IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22098

JOHN V. HOLMES, et al.,
Plaintiffs-Appellants,

v.

WILLIAM L. CARY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia (Atlanta Division)

BRIEF OF DEFENDANTS-APPELLEES

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COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Northern District of Georgia (Atlanta Division) granting summary judgment[1/] for the present and former chairman of the Securities and Exchange Commission ("Commission"), its present

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1/ The court's opinion appears at 234 F. Supp. 23 (N.D. Ga., 1964) and is also reproduced in the record on appeal at R. 206-09. "R.___" refers hereinafter to the record on appeal; "Br.___" to plaintiffs' brief.

and former members and several Commission employees[2/] (R. 210).

The complaint (R. 1-8) filed by plaintiff Holmes on behalf of himself and a class which he has designated the "Stockholders of Hydramotive Corporation"[3/] (R. 1) demanded a mandatory injunction to compel the defendants to:

(1) make available to the public the registration statement of Hydramotive Corporation; (R. 7-8)

(2) publish the filing and the effectiveness of the registration statement of Hydramotive Corporation in the Commission's "News Digest"; (R. 8) and

(3) cease and desist from efforts to "treat in any irregular fashion" the registration statement of Hydramotive Corporation (R. 8).

2/ Those Commission members and employees in whose favor summary judgment was granted (hereinafter collectively known as the defendants) are the following: Manuel F. Cohen (Chairman); William L. Cary (former Chairman); Byron D. Woodside, Hugh F. Owens (Commissioners); J. Allen Frear, Jr., Jack M. Whitney II (former Commissioners); William Green (Regional Administrator of the Commission's Atlanta Regional Office); Philip A. Loomis, Jr., (General Counsel); Peter A. Dammann (former General Counsel); Edmund D. Worthy (Director of the Division of Corporation Finance); Ralph C. Hocker (Assistant Director); Irving M. Pollack (Associate Director of the Division of Trading and Markets); Thomas W. Rae (Assistant Director); and Martin V. Miller, David B. Bliss, M. David Hyman (Attorneys). Since it is clear that defendants are sued in their official capacities within the meaning of Rule 25(d) of the Federal Rules of Civil Procedure, the successors of certain of the former officials are deemed to be automatically substituted.

3/ On August 24, 1964, the day that the district court granted summary judgment for the defendants, plaintiff Holmes filed a motion consenting to the dismissal of the class action. The district court denied the motion on the ground that the matter had already been finally determined. (R. 220). This disposes of plaintiffs' contention (Br. 17, 60, "Error" 26) that the district court did not decide the rights of the class-applicants.

The gist of the complaint, as characterized by the district court, was that "a registration statement of Hydramotive Corporation was received by the Securities and Exchange Commission on July 23, 1963, [sic] has been filed with the Commission since that date, and, pursuant to applicable statutory provisions, the registration statement has been effective since on or about August 15, 1962." (R. 206).

The defendants' verified answer (R. 15-109), as noted by the district court (R. 206), admitted "that the document referred to by the plaintiffs as the registration statement of Hydramotive Corporation was received by the Commission on July 23, 1962, and that the contents have not been placed in the public files of the Commission nor publicized in its News Digest." The court also noted (R. 207) that the answer denied that the so-called registration statement had "become effective and allege[d] that it was not accepted for filing with the Commission because it did not represent a bona fide attempt to file a registration statement with the Securities and Exchange Commission; that such document is not a registration statement and is nothing more than a sham document; that it was tendered to the Commission by the plaintiff Holmes merely in an attempt to annoy, embarrass, and harass the Commission; and that the plaintiff Holmes acquiesced in and agreed to the refusal to accept" the purported registration statement for filing.

The district court examined the purported registration statement and quoted certain language from it as follows: (R. 207-08)

(1) "The present directors do not foresee the possibility of the corporation ever being in a position to pay dividends or having any assets of determinable value. The continued existence of the corporation is questionable. Bankruptcy may result at any time."

(2) "Anyone considering purchase of this security must be prepared for immediate and total loss."

(3) "No representation is made that the possibility exists that the corporation can continue to exist."

(4) "No representation is made in this statement that the President and Secretary of the Company have any capability that can benefit the corporation in any way."

