

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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SECURITIES AND EXCHANGE COMMISSION,

Applicant-Appellee,

v.

ARTHUR ANDERSEN & CO.,

Respondent,

INVESTMENT CORPORATION OF AMERICA,

IRVING-AMICK AIRCRAFT, INC.,

AIR & SPACE UNDERWRITERS, INC.,

AIR & SPACE MANUFACTURERS, INC.,

Intervenors-Appellants.

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SECURITIES AND EXCHANGE COMMISSION,

Applicant-Appellee,

v.

McGLADREY, HANSEN, DUNN, FLATLEY &  
PRESSLER,

Respondent,

AIR & SPACE UNDERWRITERS, INC.,

AIR & SPACE MANUFACTURERS, INC.,

Intervenors-Appellants.

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No.

BRIEF OF THE APPELLEE, SECURITIES AND  
EXCHANGE COMMISSION, IN SUPPORT OF ITS  
MOTION TO DISMISS OR SUMMARILY AFFIRM  
THE ABOVE APPEALS

No.

Appeal from the United States District Court for the  
Southern District of Indiana, Indianapolis Division.

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BRIEF OF THE APPELLEE, SECURITIES AND EXCHANGE  
COMMISSION, IN SUPPORT OF ITS MOTION TO DISMISS  
OR SUMMARILY AFFIRM THE ABOVE APPEALS

STATEMENT

This action was brought by the Securities and Exchange Commission, appellee, against the accounting firms of McGladrey, Hansen, Dunn, Flatley & Pressler ("McGladrey") and Arthur Andersen & Co. ("Andersen") to obtain an order to require obedience to subpoenas directed to them by the Commission. The appellants, who are the subject of the investigation (or related corporations) in connection with which the subpoenas were issued and who employed the accounting firms, intervened in these enforcement actions. The United States District Court for the Southern District of Indiana, Indianapolis Division, ordered the accounting firms to comply with the subpoenas. They have not appealed.

On April 1, 1965, the Securities and Exchange Commission ordered an investigation of the activities of Air & Space Underwriters, Inc. ("Air & Space") and Investment Corporation of America. See Order Directing Private Investigation and Designating Officers to Take Testimony. On June 16, 1965, a subpoena duces tecum was issued by the Commission to Andersen, and on June 18, 1965, a subpoena duces tecum was issued to McGladrey requiring them to produce work papers, memoranda, trial balances, balance sheets, profit and loss statements, reports and other records relating to Air & Space Underwriters, Inc., Air & Space Manufacturing, Inc., <sup>1/</sup> and Investment Corporation of

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<sup>1/</sup> Although this company has often been incorrectly referred to as Air & Space Manufacturers, Inc., the actual name of the company is Air & Space Manufacturing, Inc.

America.

The Securities and Exchange Commission obtained a preliminary injunction from the United States District Court for the Southern District of Indiana, Indianapolis Division, on July 12, 1965, enjoining Air & Space, among others, from violating Sections 5(a) and (c) and 17(a)(2) and (3) of the Securities Act of 1933, 15 U.S.C. 77e(a) and (c) and 77q(a)(2) and (3), and enjoining Investment Corporation of America, among others, from violating Sections 17(a)(2) and (3) of the Securities Act of 1933, 15 U.S.C. 77q(a)(2) and (3). Securities and Exchange Commission v. Robert S. Chappell, et al., Civil Action No. IP 65-C-279 (S.D. Ind., 1965). This action had been commenced on June 15, 1965.

After several continuances, on September 7, 1965, a partner in Andersen and on September 8, 1965, a partner in McGladrey appeared in response to the subpoenas but both refused to comply with the subpoenas unless ordered to do so by a court. None of the books, papers or documents called for in the subpoenas were produced. On September 7, 1965, the Commission commenced the proceeding to enforce the subpoena directed to Andersen in the District Court for the Southern District of Indiana. An enforcement proceeding was commenced against McGladrey on the following day. Air & Space and others moved to intervene and were permitted to do so on September 13, 1965. The intervenors filed answers asserting eight alleged defenses.

