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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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IN THE MATTER

of

An Inquiry by the Attorney General of the State of New York, pursuant to Article 23-A of the General Business Law of the State of New York, in regard to the practice of

BRANDEL TRUST,
PAUL HAGENBACH,
LAVAN TRUST and
SUN INVESTMENT ESTABLISHMENT

in the issuance, sale, promotion, negotiation, advertisement and distribution of securities within and from the State of New York.

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MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS BY PAUL HAGENBACH AND BRANDEL TRUST TO VACATE ORDER OF SUPREME COURT ISSUED OCTOBER 7, 1957 UNDER AND PURSUANT TO SECTION 354 OF THE GENERAL BUSINESS LAW, OF THE STATE OF NEW YORK, AND TO VACATE SERVICE THEREOF UPON THE AFORESAID.

STATEMENT

Paul Hagenbach and Brandel Trust are here moving to vacate an order issued by the Hon. Samuel M. Gold, Justice of the Supreme Court of the State of New York on October 7, 1957, made on application by the Attorney General of the State of New York

under Section 354 of the General Business Law of this state, requiring Paul Hagenbach and Brandel Trust to appear for examination on November 27, 1957, at 10 a.m. in the Supreme Court, Special Term, Part II, New York County, and produce records relevant to the Attorney General's inquiry into fraudulent securities practices stemming from their activities in this state.

The aforesaid order was applied for by the Attorney General after an extensive investigation conducted by the Securities Frauds Bureau of the Attorney General's office into the affairs and activities of Paul Hagenbach and Brandel Trust.

The dealings and the practices engaged in by the moving parties are contained in Exhibit "A" of the affidavit submitted by the Attorney General in opposition to the motion by Paul Hagenbach and is included in the moving papers by Brandel Trust, and said allegations are not, for that reason, enumerated in this memorandum.

In substance, the application for the order of October 7, 1957, by the Attorney General sets forth the charges against Paul Hagenbach and Brandel Trust of engaging in an international conspiracy involving:

1. Use of false and fraudulent literature regarding certain securities.

2. The making and enforcing of secret and fraudulent international agreements regarding the acquisition of hundreds of thousands of shares of promotional stock and other securities of certain corporations.

3. Trickery and deception, to the detriment of the New York public, to violate the filing requirements of the New York State Security Law.

POINT I

THE MARTIN ACT DOES NOT CONTEMPLATE ANY MODIFICATION OR VACATUR OF AN ORDER ISSUED UNDER SECTION 354 OF THE GENERAL BUSINESS LAW.

Section 354 of the General Business Law, under which the order in question on this motion was issued, reads as follows:

> "Section 354. EXAMINATION OF WITNESSES AND PRELIMINARY INJUNCTION. Whenever the attorney-general has determined to commence an action under this article, he may present to any justice of the supreme court, before beginning such action, an application in writing for an order directing the person or persons mentioned in the application to appear before the justice of the supreme court or referee designated in such order and answer such questions as may be put to them or to any of them, or to produce such papers, documents and books concerning the alleged fraudulent practices to which the action which he has determined to bring relates, and it shall be the duty of the justice of the supreme court to whom such application for the order is made to grant such application. The application for such order made by the attorney-general may simply show upon his information and belief that the testimony of such person or persons is material and necessary. The provisions of the civil practice act, relating to an application for an order for the examination of witnesses before the commencement of an action and the method of proceeding on such examination shall not apply except as herein prescribed. The order shall be granted by the justice of the supreme court to whom the application has been made with such preliminary injunction or stay as may appear to such justice to be proper and expedient and shall specify the time when and place where the witnesses are required to appear. The justice or referee may adjourn such examination from time to time and witnesses must attend accordingly. The testimony of each witness must be subscribed by him and all must be filed in the office ot the clerk of the county in which such order for examination is filed." (Italics supplied).

The important language above underlined indicates that it is the "duty" of the Court to "grant such application". Moreover, "The application for such order made by

the Attorney General may simply show upon his information and belief that the testimony of such person or persons is material and necessary."

The aforesaid order clearly is based upon an affidavit by a member of the staff of the Attorney General's office, indicating that upon information and belief the testimony of the moving parties is material and necessary prior to the institution of a Martin Act proceeding against such person by the Attorney General, on behalf of the People of the State of New York.

The above statutory language appears to be mandatory, making an order under Section 354 not susceptible to vacatur.

It would appear to be in harmony with the very words of Section 354 and the Court's interpretation thereof, that it is the duty of the Supreme Court not only to grant such an order but to maintain its effect by not permitting a motion to vacate such an order to stand where the Attorney General has stated in his application for such order that the examination of the named persons and firms was material and necessary to his investigation.