(5) "In view of the above unfavorable factors, and other unfavorable factors in every part of this offering circular, it would appear that it is self-evident that any prospective purchaser of Hydramotive Corporation stock should be prepared for an immediate total loss."

The court held that "The document submitted by the plaintiff Holmes is replete with frivolity" (R. 209) and that "this so-called registration statement is obviously not a bona fide attempt to qualify to sell securities to the investing public. The Court can only agree with the defendants that it is nothing more than a sarcastic piece of mockery and, as such, is totally frivolous." (R. 208).

Alternatively the district court held that even if plaintiffs' "registration statement" were found to be bona fide plaintiff Holmes would not be "entitled to the relief sought because he acquiesced in and agreed to the action of the defendants in not accepting" the purported registration statement for filing (R. 209). The Commission's motion for summary judgment was granted by order of August 24, 1964 (R. 210), and it is from this order that plaintiffs appeal herein.

Historical Background and Genesis of the Action

Although the Court could correctly decide this case solely on the basis of the complaint, the defendants' verified answer and the exhibits thereto, we believe that it may lead to a clearer understanding of the case to have a factual outline of certain events which occurred prior to the filing of the complaint.

Late in 1961 the Commission began an injunctive action against 26 defendants, including plaintiff Holmes, in the United States District Court for the Western District of Oklahoma.[4/] The action sought, inter alia, to enjoin the defendants therein from selling, delivering after sale or offering to sell the common stock of Hydra-motive Corporation in violation of Section 5 of the Securities Act of 1933, 15 U.S.C. 77e, "unless and until a registration statement as to such securities [was] in effect with the Securities and Exchange Commission."[5/]

4/ Securities and Exchange Commission v. Bond and Share Corporation, 229 F. Supp. 88 (W.D. Okla., 1963), now on appeal to the Court of Appeals for the Tenth Circuit (No. 7797).

5/ The quoted language appears in the prayer of the complaint in the Bond and Share case, supra, and is reproduced in the Appendix hereto. The complaint also charged violations of the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. (Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5).

On July 21, 1962 after a temporary restraining order was in effect, plaintiff Holmes mailed a letter to the Commission which enclosed the purported registration statement. The letter stated that "the filing of this full registration by Hydramotive Corporation has been demanded by the Commission" in its injunctive action (R. 88). This characterization of the Commission's injunctive action was, of course, erroneous. The Commission was not seeking a mandatory injunction to compel Hydramotive Corporation to file a registration statement but was, rather, seeking among other things to prevent the defendants from offering or selling securities unless a registration statement was in effect as to such securities. There is a great difference between the two forms of injunction, mandatory and prohibitory, and it was this basic misconception 6/ of what the Commission was seeking that apparently led plaintiff Holmes to attempt to file the purported registration statement in the expectation that the injunctive action would thereby be rendered moot. The Assistant Director of the Commission's Division of Corporation Finance, the Division which initially passes on Securities Act filings, returned the "registration statement" to plaintiff Holmes together with an accompanying letter which stated in part that:

> The registration statement has not been accepted for filing because it patently fails to meet the disclosure requirements for a registration statement under the Securities Act of 1933. . . . (R. 92)

6/ "Error" 20 (Br. 12, 13, 51) evidences that plaintiffs are still laboring under the same misconception of the nature and purpose of the Commission's injunctive proceeding.

Subsequently plaintiff Holmes served interrogatories upon the Commission the purpose of which was to determine the reasons for the Commission's refusal to accept the purported registration statement for filing (R. 152-56). In a memorandum objecting to these interrogatories the Commission's counsel stated that:

> It should also be pointed out that the mere filing of such a [registration] statement and compliance with the Act in respect to certain shares in no way moots the Commission's action since there is no assurance that the defendants will not offer additional unregistered shares unless restrained by the Court. Thus the filing of a registration statement for the sale of shares on behalf of Hydramotive Corporation or the attempt to so file, has no relevancy to the Commission's action pending in this Court (R. 150-51).

The district court on November 27, 1962 determined that the interrogatories were "not pertinent or material to the issues involved in" the Commission's injunctive action (R. 157). The court's order concluded as follows:

> The moving defendants are referred to established procedures to be followed in connection with their desired registration. While the desired registration when accomplished may have some effect on the issues herein the act of obtaining a registration is not within the purview of this action (R. 157).