The District Court ordered McGladrey and Andersen to comply with the subpoenas on September 13, 1965. See Order and Entry for September 13, 1965, in each of the cases at bar. While the court ordered compliance, it held, in its Entries for September 13, 1965 that any information secured by virtue of these subpoenas might not

be used in the pending civil proceeding for a permanent injunction against the intervenors but may only be used in determining whether or not to recommend criminal prosecutions to the Department of Justice.

On September 14, 1965, the intervenors appealed to this Court from the orders enforcing the subpoenas. See Notices of Appeal. The accounting firms, who were the respondents in the subpoena enforcement actions, have not appealed. On September 17, 1965 the District Court granted the appellants' motions for a stay pending their appeals to this Court. On October 21, 1965, the District Court granted motions of the appellants for extension of the time within which to file the record and docket the above-entitled appeals to and including December 13, 1965.

#### STATUTORY PATTERN

By virtue of Section 20(a) of the Securities Act of 1933, 15 U.S.C. 77t(a), the Securities and Exchange Commission has the authority to conduct investigations to determine if violations of that Act are being or have been committed. This provision states in pertinent part:

"Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts."

Section 20(b) of the Securities Act of 1933, 15 U.S.C. 77t(b), indicates that such investigations are not limited to matters that are civil in nature but may also deal with possible criminal violations:

"The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title."

In order to carry out such investigations the Commission is empowered by Section 19(b), 15 U.S.C. 77s(b), to authorize any member of the Commission or any officer so designated to conduct such investigations, to subpoena witnesses, and to demand the production of any books or documents relevant and material to the inquiry. That provision provides in pertinent part:

"For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers or other documents which the Commission deems relevant or material to the inquiry."

The power of the Commission to conduct such investigations is made effective by Section 22(b), 15 U.S.C. 77v(b), which authorizes the Commission to seek the enforcement of its subpoenas by invoking the power of the federal courts. Section 22(b) provides in pertinent part:

"In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

Similar provisions are found in the Securities Exchange Act of 1934, empowering the Commission to investigate, empowering the federal courts to enforce Commission subpoenas, and providing that the Commission may submit evidence of criminal violations to the Attorney General for the institution of criminal proceedings. Sections 21(a), (b), (c) and (e), 15 U.S.C. 78u(a), (b), (c) and (e).

CONTESTED ISSUE

Should an appeal taken for delay and based on insubstantial and frivolous grounds be dismissed?

SUMMARY OF ARGUMENT AND CITATION OF  
CASES

Since there is no legal basis for these appeals, they should be promptly dismissed.

Securities and Exchange Commission v. Vacuum Can Co.,  
157 F.2d 530 (C.A. 7, 1946), certiorari denied,  
330 U.S. 820 (1947)

Ginsburg v. American Bar Assoc., 277 F.2d 801 (C.A. 7,  
1960), certiorari denied, 364 U.S. 829 (1960).

The immunity granted by the Fourth Amendment is "a personal protection" of the person subpoenaed.

McMANN v. SECURITIES AND EXCHANGE COMMISSION, 87 F.2d 377,  
379 (C.A.2, 1937), certiorari denied sub nom. McMann v.  
Engel, 301 U.S. 684 (1937)

NEWFIELD v. RYAN, 91 F.2d 700 (C.A.5, 1937), certiorari  
denied, 302 U.S. 729 (1937)

DeMASTERS v. AREND, 313 F.2d 79 (C.A.9, 1963), petition  
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Foster v. United States, 265 F.2d 183 (C.A.2, 1958),  
certiorari denied, 360 U.S. 912 (1959)

United States v. Eversole, 209 F.2d 766 (C.A.7, 1954)



The Commission is authorized to proceed by way of investigation to uncover matters that should be referred to the Attorney General for criminal prosecution.

