intention to vote against the reelection of Edelson and Beese to the board; (4) whether Chinadotcom is a proper party; and (5) the proper form of injunctive relief.

This brief does not address all five issues. The district court only addressed Edelson's standing to assert a private right of action under Section 13(d). This brief addresses that issue and the issue whether Section 13(d) applies in a non-tender offer context. The fourth and fifth issues listed above – whether Chinadotcom is a proper

party and the proper form of injunctive relief – are questions of jurisprudence that are not within the Commission's substantive area of expertise. 10/ The Commission believes that the third issue requires further factual determination. As discussed below, should the Court otherwise rule for the plaintiff, the Commission recommends that the case be sent back to the district court for development of the record on the alleged Section 13(d) violation.

I. THE PLAINTIFF HAS STANDING TO ASSERT A PRIVATE ACTION UNDER SECTION 13(D).

The district court erred in finding that Edelson did not have standing to assert a private right of action under Section 13(d). The district court focused on Edelson's position as former board member and concluded that he was not within the class that Section 13(d) was enacted to protect. The court paid little attention to Edelson's status as owner of hundreds of thousands of Chinadotcom shares.

The parties do not contest that the purpose of Section 13(d) is to protect shareholders, nor that Section 13(d) confers a private right of action for injunctive

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10/ While the Commission does not address the question of whether Chinadotcom, which did not violate Section 13(d), is a proper party, the Commission believes that the Court should proceed with caution should it address this issue. Specifically, the Commission believes that in some Section 13(d) cases an issuer may be a necessary party in order to effectuate proper and full relief. In this case, for example, if it were to be determined that a Section 13(d) violation required a new election, it is difficult to see how that could be accomplished without an order directed at the issuer running the election.

relief in favor of shareholders. 11/ Yet, even though Edelson is the beneficial owner of hundreds of thousands of shares of Chinadotcom stock, the district court held that he was not entitled to seek injunctive relief under Section 13(d). 12/ In reaching its conclusion, the court reasoned that all but one of the injuries Edelson alleges concern his capacity as a member of the board, as opposed to his capacity as a shareholder.

11/ The Supreme Court has recognized that the purpose of the Williams Act was to protect shareholders. *See Piper v. Chris-Craft Ind., Inc.,* 430 U.S. 1, 33-34 (1977); *Rondeau v. Mosinee Paper Corp.,* 422 U.S. 49, 58 (1975). As the leading securities treatise has noted: "The theme of investor protection was emphasized * * * by Senator Williams on the day the measure was passed by the Senate," when he stated:

> [The federal securities laws] provide protections for millions of American investors by requiring full disclosure of information in connection with the public offering and trading of securities. These laws have worked well in providing the public with adequate information on which to base intelligent investment decisions.
>
> There are, however, some areas still remaining where the full disclosure is *necessary for investor protection* but not required by present law. One such area is the purchase by direct acquisition or by tender offers of substantial blocks of securities of publicly held companies.
>
> S. 510 * * * provides for investor protection in these areas.

V Louis Loss & Joel Seligman, *Securities Regulation* 2165 (3rd ed. 1990), quoting 113 Cong. Rec. 24664 (emphasis added in Loss).

12/ There is no suggestion that Edelson acquired his shares solely to create standing.

Specifically, the court found that only one of Edelson's allegations "relates to his role as a shareholder: Edelson claims to have been disenfranchised by Defendants because he, and other shareholders, did not know the election was contested." 2004 WL 422674, at *5. 13/

Even if it accepted, however, that part of the relief Edelson seeks is as a director, so long he is in part seeking relief as a shareholder, he has standing to sue under Section 13(d). 14/ If the substantive charge in the complaint is taken as true, Edelson, in his capacity as a shareholder, was illegally kept in the dark about the change in control plans of shareholders who were required to disclose those plans under Section 13(d). The solidifying of management's hold over a company, to the exclusion of dissenting voices, is the kind of event that Section 13(d)'s disclosure requirement was intended to reveal to shareholders, *see Bath Ind., Inc. v. Blot*, 427 F.2d 97, 109 (7th Cir. 1970), and Schedule 13D expressly requires the disclosure of any plan to change the composition of corporate boards. *See* Schedule 13D, Item 4.