Holmes repeatedly filed similar interrogatories relating to the Commission's refusal to accept the purported registration statement (R. 162, 165-67) and the court repeatedly entered orders finding that no answer was required to these interrogatories because they were "irrelevant and immaterial" (R. 169-70, 176).

On December 30, 1963 the United States District Court for the Western District of Oklahoma permanently enjoined Holmes from further violating the registration and antifraud provisions of the Securities

Act of 1933 and the Securities Exchange Act of 1934. Securities and Exchange Commission v. Bond and Share Corporation, supra. It was subsequent to the entry of this injunction that plaintiff Holmes filed this action.

QUESTIONS INVOLVED

1. Whether the district court correctly granted summary judgment for defendants on the ground that the purported Hydramotive Corporation registration statement did not represent a bona fide attempt to register securities with the Commission but was rather a frivolous document which the defendants properly refused to accept for filing.
2. Whether the district court correctly granted summary judgment on the alternative ground that plaintiff Holmes had acquiesced and agreed to the Commission's decision not to accept the purported registration statement for filing.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT FOR THE DEFENDANTS.

There Were No Genuine Issues of Material Fact Presented.

The district court noted that the following basic facts were undisputed: (1) on July 23, 1962 the Commission received the "registration statement" (R. 206) with a covering letter from plaintiff Holmes dated July 21, 1962 which acknowledged that the

"registration statement" was incomplete (R. 209); (2) the Commission did not accept the "registration statement" for filing (R. 207). On the basis of these undisputed material facts and upon an examination of the purported "registration statement" itself, the district court correctly determined that it did not represent a bona fide attempt to register securities with the Commission, that it was a frivolous document and that the defendants' refusal to accept it for filing was proper. Accordingly, the court granted summary judgment for the defendants.

The Frivolous Nature of the Document

The district court in its opinion quoted certain language[7/] from the purported registration statement and held on the basis thereof that "this so-called registration statement is obviously not a bona fide attempt to qualify to sell securities to the investing public. . . . is nothing more than a sarcastic piece of mockery and, as such, is totally frivolous (R. 208). It is clear that such document was not entitled to serious consideration either by the staff commenting informally on

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7/ The language referred to is set out in full at page 4, supra.

its obvious deficiencies[8/] or by the Commission ordering the institution of formal proceedings authorized by the statute to prevent bona fide but deficient registration statements from becoming effective.[9/] A contrary view would result in expensive and time-consuming efforts on the part of a public agency involving a document which the trial judge characterized as"replete with frivolity"(R. 209). As a legal proposition, the plaintiffs' contention is not materially different from a situation in which someone might submit to the Commission a telephone directory under the cover of one of the Commission's registration forms and insist that it be given serious consideration and processed as though it were a bona fide attempt to register securities for sale to the public.

8/ The Commission has developed in its administration of the registration process of the Securities Act of 1933 an informal procedure of issuing "Letters of Comment" if a registration statement appears to afford inadequate disclosures. A codification of this procedure is set forth in 17 CFR 202.3. The Assistant Director who has been assigned the review of the registration statement will notify the person filing such statement of the deficiency and, after affording a reasonable opportunity to discuss the matter, allow him to make corrections. However, this procedure is not used where, as in the instant case, there is a careless disregard for the statute. This refutes plaintiffs' contention that the Commission did not follow its own rules (Br. 12, 51, "Error" 19).

9/ Section 8(b) of the Securities Act of 1933, 15 U.S.C. 77h(b), provides that if a registration statement is on its face materially incomplete or inaccurate, the Commission may within 10 days after its filing give notice, hold a hearing, and then issue an order refusing to permit it to become effective until amended.

Section 8(d) of the Securities Act of 1933, 15 U.S.C. 77h(d), permits the Commission at any time to suspend the effectiveness of a registration statement upon appropriate notice and opportunity for a hearing if it contains materially misleading or false information.

The instant action presents a situation comparable to recent holdings that federal agencies need not afford applicants for licenses a hearing where the application is clearly contrary to the regulations of the agency. Federal Power Commission v. Texaco, Inc., 377 U.S. 33 (1964); Ranger v. Federal Communications Commission, 294 F.2d 240 (C.A.D.C., 1961). In the Ranger case, the court stated (294 F.2d at 243):

> [W]e think Congress did not intend . . . to require the formality of Commission consideration of and hearing on an application in which the signatory obviously fails in major material respects to abide the regulations. The Commission obviously has the power to require conformance with regulations prescribing the material with which it must be furnished. If this were not so, any obstructionist could easily prevent indefinitely the consideration of an application by merely filing skeleton competing applications.