Securities Act of 1933:

Section 20, 15 U.S.C. 77t

Securities Exchange Act of 1934:

Section 21, 15 U.S.C. 78u

The purpose of a subpoena is to discover information not to prove a charge.

Securities and Exchange Commission v. Vacuum Can Co.,  
157 F.2d 530, 532 (C.A. 7, 1946), certiorari denied,  
330 U.S. 820 (1947)

#### ARGUMENT

Since appellants have filed nothing in this Court indicating the nature of their exceptions to the orders of the court below enforcing the Commission's subpoenas, we may assume that their "Interveners' Answer" filed below includes all the contentions upon which they intend to rely in these appeals. These contentions are frivolous and without evidentiary support,<sup>2/</sup> and accordingly the appeals, which were apparently taken solely to delay the Commission's investigation, should be promptly dismissed. Securities and Exchange Commission v. Vacuum Can Co., 157 F.2d 530 (C.A. 7, 1946), certiorari denied 330 U.S. 820 (1947); Ginsburg v. American Bar Assoc. 277 F.2d 801 (C.A. 7, 1960, certiorari denied 364 U.S. 829 (1960).

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<sup>2/</sup> See Affidavit of Joan H. Saxer submitted herewith.

The fundamental argument running through the appellants' defenses appears to be that the Commission may not issue a subpoena to obtain information because a civil suit for injunction is pending in which such information might be used. While the Commission disagrees with this contention,<sup>3/</sup> it is no longer available to these appellants because the court below ordered that any information uncovered by these subpoenas may not be used in the pending injunction proceedings.<sup>4/</sup> The Commission has not cross-appealed from this ruling.

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<sup>3/</sup> During the pendency of injunctive proceedings it may be necessary for the Commission to conduct investigations into additional but perhaps related violations. The purpose of the federal securities acts would be severely frustrated if the power to investigate were to be terminated by the institution of public proceedings against one of the violators. Sutro Brothers & Co. v. Securities and Exchange Commission, 199 F. Supp. 438 (S.D.N.Y., 1961). See also Bowles v. Bay of New York Coal and Supply Corp., 152 F.2d 330 (C.A.2, 1945); and Federal Trade Commission v. Waltham Watch Co. 169 F. Supp. 614 (S.D.N.Y., 1959). The pendency of such an action against the intervenors does not warrant delay in enforcement of the subpoenas directed to the respondents. Cf. Porter v. Mueller, 156 F.2d 278 (C.A. 3, 1946); Bolich v. Rubel, 67 F.2d 895 (C.A. 2, 1933); National Plate & Window Glass Co. v. United States, 254 F.2d 92 (C.A. 2, 1958), certiorari denied, 358 U.S. 822 (1958); Norda Essential Oil & Chemical Co. v. United States 253 F.2d 700 (C.A. 2, 1958). Otherwise, the more widespread a fraudulent scheme, the greater the protection for its perpetrators. Appellants should not be given any advantage by reason of the fact that their widespread activities required the Commission to bring not only injunctive proceedings against them but also to conduct an investigation to determine if they had violated any of the criminal provisions of the statutes. See the District Court's oral opinion at Transcript 84-89.

<sup>4/</sup> "Because of the initiation of such civil proceeding, any information secured by the applicant pursuant to the order which the court will enter herein may not, however, be used as evidence in said civil proceeding, but may be used by the Commission only in determining whether to recommend criminal prosecutions to the Department of Justice, and thereafter by the Department of Justice for any appropriate use." Entries of September 13, 1965, p. 5.