A recent decision by Mr. Justice Flynn, decided on July 8, 1957, set forth the requirements for issuance of such an order. That opinion reads:

> "This motion to modify an order directing the moving party to appear and be examined pursuant to Section 354 of the General Business Law is in all respects denied. The applicable rule was succinctly stated by Judge Cardoza in Ottinger v . State Civil Service Commission, 240 N.Y. 435, 148 N.E. 627, when he said: 'In support of such a motion, and almost upon mere request, he may have an examination before trial of parties or of witnesses.'

The stay is vacated. The Attorney General will not be required to supply a transcript of testimony for the examination."

In re Republic Gas & Uranium Corp.,
164 NYS 2nd, 548

POINT II

SECTION 352-b OF THE MARTIN ACT IS APPLICABLE TO SERVICE OF PROCESS UNDER SAID ACT UPON NONRESIDENTS, WHO, DEALING IN SECURITIES IN THIS STATE AS PRINCIPAL OR PRINCIPAL OFFICERS, CONSENT BY SUCH PRACTICE TO THIS MANNER OF SERVICE

Section 352-b of the General Business Law reads as follows:

"Section 352-b. Non-resident dealers; designation of secretary of state as agent for service of process; service of process. Any person, partnership, corporation, company, trust or association resident or having his or its principal place of business without the state or organized under and by virtue of the laws of a foreign state, who or which shall do business in this state as a dealer, as defined in section three hundred fifty-nine-e of this article, shall be deemed to have irrevocably appointed the secretary of state as his or its agent upon whom may be served any summons, subpoena, subpoena duces tecum or other process directed to such person, partnership, corporation, company, trust or association, or any partner, principal, managing agent, officer or director thereof, in any action or proceeding brought by the attorney general under the provisions of this article arising out of or in connection with any transaction, matter or thing relating to the practices, affairs, management or business of such person, partnership, corporation, company, trust or association. Any such person, partnership, corporation, company, trust or association may file with the secretary of state a designation, in terms complying herewith, duly acknowledged, irrevocably appointing the secretary of state as his or its agent upon whom may be served any such process; provided, however, that a designation filed with the secretary of state pursuant to section three hundred fifty-two-a of this article or section two hundred ten of the general corporation law shall serve also as such designation. Service of such process upon the secretary of state shall be made by personally delivering to and leaving with him or a deputy secretary of state a copy

> thereof at the office of the department of state in the city of Albany, and such service shall be sufficient service provided that notice of such service and a copy of such process are forthwith sent by the attorney general to such person, partnership, corporation, company, trust or association, by registered mail with return receipt requested, at his or its office as set forth in the "dealer's statement" filed in the department of law pursuant to section three hundred fifty-nine-e, subdivision two, of this article, or in default of the filing of such "dealer's statement", at the last address known to the attorney general. Service of such process shall be complete ten days after the receipt by the attorney general of a return receipt purporting to be signed by the addressee or a person qualified to receive his or its registered mail, in accordance with the rules and customs of the post office department, or if acceptance was refused by the addressee or his or its agent, ten days after the return to the attorney general of the original envelope bearing a notation by the postal authorities that receipt thereof was refused."
> (Italics supplied).

That the all-inclusive purpose of Section 352-b is to deal with out-of-state dealers in securities who prey on the New York public is made obvious from the memorandum submitted by State Senator Williamson to the 1948 Legislature when he introduced Section 352-b as a bill for enactment. Said memorandum included the following language (New York State Legislative Annual 1948 at Page 11):

> "The proposed new section is intended to furnish a more effective means for investigating stock frauds which may be operated from outside the State. It provides that every non-resident dealer under Article 23-A of the General Business Law (the Martin Act), relating to fraudulent practices in respect to stock, bonds and securities, shall be deemed to have designated the Secretary of State as agent for the service of process in all proceedings brought by the Attorney General arising out of the affairs and business of such dealer. Provision is made also for the filing of such designation and for the manner of service of process.
>
> "The purpose of Article 23-A as a whole is to protect investors from frauds in connection with the sales of securities and to frustrate all illegal schemes relating thereto. For this reason it is comprehensive in its requirements relating to the registration of dealers (see Section 359-e) and is broad in its authority to the Attorney General to investigate any fraudulent scheme which he

believes is being or is about to be employed (see Sections 352, 353).

"While this authority of the Attorney General may be exercised without difficulty in the case of domestic dealers, a problem arises when a suspected dealer's place of business is outside the State and service of process to commence litigation or to conduct an investigation cannot be made within the State. Thus, despite the beneficial purposes of Article 23-A, a dealer resident or having his principal place of business outside the State or organized under the laws of a foreign state may avoid the consequences of an unlawful act or scheme if he can evade process during his visits to this State.