In the above cases the action of the agency in returning the applications without the institution of statutory hearing procedures was upheld even though presumably the applications were considered bona fide. In contrast, the purported registration statement submitted by plaintiffs here was not submitted in good faith and was wholly frivolous.

Plaintiffs attempt to distinguish the Ranger case (Br. 10-12, 51, "Error" 17) on several grounds. The first ground is that Ranger received due process, whereas plaintiffs were denied it through the lack of an order. This purported distinction appears substantially identical to "Errors" 1-4, and 6 (Br. 4-5,28-35), and resolves into a contention that because no order of the Commission was entered plaintiffs were deprived of

due process because there could be no review by a court of appeals. The Ranger case makes clear, however, that no hearing by the Commission was necessary where there is a failure to comply with the Commission's rules and regulations. Consequently, no order need be entered.

Plaintiffs make a closely related argument in "Error" 7 (Br. 5, 35) where they complain that the district court had "no authority or jurisdiction to make 'findings' as to the adequacy or completeness" of the purported registration statement, and that such powers are initially vested in the Commission, with review in the courts of appeals. We would agree that where a stop order proceeding is begun, it is the Commission which first passes upon the adequacy of the registration statement, with review later in a court of appeals. In the instant case, however, the Commission did not allow the plaintiffs' document to be filed because it was on its face not bona fide. Therefore, there was no need to begin stop-order proceedings and accordingly no possibility of appellate review. In such circumstances if any review at all is available, it can be had only in the district court through the filing of a complaint asking for mandatory relief, as was done here. It is somewhat anomalous for plaintiff Holmes to argue now that the district court in which he himself brought this action was powerless to make the necessary findings upon which to base its decision.

Plaintiffs' second and fourth purported distinctions of the Ranger case relate to another issue in that case involving late filings of competitive applications. The court's holding therein on this matter has no

relevance to this appeal. With respect to plaintiffs' other purported distinctions, we show infra, pp. 19-20 that they are equally without merit.

Plaintiffs contend that the district court erred in misunderstanding the import of the caveats in their "registration statement" and in failing to recognize that such caveats were required (Br. 9-10, 39-49, "Error" 14). Plaintiffs say that their caveats were designed to comply with a policy of the Commission that a registration statement should prominently disclose potential risks to investors (Br. 42), and that, in purported compliance with such policy (Br. 46-48), they included in their document such statements as the following:

> No representation is made in this statement that the President and Secretary of the Company have any capability that can benefit the corporation in any way.
>
> In view of the above unfavorable factors, and other unfavorable factors in every part of this offering circular, it would appear that it is self-evident that any prospective purchaser of Hydramotive Corporation stock should be prepared for an immediate total loss.

Only by a great stretch of the imagination could such statements be considered to have been made in good faith. They smack rather of mockery and sarcasm.

Plaintiffs attempt to justify the bona fides of such statements by comparing them to a Commission statement in In the Matter of the Richmond Corporation, Securities Act Release No. 4584, (Br. 43-45) where the Commission held that promoters in a real estate venture were required to declare their "lack of experience in the development of unimproved lands and the construction and operation of shopping centers . . . ." (Br. 44-45).

We think there is an obvious difference between the statement required by the Commission in the Richmond case and plaintiffs' statement that management has no "capability that can benefit the corporation in any way." (Emphasis added). The omission to state the qualifications of management is misleading, where, as in the field of speculative real estate investment, such qualifications may be of great importance to an intelligent decision by an investor. Plaintiffs have, however, taken the necessity for such disclosure and twisted it out of all proportion. A statement that management has no capability that can benefit the corporation in any way is so ridiculous that it only serves to reinforce the trial court's opinion that the document was a sarcastic piece of mockery (R. 208).

With regard to plaintiffs' second so-called caveat above, "that any prospective purchaser of Hydramotive Corporation stock should be prepared for an immediate total loss," plaintiffs say that such caveat is also required by the Richmond case, since "the '(un)sophisticated investor' need 'ferret out' nothing when such a statement is eyeballed." (Br. 46). This attempted defense of plaintiffs' second caveat shows clearly that the caveat was intended to ridicule through gross exaggeration the very disclosure provisions plaintiffs profess to be following.