13/ The other alleged injuries include: (1) his "illegal and improper removal" from the company's board; (2) his preclusion "from having a full and fair opportunity to solicit proxies in favor of his retention on the * * * Board;" and (3) his preclusion "from serving as a director of Chinadotcom," thereby preventing him "from attempting to exercise influence on the policies and direction of the company." *Id.* at *5, n.6.

14/ As noted, Edelson seeks an order to have the old election declared null and void and to require the holding of a new election.

The district court dismissed this interest, on the view that disclosure of Yip and Ch'ien's alleged plans to vote against Edelson and Beese would not have changed Edelson's own vote. He voted for himself in any event. However, Edelson alleges that had he known of the defendants' plans, he would have waged a proxy contest, informed the other shareholders of his concerns about management, and sought to have more shareholders vote in the election. A shareholder's interest in corporate suffrage is not limited to his or her own vote. The right of a shareholder to contest an election for directors certainly is a fundamental part of corporate suffrage. In seeking to have an opportunity to assert that right, Edelson is asserting a claim that any shareholder could assert.

That the shareholder is also a director does not change the analysis. 15/ There is no justification in the text of Section 13(d), its legislative history, or the rules promulgated under it to deny a shareholder a private right of action simply because he or she also is or was a member of the board. 16/ In holding otherwise, the district

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15/ The Commission takes no position on the standing of dissenting board members who are *not* also shareholders. The views of the Commission expressed here are further limited to the right of a plaintiff to assert an implied private right of action for *injunctive* relief because Edelson does not seek damages under Section 13(d).

16/ Should the Court rule that plaintiff has standing to assert an implied private right of action under Section 13(d), it need not address the proper form of injunctive relief that plaintiff may obtain since that determination is best made after a full inquiry and determination of the facts.

court stated the legislative history of Section 13(d) shows that it was intended to protect "unsuspecting investors," as opposed to "well-informed members of management who can adequately protect their own interests." 2004 WL 422674, at *5 (*quoting Mates v. N. Am. Vaccine, Inc.*, 53 F. Supp. 2d at 825). The district court reasoned that "[b]y his own account, Edelson was an active member of the Chinadotcom board of directors. In that role, he was privy to meetings that were not attended by common shareholders."

This argument is contradicted by the undisputed allegations in the complaint. Edelson did not know about Yip and Ch'ien's alleged plans. He was as ignorant as any other Chinadotcom shareholder (other than Yip and Ch'ien themselves) of any secret plans that Yip and Ch'ien may have had to vote against Edelson and Beese. The complaint alleges that the two defendants disingenuously purported to go along with the board's recommendation that the two directors be voted in again, and concealed their contrary plan from not just outside shareholders, but also from the board. Indeed, it is typical that corporate insiders, absent required Schedule 13D disclosures, are ignorant of the plans of Section 13(d) filers. For this reason, the Seventh Circuit and other courts of appeals have held that the issuer itself may sue, on behalf of shareholders, to obtain injunctive relief under Section 13(d). *See Indiana Nat'l. Corp. v. Rich*, 712 F.2d at 1185-86. *Accord, Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1158 (9th Cir. 1992); *Florida Commercial Banks v. Culverhouse*, 772 F.2d 1513,

1517-19 (11th Cir. 1885); *Gearhart Ind. Inc. v. Smith International, Inc.,* 741 F.2d 707, 714-15 (5th Cir. 1984); *Dan River, Inc. v. Unitex Limited,* 624 F.2d 1216, 1224 (4th Cir. 1980).