"It is obvious that such a situation was not intended by the authors of Article 23-A. Indeed, existing law requires that foreign corporations designate the Secretary of State as agent for the service of all process in any action or proceeding before they may be permitted to do business in this State (see General Corporation Law, Section 210; Stock Corporation Law, Section 91, subd. 8), and if Article 23-A is to be effectively administered for the protection of the public generally, a similar condition should be required of non-resident dealers under that Article.

*Introduced also in 1947 as S.I. 1280, Williamson; A.I. 1453, Resux, and passed the Senate only."

The moving parties by their acts and transactions in securities must be assumed to have known that as a consequence of their actions, they appointed the Secretary of State of New York as an agent for receipt of all process served upon them in proceedings brought by the Attorney General.

Section 352-b quoted in full above, states that it is applicable "in any action or proceeding brought by the attorney general under the provisions of this article." Legislative intention to apply Section 352-b to any proceeding brought by the Attorney General under Article 23-A has been made unmistakably clear by the aforesaid language.

It is incorrect that Section 355 governs service upon out-of-state residents who engage in the securities business in New York State. For to hold that Section 355 of the Martin Act governs service upon out-of-state residents is to ascribe a meaningless act to the State Legislature. As it would be impossible to exhibit the original copy of the order on personal service upon the moving parties who are nonresidents, Section 355 could not possibly apply to out-of-state residents. The Legislature apparently realized that Section 355 passed back in 1921, was not adequate to cope with service of process on out-of-state residents. Thus Section 352-b, passed in 1948, was directly aimed at remedying the limited provisions for service of process under the Martin Act, and provided for service of process directed to out-of-state dealers and principal officers thereof (Section 352-b, General Business Law).

Moreover, all statements in Section 355 pertaining to fees are superseded by Section 352-b. Section 352-b provides for service upon the Secretary of State as appointed agent for service with no provise for service of fees upon said State official. Even if fees were to be paid to the moving parties, the general statement of policy contained in Section 352, subdivision 3 pertaining to the payment of witness fees must be held to apply as governing all service of process under other subheadings of Section 352. Section 352, subdivision 3 reads as follows:

> "3. No person shall be excused from attending such inquiry in pursuance to the mandates of a subpoena, or from producing a paper or book, or from being examined or required to answer a question on the ground of failure of tender or payment of a witness fee and/or mileage, unless at the time of such appearance or production, as the case may be, such witness makes demand for such payment as a condition precedent to the offering of testimony or production required by the subpoena and unless such payment is not thereupon made. The provisions for payment of witness fee and/or mileage do not apply to any officer, director or person in the

employ of any person, partnership, corporation, company, trust or association whose conduct or practices are being investigated."

If the above interpretation appears to be burdensome to a nonresident who engages in business in this state, it must be realized that the nonresident who utilizes New York State to gain the benefit of securities transactions with the public must accept the responsibilities and consequences provided by statute.

POINT III

THE MARTIN ACT IS REMEDIAL IN ITS CHARACTER AND SHOULD BE LIBERALLY CONSTRUED.

It has been overwhelmingly decided by the Courts of this state that the Martin Act is a remedial statute and that a liberal construction must be given to afford adequate protection to the investing public (People v. Federated Radio Corp, 244 N.Y. 33; People v. Hooker, 2 Misc. 2nd 874, People v. Electre Process, 284 App. Div. 833)

Thus the definition of a dealer in securities has been given a broad interpretation to effectuate the purposes of the Martin Act. (Matter of Waldstein, 160 Misc. 764). Novel, uncommon or irregular devices to procure money from the public directly or through agents by the sale of securities constitute a person a dealer, as well as the ordinary and more common business practices associated with a dealer in securities (Matter of Waldstein, supra).

Section 359-e defines a dealer in securities to include: "Every person, corporation, company * * * who engages directly or through an agent in the business of trading in securities in such manner that as part of such business any of such securities are sold or offered for sale to the public in the state."

The accompanying affidavits submitted by the Attorney General on both of the motions to which this brief is addressed establishes a prima facie case evidencing the fact that the moving parties have engaged in business as dealers in securities in this state. The burden now rests upon the moving parties to prove otherwise.

POINT IV

SECTION 352-b PERMITS SERVICE UPON THE SECRETARY OF STATE OF PROCESS DIRECTED TO A PRINCIPAL OR OFFICER OF A DEALER IN SECURITIES.