Plaintiffs seek (Br. 39-42) to bolster these frivolous statements by comparing the instant "registration statement" with that of the Communications Satellite Corporation (File No. 2-22400) and showing that

Comsat's registration statement was written in conservative terms. Comsat, the corporation which is pioneering this country's first space communications system on a commercial basis, naturally tended to be conservative in its statements of future earnings and potential growth. However, plaintiffs have not shown that any of the Comsat caveats even remotely resembled the ludicrous caveats made by plaintiffs here.

Plaintiffs also argue (Br. 12, 51, "Error" 18) that the district court did not take into account (1) the "plain language" of Section 6 of the Securities Act of 1933, 15 U.S.C. 77f, which provides in part that "the filing with the Commission of a registration statement . . . shall be deemed to have taken place upon the receipt thereof . . . ." (Emphasis added), and (2) the fact that the Commission did not institute stop-order proceedings under Section 8, 15 U.S.C. 77h. This "error" is without merit since the whole import of the district court's opinion is that plaintiffs' document was not a registration statement within the meaning of the Securities Act of 1933. Thus the quoted portion of Section 6 thereof does not come into play, and stop-order proceedings under Section 8 were unnecessary for the same reason.

Lastly, plaintiffs contend that the district court erred in adopting the Commission's allegation that the purported registration statement was a sham document when the Commission and its staff had themselves termed it a registration statement (Br. 10, 49-50 "Error" 16). In support of this "error" plaintiffs cite this Court to a letter (R. 179) written by a member of the staff to plaintiff Holmes advising him that the staff

would discuss the general requirements applicable to the filing of a registration statement. While it is true that this letter described plaintiffs' document as a registration statement and spoke of it as having been filed, plaintiffs had been officially advised almost a year previously that plaintiffs' document had not been accepted for filing because patently incomplete (R. 92). The subsequent inaccurate description of plaintiffs' document by a staff member of the Commission can neither change the nature of the document nor affect in any way the ruling by the district court that the document was frivolous.

Plaintiffs' Acquiescence in the Commission's Action.

The district court held alternatively that summary judgment should be granted because plaintiff Holmes "acquiesced in and agreed to the action of the defendants in not accepting" the purported registration statement for filing and acknowledged that it was incomplete (R. 209).

Plaintiff Holmes' letter of July 21, 1962 (R. 88-91) acknowledged that the "registration statement" was incomplete in that it omitted to contain certified financial statements and an opinion of counsel as required by Schedule A of the Securities Act of 1933.[10/]

10/ Section 7 of the Securities Act of 1933, 15 U.S.C. 77g, provides that every registration statement "shall contain the information, and be accompanied by the documents specified in Schedule A" and the purported registration statement, as Holmes acknowledged, did not contain certain of the basic information required by that schedule.

These and other inadequacies were brought to the attention of plaintiff Holmes by the Commission in its letter returning the purported registration statement (R. 92). The letter further advised plaintiff Holmes (R. 92) that "If the registration statement were accepted for filing in its present form, the Division would recommend that the Commission institute proceedings under Section 8 of the Securities Act of 1933 to prevent the registration statement from becoming effective." Although plaintiff Holmes attempted to challenge this action in the course of the Commission's injunctive action in the Western District of Oklahoma (R. 162, 165-67), after the court there ruled that this question was immaterial to the issues therein (R. 169-70, 176), he sought no further action by the Commission in any other judicial action or otherwise until the institution of this suit.[11/] During the interim, as indicated from correspondence, plaintiff Holmes had advised the Commission that he was preparing a new document (R. 104).

11/ Although the last order of the Oklahoma court on this subject was entered on April 18, 1963 (R. 176) plaintiffs did not see fit to challenge the action of the Commission until more than a year later, on May 11, 1964, when the instant suit was filed. Plaintiffs did, however, bring other suits against the Commission and its employees: Holmes v. Eddy, CCH Fed. Sec. L. Rep. ¶ 91,277 (W.D.N.C., No. 1755, 1963) (complaint filed April 2, 1963), Holmes v. United States, CCH Fed. Sec. L. Rep. ¶ 91,346 (W.D.N.C. No. 1784, 1964) (complaint filed May 24, 1963), aff'd per curiam by consolidated decision, 341 F.2d 477 (C.A. 4, 1965); Holmes v. United States, 231 F. Supp. 971 (N.D. Ga., 1964, appeal pending in this Court, No. 22052)(complaint filed December 13, 1963). In none of this other litigation did he at any time seek to raise the issue concerning which he now belatedly brings still another action against the Commission and its staff.