The appellants contended also that the subpoenas directed to the respondents violated the Fourth Amendment because they were so broad and burdensome as to constitute an unreasonable search and seizure. But the immunity granted by the Fourth Amendment is "a personal protection" of the person subpoenaed and therefore is not available to appellants, who were not the persons subpoenaed. McMann v. Securities and Exchange Commission, 87 F.2d 377, 379 (C.A. 2, 1937), certiorari denied sub nom. McMann v. Engel, 301 U.S. 684 (1937); Newfield v. Ryan 91 F.2d 700 (C.A. 5, 1937), certiorari denied 302 U.S. 729 (1937); DeMasters v. Arend, 313 F.2d 79 (C.A. 9, 1963), petition dismissed 375 U.S. 936 (1963); Foster v. United States, 265 F.2d 183 (C.A. 2, 1958), certiorari denied 360 U.S. 912 (1959). And cf. United States v. Eversole 209 F.2d 766 (C.A. 7, 1954).<sup>5/</sup>

The assertion that the investigation ordered by the Commission had been terminated (Second Defense, Interveners' Answers) is absurd because the very issuance of the subpoenas clearly indicated that the investigation had not been completed.

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<sup>5/</sup> The intervenors do not appear to have objected that the papers demanded in the subpoenas are their property nor that their property is privileged in any way from inspection. Even if the intervenors had shown that their corporate papers would be disclosed if the subpoenas to the accountants should be complied with, the intervenors have no right to object to the disclosure of such corporate records. A corporation may not refuse to produce its corporate records on the ground of the Fifth Amendment privilege against self-incrimination. Hale v. Henkel, 201 U.S. 43, 74-75 (1906); Curcio v. United States 354 U.S. 118, 122 (1957); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 196, 208 (1946); United States v. Bausch & Lomb Optical Co. 321 U.S. 707, 726-727 (1944); McGarry v. Securities and Exchange Commission 147 F.2d 389, 392 (C.A. 10, 1945).

We do not dispute the contention that the Commission's order did "not authorize an investigation for the sole purpose" of determining whom the Commission should recommend to the Department of Justice for criminal prosecution (Third Defense, Interveners' Answers) but this is wholly without significance. Like substantially all Commission orders of investigation, the April 1, 1965 order was broad enough to permit information to be obtained that might lead to either civil or criminal action. See Order Directing Private Investigation and Designating Officers to Take Testimony.

The argument that an investigation to aid in the enforcement of the criminal provisions of the securities acts exceeds the power of the Commission and usurps the power of the Grand Jury in violation of the Fifth Amendment (Fourth Defense, Interveners' Answers) flies directly in the face of clear statutory provisions. See Section 20, Securities Act of 1933, 15 U.S.C. 77t; Section 21, Securities Exchange Act of 1934, 15 U.S.C. 78u. These sections specifically provide that the Commission may refer the results of its investigations to the Attorney General for criminal prosecution. Thus, the assertion that the "d/iscretion to institute criminal proceedings. . . is vested in the Attorney General . . . and not in the Securities and Exchange Commission" (Fifth Defense, Interveners' Answers) is irrelevant in the statutory context.

Finally the fact that the intervenors have denied that securities of Air & Space had been sold by means of fraudulent devices (First Defense, Interveners' Answers) cannot affect the validity of the

subpoenas. As this Court stated in Securities and Exchange Commission v. Vacuum Can Company, supra, 157 F.2d at 532:

"The purpose of the subpoena is to discover evidence, not to prove a pending charge, but upon which to make one if the discovered evidence so justifies. It is sufficient that the investigation be for a lawfully authorized purpose. Oklahoma Press Publishing Co. v. Walling, supra [327 U.S. 186, 208-209]; Endicott Johnson Corporation v. Perkins, 317 U.S. 501, 63 S.Ct. 339, 87 L.Ed. 424. The investigation here was one authorized by law, and the evidence sought to be produced was material and relevant to the investigation. Under such circumstances, the Supreme Court has directly rejected appellants' contentions."

CONCLUSION

For the foregoing reasons these appeals should be dismissed or summarily affirmed.

Respectfully submitted,

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