The district court's opinion relies on two other trial court opinions in reaching its conclusion that Edelson's status as a former board member removes him from the class that the Williams Act was intended to protect. *See Mates v. N. Am. Vaccine. Inc., supra.* and *Nowling v. Aero Serv. International, Inc.,* 752 F. Supp. 1304 (E.D. La. 1990). But these cases are far removed from the circumstances presented in this appeal. The former board member who filed the claim in *Mates* was found to have had knowledge of the very matters that the defendants were alleged to have failed to disclose under Section 13(d). 53 F. Supp. 2d at 825. In *Nowling,* the plaintiff was found to have had access to the information that the defendant is alleged to have failed to disclose while the plaintiff was serving as CEO of the issuer. 752 F. Supp. at 1313. Here, however, the defendant Chinadotcom does not dispute (and cannot for purposes of a motion to dismiss) that Edelson was unaware of the defendants' alleged plan to vote against him and Beese.

II. SECTION 13(D) DOES NOT APPLY ONLY TO TENDER OFFERS OR CONTESTS FOR CONTROL OF AN ISSUER.

The defendant argues that Section 13(d) is inapplicable to this case because the provision only applies to tender offers or contests for control of the issuer. "There

is," defendant argues, "no allegation that APOL," whose shares were beneficially owned by Yip, "was in the process of acquiring shares as part of an effort to change or take over control of Chinadotcom" nor any allegation that Yip and APOL were "planning to make a tender offer to Chinadotcom's shareholders." (Defendant-Appellee's Brief, p. 24).

While the increase in cash tender offers was the genesis of the Williams Act, defendant's assertion that Section 13(d) only applies to tender offers or contests for control of the issuer is nonsense. The Williams Act's coverage is very broad. The statute itself is broadly written and contains no restriction of its coverage to accumulations of stock made as part of a tender offer. Under Section 13(d)(1) "[a]ny person" who, after acquiring a class of securities registered under Section 12, "is directly or indirectly the beneficial owner of more than 5 per centum of such class shall" make certain disclosures. As the Commission's then Chairman informed Congress:

> The Bill before you deals with stock acquisitions in three specific contexts: first, the acquisition by means of a cash tender offer of more that [5 percent] of any class of stock of a publicly held company; second, other acquisitions by any person or group of more than [5 percent] of any class of stock of a publicly held company; and third, the repurchase by a corporation of its own outstanding shares.

Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings Before the Subcommittee on Securities of the Committee on Banking and Currency, 90th Cong. 1st Sess.

16, 33 (1967) (remarks of Commission Chairman Manuel Cohen) (*quoted in General Aircraft Corp. v. Lampert,* 556 F.2d 90, 94 (1st Cir. 1977)). *See also* S. Rep. No. 550, 90 th Cong., 1st Sess. 4 (1967) ("Under this bill, the material facts concerning the identity, background, and plans of the person or group making a tender offer *or* acquiring a substantial amount of securities would be disclosed.") (emphasis added); H.R. Rep. 1711, 90th Cong. 2d Sess. 4 (1968) (same). Thus "[t]he disclosures required of 'any person' by §13(d) * * * apply regardless of whether a tender offer or any other effort to change or influence control is contemplated or pursued." V Loss & Seligman, *Securities Regulation* 2176. *See also Chromalloy Am. Corp. v. Sun Chem. Corp.,* 611 F.2d 240, 245 (8th Cir. 1979) ("[A] securities purchaser is required to disclose the purpose of the purchase * * * regardless of whether the underlying purpose is to acquire control of the issuer."). 17/

17/ Some courts have stated that Section 13(d) is concerned with the rapid accumulation of securities. "Section 13(d) is concerned with the second type of stock acquisition, requiring after-the-fact disclosure of substantial open market accumulations of securities within a relatively short period of time." *General Aircraft Corp. v. Lampert,* 556 F.2d at 94 (*referring to* remarks of Chairman Cohen as quoted above). *See also* H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4, *reprinted in* 1968 U.S.C.C.A.N. 2811, 2814. "The goal of §13(d) 'is to alert the market place to *every large, rapid aggregation or accumulation of securities*, regardless of the technique employed, which might represent a *potential* shift in corporate control.'" *Treadway Companies, Inc. v. Care Corp.,* 638 F.2d 357, 380 (2d Cir. 1980) (*quoting GAF Corp. v. Milstein,* 453 F.2d at 717) (emphasis added). *See also Gearhart Ind. Inc. v. Smith International, Inc.,* 741 F.2d 707, 715 (5th Cir. 1984)(same). But nothing in Section 13(d) limits its coverage to rapid accumulations. While this may have been the typical scenario with which the