Clearly there was ample evidence to support the district court finding that plaintiff Holmes by his own admission acknowledged that the document was incomplete and that his failure to take further action demonstrated his acquiescence in the Commission's decision.

Plaintiffs now contend (1) that they did not acquiesce in the Commission's action because it was an "arbitrary act" (Br. 7, 36-38, "Error" 10), (2) that the district court erred in finding that plaintiffs acknowledged that the document was incomplete (Br. 8-9, 38, "Error" 12), and (3) that they "repeatedly sought to have the registration application regularly treated" (Br. 7-8, 36-38, "Error" 11).

With respect to plaintiffs' first contention, the record makes it clear that the Commission's action was not arbitrary. In response to a request of plaintiff Holmes, the Commission wrote him a letter stating that members of the staff would discuss the registration requirements of the Securities Act with him (R. 179). This conference took place on or about June 28, 1963 (R. 27). The willingness of a government agency to help a prospective registrant in such a manner is hardly consistent with his charge of arbitrary action. Moreover, it has been held that a prospective registrant assumes the risk that his registration statement may not be accepted for filing even though the Commission does not notify him of its defects. In Ranger v. Federal Communications Commission, 294 F.2d 240 (C.A. D.C., 1961) the court, in answering the appellants' argument that the

Federal Communications Commission was required by statute to notify them of the defects in a filing submitted by them, stated:

> We think an applicant for a radio license who either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing. 294 F. 2d at 242. 12/

It therefore appears not only that the Commission's action was not arbitrary but also that plaintiffs, by filing a document which ignored or failed to follow the required applicable rules and regulations under the Securities Act of 1933, 17 CFR 230.100, et seq., assumed the risk that such document would be unacceptable for filing.

Plaintiffs' second contention that the district court erred in finding that plaintiffs had acknowledged that their purported registration statement was incomplete is based on various grounds. First, they argue that "No registration statement of medium to small-size companies ever is or can be, 'complete' until a 'deficiency letter' or 'letter of comment . . . has been received by the company and Commission comments acted upon" (Br. 8). Plaintiffs misunderstand the use of the letter of comment. The Commission issues such letters in an attempt to help bona fide

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12/ Plaintiffs attempt to distinguish this case on the ground that it was concerned with an application which did not approach essential completeness (Br. 11, "Error" 17). However, the lack of certified financial statements alone was a sufficiently serious deficiency as to make the filing lacking "essential completeness."

registrants comply with the disclosure requirements of the Securities Act of 1933. There is no Commission policy or practice of sending such letters of comment in every case, and particularly where, as here, there was no bona fide attempt to comply.[13/] Secondly, they urge that the Commission frustrated the filing of the registration statement (Br. 8). In support of this argument plaintiffs cite three pieces of correspondence between plaintiff Holmes and counsel for the Commission (R. 143, 144, 145). We fail to see how this correspondence in any way supports plaintiffs' charge of "frustration." Thirdly, it is argued that certain matters could have been filed by amendment and that the defendants concealed from the district court, and the court was unaware of, rules and regulations of the Commission which would have permitted these amendments (Br. 8-9). While it is true that information which is required to be contained in a registration statement may be supplied by amendment, see, e.g. Rule 470, 472 under the Securities Act of 1933, 17 CFR 230.470, 230.472, this does not change the undisputed facts (1) that plaintiffs' document was admittedly incomplete, and (2) that plaintiffs never attempted to file any amendments (R. 24). Defendants did not, of course, conceal anything from the district court; the question of what kind of amendments could have been made was not in issue since plaintiffs attempted no amendment.