Section 352-b of the General Business Law quoted in full, supra, provides that the appointment of the Secretary of State for service of process shall include the appointment for such service by "any partner, principal, managing agent, officer or director" of any dealer in securities in any action or proceeding brought by the Attorney General under the provision of this article. The specific statutory language involved reads as follows:

> "* * * shall be deemed to have irrevocably appointed the secretary of state as his or its agent upon whom may be served any * * * process directed to such person, partnership, corporation, company, trust or association, or any partner, principal, managing agent, officer or director thereof, in any action or proceeding brought by the attorney general * * *" (Italics supplied).

The obvious intent of Section 352-b is to provide that all managing officers of firms which deal in securities in New York State are themselves susceptible to service of process under Section 352-b. This is the plain meaning from the express language of the statute.

It should be noted by this Court that any officer of a "trust" or "association" comes within the terms of the above provision of law.

Paul Hagenbach was duly served with process under Section 352-b twice, once as President of the Brandel Trust and once individually. It is the contention of the Attorney General as specified in detail in his affidavit submitted on this motion that Hagenbach as a co-conspirator in the alleged transactions is himself a principal and a dealer in securities. But, in any event, Hagenbach by his own acts held himself out to be the President of Brandel Trust, a dealer in securities, as shown in the affidavit of the Attorney General submitted herewith. Therefore, service of process upon Hagenbach, as well as Brandel Trust under Section 352-b of the General Business Law was entirely warranted.

POINT V

THE BURDEN OF PROOF IS UPON THE MOVING PARTIES TO SHOW IMPROPER SERVICE OF PROCESS

The Attorney General has set forth in his affidavit on this motion sufficient evidence to provide for service upon Paul Hagenbach and Brandel Trust under Section 352-b of the General Business Law. The broad purpose of the Martin Act would indicate that such a statement by the chief legal officer of the state is sufficient for the Court to assume that service of process has been properly effected. (Matter of MacNamara, 128 Misc. 84).

Section 354 quoted in full, supra, states that the Attorney General's application for an order under Section 354 "may simply show upon his information and belief that the testimony of such person or persons is material and necessary."

The test of proof to be made by the Attorney General when any aspect of a Section 354 order is attacked would appear to be a "simple showing upon information and belief" that certain facts exist. In the event that service of a Section 354 order is disputed, and the Attorney General has set forth evidence of the propriety of said service, the burden rests upon the moving party to prove that said service was not proper. But the moving papers by both Paul Hagenbach and Brandel Trust, which contained only the affidavits of their attorneys specified no facts to disprove that they have been properly served with process under Section 352-b of the General Business Law.

In the case of the Attorney General v. Atlas Securities reported in the New York Law Journal of June 24, 1954, the subject of an order obtained under Section 354 of the General Business Law, subpoenaed the Attorney General to produce transcripts and exhibits taken during the Martin Act investigation. Mr. Justice Greenberg, in quashing the subpoena duces tecum wrote:

> "* * * The attorney general would be stymied in his powers under the Martin Act if parties claimed to be guilty thereunder were permitted to discover and examine the information obtained in the proceeding by the chief legal officer of the state." (Attorney General v. Atlas Securities Corp.. N.Y.L.J. June 24, 1954.)"

It is urged upon the Court that the Legislators intended the Attorney General to have great discretion as to the manner chosen under the Martin Act to conduct his investigations. Thus the statements made by Mr. Stim in his affidavit concerning the choice of the Attorney General to first subpoena Brandel Trust and then to obtain a court order should be given no weight upon this argument. If anything, such statements constitute a general appearance by Brandel Trust to dispute the merits of this proceeding. In Matter of MacNamara, 128 Misc. 84, the Court stated:

> "In the administration of this law, and particularly of Section 352, that official is not acting as a prosecuting official at all, but in his capacity as an independent executive officer of the State government. (Mills Fraudulent Practices in Respect to Securities & Commodities, 46). He is charged with duties analogous to those exercised by the Securities Commissioners or other licensing bodies administering the Blue Sky Laws of other States."

The affidavits submitted by the People on these motions indicate the Attorney General's belief on information on file in his office that both of the moving parties on the instant motions have been guilty of stock swindles costing millions of dollars to the investing public in New York State. With that assertion having come from the law official of New York charged with protecting investors from securities frauds, this Court should give profound consideration to these motions to stifle the further investigation by the Attorney General into these matters.

CONCLUSION

THE INSTANT MOTIONS BY PAUL HAGENBACH AND BRANDEL TRUST SHOULD IN ALL RESPECTS BE DENIED.

Dated: New York, N.Y. November 27, 1957

Respectfully submitted,

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