The statute, moreover, expressly requires disclosure even where there is no control-purpose or contest for control. The statute requires "any person" who accumulates 5 percent of a class of stock of an issuer to make the appropriate filings and include the disclosure required by the form. While the statute gives the Commission authority to promulgate rules permitting less detailed disclosures in circumstances where it appears to the Commission that the securities were acquired "in the ordinary course of business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer," Section 13(d)(5), 15 U.S.C. 78m(d)(5), such persons still must make the appropriate filings and comply with the item disclosure requirements under the form.

The Rules adopted by the Commission under Section 13(d) also make clear that the disclosure requirements of the provision extend beyond the tender offer context. In addition to long-form Schedule 13D, which reflects the disclosure required by Section 13(d)(1), the Commission has adopted short-form Schedule 13G for passive investors who "[have] not acquired the securities with any purpose, or with the effect of, changing or influencing the control of the issuer." Rule 13d-

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section was concerned, it requires filing and disclosure, subject to certain exceptions not applicable here, whenever and however the 5 percent threshold is crossed. Material changes in the facts set forth in the disclosure schedules, such as the acquisition or disposition of one percent or more of the subject security, must also be reported in an amended filing irrespective of whether such changes occur in the context of a tender offer or control contest.

1(c)(1). If a person cannot certify that the acquisition was made without the purpose nor the effect of influencing control or cannot continue to do so after filing a Schedule 13G, that person must file a Schedule 13D. *See* Rules 13d-1(c); 13d-1(e)(1). *See also Amendments to Beneficial Ownership Reporting Requirements*, Release No. 34-39538, 63 F.R. at 2854-55. 18/

Accordingly, the assertion that Section 13(d) applies only to tender offers is unsupportable and incorrect. 19/

18/ The Commission expresses no opinion as to whether the actions of Yip or Ch'ien violated the federal securities laws. Presumptively, however, Yip was not entitled to file a Schedule 13G on behalf of APOL, in his capacity as the beneficial owner of APOL's Chinadotcom shares, because Yip was the CEO of Chinadotcom. As the CEO of the issuer it would have been difficult, if not impossible, for Yip to certify, as he did, that his beneficial ownership of a large block of shares in the issuer was "not held for the purpose of or *with the effect* of changing or *influencing the control* of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose." Schedule 13G, Item 10 (emphasis added).

19/ The Commission recommends that the case be sent back to the district court for development of the record on the alleged Section 13(d) violation. Facts in need of further development upon remand to the district court include: why Yip never filed a beneficial ownership report in his individual capacity during the relevant period; why Yip filed a Schedule 13G on behalf of APOL instead of a Schedule 13D; whether the alleged plan to vote plaintiff and Beese off the board existed; and whether Yip, Ch'ien or any other Chinadotcom security holders had an agreement to vote against Edelson and Beese and were therefore required to aggregate their beneficial ownership under Rule 13d-5(b) and report as a group.

CONCLUSION

In accordance with the above, the Commission believes the ruling of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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December 15, 2004

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1299

HARRY EDELSON,

Plaintiff-Appellant,

v.

RAYMOND K.F. CH'IEN, PETER YIP HAK YUNG, ASIA PACIFIC ONLINE LTD., AND CHINADOTCOM CORPORATION,

Defendants-Appellees.

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, IN SUPPORT OF THE PLAINTIFF - APPELLANT ON THE ISSUES ADDRESSED, beginning with the title on the first page and ending with the names following the conclusion is in 14 point type and is 5867 words in length as counted by the WordPerfect word processing system.

_____
Allan A. Capute

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Defendants-Appellees.

CERTIFICATE OF SERVICE

I, Allan A. Capute, am a member of the bars of Maryland and the District of Columbia, and I hereby certify that on 15th day of December, 2004, I caused to be served two copies of the BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, IN SUPPORT OF THE PLAINTIFF - APPELLANT ON THE ISSUES ADDRESSED to counsel for the parties at the address below, by overnight Federal Express:

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