Plaintiffs' third contention, that they made repeated attempts

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13/ For the same reasons plaintiffs' attempted distinction of the Ranger case (Br. 11) is erroneous. Likewise their "Error" 19 (Br. 12, 51) is without merit.

without success to obtain regular treatment by the Commission (Br. 7-8, 36-37), stems from "repeated attempts" made in the course of the Commission's injunctive proceeding in the United States District Court for the Western District of Oklahoma. That court noted several times that plaintiffs could not interject the issue of the filing of the purported registration statement into the Commission's injunctive action (R. 169-70, 176). Thereafter plaintiffs neither sought further action by the Commission nor filed a separate suit seeking redress from the Commission on that score. Instead, plaintiffs decided and advised the Commission on January 13, 1964 that they would "prepare a new edition of the Hydramotive Corporation S-2 Registration Form" (R. 104), thus confirming their abandonment of the previous document which the Commission had refused to accept nearly a year and a half earlier (R. 92).

Moreover, by asking the district court and this Court to compel the defendants to treat the "registration statement" as if it were an effective registration statement, plaintiffs are requesting a holding of this Court declaring a document effective which they have admitted is incomplete in at least two material respects: certified financial statements and a legal opinion of counsel. For this Court to make such a declaration would contravene the express provisions of the Securities Act of 1933 and subject potential investors who might rely upon such an incomplete document to the very hazards the Act was intended to eliminate.

II. PLAINTIFFS' OTHER CONTENTIONS ARE WHOLLY WITHOUT MERIT.

Plaintiffs list 28 items as "Errors of the Opinion Below" (Br. 4-16, 28-60), some of which have been considered elsewhere in the foregoing argument; the remaining ones are discussed here. Many of these "errors" overlap each other and are mere irrelevancies; none of them is meritorious.

As "error" No. 5 (Br. 5, 28-35) plaintiffs contend that the Commission's action in refusing to accept their purported registration statement for filing was contrary to Section 3(a)(2) of the Administrative Procedure Act, 5 U.S.C. 1002(a)(2). Section 3(a) provides in pertinent part that an agency "shall separately state and currently publish in the Federal Register . . . (2) . . . the nature and requirements of all formal or informal procedures available . . . . No person shall in any manner be required to resort to organization or procedure not so published." The Commission's informal procedure concerning the processing of filings is, however, published in the Federal Register and appears in 17 CFR 202.3 as follows:

> If the filing [registration statement]appears to afford inadequate disclosure, as for example through omission of material information or through violation of accepted accounting principles and practices, the usual practice is to bring the deficiency to the attention of the person who filed the document by a letter from the Assistant Director assigned supervision over the particular filing, and to afford a reasonable opportunity to discuss the matter and make the necessary corrections. <u>This informal procedure is not</u>

> generally employed where the deficiencies appear to stem from careless disregard of the statutes and rules or a deliberate attempt to conceal or mislead or where the Commission deems formal proceedings necessary in the public interest. (Emphasis added.)

Since the Commission's procedures are thus published the plaintiffs are clearly in error in complaining that "secret procedures" were applied to their "basic rights" (Br. 34). Indeed, it is precisely because he failed to comply with known and published procedures and made a mockery of them by filing a frivolous document that the staff determined to return that document to plaintiff Holmes and refused to accept it for filing.

"Error" 13 (Br. 9, 38) appears also to be covered by the above reasoning.

"Errors" 8, 9 and 24 complain that the district court erred in failing to make specific findings of fact (Br. 5-7, 15, 36, 59, 60). Plaintiffs misconceive the function of a motion for summary judgment. The complete answer to plaintiffs' contention is found in Rule 52(a) of the Federal Rules of Civil Procedure, which states, in pertinent part, that "Findings of fact and conclusions of law are unnecessary to decisions of motions under Rules 12 or 56 . . . ." The reason Rule 56 is excepted from the provision regarding findings of fact is because, in ruling on a motion for summary judgment, the function of the court is to determine whether any genuine issue of material fact exists; its purpose is not to resolve conflicting material issues of fact. Whitaker v. Coleman,

115 F. 2d 305 (C.A. 5, 1940); 6 Moore's Federal Practice par. 56.04[1]. See Fletcher v. Bryan, 175 F. 2d 716 (C.A. 4, 1949).

"Error" 15 (Br. 10, 49) is an irrelevant quibble about a statement made by the district court. The court said: "In the opinion of this Court, this so-called registration statement is obviously not a bona fide attempt to qualify to sell securities to the investing public" (R. 208). Plaintiffs claim that this statement is erroneous because it implies that the purpose of registration is to "qualify to sell securities" rather than to provide "full and fair disclosure" as recited in the preamble to the Securities Act of 1933. This is absurd. Underlying the court's statement is the obvious premise that the way to qualify securities for sale to the public is to register them. Full and fair disclosure is, of course, the very essence of the registration process. The two things — full disclosure and qualifying to sell securities — are "part and parcel" of the basic pattern of the Securities Act.

"Errors" 21, 25 and 28 (Br. 13, 16, 51, 60) charge that the Commission intended to treat the purported Hydramotive registration statement in an unlawful manner even before it was received and cite in support of this charge a purported statement by a staff member of the Commission (R. 199). The "evidence" that the statement was made is, however, not competent, since the statement proffered to prove that fact is made by a third person and is accordingly pure hearsay. Other record references are also cited as proof but they too show nothing. The material contained at the first cited place in the record (R. 4-5) is controverted in the

Commission's Answer (R. 18-19), and the affidavits at R. 205 and R. 211 are meaningless. It is to be noted, however, that even if the alleged statement had been made by a member of the Commission's staff, this would not preclude the Commission from refusing to accept a frivolous document for filing.

"Error" 22 (Br. 13-14, 53-58) contends basically that the Commission's letter of July 31, 1962 (R. 92) was actually an attempt "to threaten applicant-appellants out of their application rights" because of "unspecified alleged deficiencies." We think it clear that neither this letter nor the Commission's letter of June 24, 1963 (R. 179) shows any such thing. There is likewise no merit to plaintiffs' contention of a conspiracy on behalf of the Commission.

"Error" 23 (Br. 14-15, 58) appears to relate to some other case and has no relevancy to the issue here. "Error" 27 (Br. 16, 60) is not really an error but a statement of law that judicial notice may be taken of court records.

CONCLUSION

For the foregoing reasons the order of the district court should be affirmed.

Respectfully submitted,

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DATED: July 1965

APPENDIX

Excerpt from prayer of Commission's complaint in Securities and Exchange Commission v. Bond and Share Corporation, 229 F. Supp. 88 (W.D. Okla., 1963), now on appeal (C.A. 10, No. 7797).

"WHEREFORE, the Securities and Exchange Commission, plaintiff herein, demands a temporary restraining order, a preliminary injunction and final judgment restraining and enjoining the defendants Bond and Share Corporation, Dixie Lumber Company, Inc., Mid-Central Petroleum Corp., Namsa, Inc., Petroleum Finance Corporation, Plains Petroleum Corporation, Resources Engineering, Inc., Americrude, Inc., United Oil Corporation, Hydramotive Corporation (formerly known as Cal-Moab Uranium Corporation), Forrest Parrott, Donald Parrott, John V. Holmes, American Capital Corporation (formerly known as American Securities Company), Jules Arfield, Robert I. Allen, Walter Allen Raleigh, dba Raleigh Securities Company, Morrison and Company, Inc., Robert H. Morrison, Thomas J. O'Connor, General Securities Corp., Durward E. Willis, George H. Slack, and Max V. Schoenwald and Hydramotive Manufacturing Corporation and their officers, agents, servants, employees, attorneys and assigns, and each of them, from directly or indirectly -

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"A) Making use of any means or instrumentalities of transportation or communication in interstate commerce or of the mails to sell securities, namely, the common

stock of Hydramotive Corporation through the use or medium of a prospectus or otherwise; or

"B) Carrying such securities or causing them to be carried through the mails or in interstate commerce, by means or instruments of transportation, for the purpose of sale or for delivery after sale,

unless and until a registration statement as to such securities is in effect with the Securities and Exchange Commission; or

"C) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell such securities through the use or medium of a prospectus or otherwise, unless and until a registration statement as to such securities has been filed with the Securities and Exchange Commission, or while a registration statement as to such securities is the subject of a refusal order or stop order issued by the Securities and Exchange Commission, or (prior to the effective date of such registration statement) any public proceeding or examination under Section 8 of the Securities Act of 1933, as amended, 15 U.S.C. §77h;

provided that the foregoing shall not apply to any securities or transactions which are exempt from the provisions of Section 5 of the Securities Act of 1933, as amended, 15 U.S.C. §77e; or"

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Defendants-Appellees was furnished by mail to Mr. John V. Holmes, Love Valley, North Carolina, this day of June, 1965.

Martin D. Newman
Attorney