UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1820

ELLIOT HANDLER, et al.,

Appellants,

v.

SECURITIES AND EXCHANGE COMMISSION, et al.,

Appellees.

On Appeal from the United States District Court
for the Central District of California

ANSWERING BRIEF OF SECURITIES AND EXCHANGE COMMISSION, RODERICK M. HILLS, PHILIP A. LOOMIS, JR., JOHN R. EVANS, IRVING M. POLLACK, STANLEY SPORKIN, IRWIN M. BOROWSKI, JAMES G. MANN AND RALPH H. ERICKSON, APPELLEES

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PRELIMINARY STATEMENT

In August 1974, the Securities and Exchange Commission (the "Commission") instituted a lawsuit against Mattel, Inc. ("Mattel"), a publicly-held corporation principally engaged in the manufacture of toys. The Commission's complaint charged Mattel with issuing false and misleading press releases concerning the results of its operations, and with filing materially false and misleading reports with the Commission, all in contravention of the antifraud and reporting provisions of the Securities Exchange Act of 1934. Rather than contest the Commission's charges of serious wrongdoing, Mattel consented to the entry of a permanent injunction barring future similar violations of the federal securities laws, and the award of ancillary relief, including, among other things, the addition of new, independent directors.

Thereafter, and as a result of its own internal investigation, Mattel discovered that its prior fraud had been far more extensive than previously believed. As a result, the consent decree previously entered was amended, also by consent, to require, among other things, the appointment by Mattel of a special counsel to conduct an inquiry designed to uncover instances of fraud and any similar acts in violation of the federal securities laws, and to recommend to Mattel's board of directors any steps that should be taken in response to such violations.

During the period that the alleged violative activities occurred, the appellants—Elliot Handler, Ruth Handler and Seymour Rosenberg—were senior officers and directors of Mattel. The Handlers personally voted on, and approved, each and every aspect of the consent decree and amendments thereto, and Mr. Rosenberg knew of, and did not object to, them. And, when a special counsel was appointed, the appellants cooperated fully in his investigation, voluntarily testifying as to their conduct despite being advised, out of an abundance of caution, that they were entitled to refuse to answer any questions that might be put to them.

Upon the completion of his ten-month investigation, and after the appellants had had an opportunity to review a draft report of his investigation, the special counsel filed a definitive report with the district court having jurisdiction over the Commission's action against Mattel, and the report was made public. Although the report recommended that Mattel pursue any claims it might have against the appellants, the report did not identify specifically named individuals with the commission of any unlawful act. The Commission, however, referred its files, as well as the special counsel's report, to the United States Attorney for the Central District

of California, who has been actively pursuing the possible criminal indictment of various persons, including the appellants.

This action, plainly stated, reflects the appellants' desperate attempts to stave off the possibility of criminal indictment. More than two years after the appointment of the special counsel, and fourteen months after the publication of the special counsel's report, perhaps fearing the worst, the appellants commenced this action in the court below, belatedly seeking the judicial eradication of machinery, the implementation of which they knowingly accepted. The district court, however, dismissed this lawsuit. It recognized the prematurity of this suit before any indictment has issued, as well as the lack of merit in the appellants' long-delayed attempts to invoke judicial processes; it was cognizant of the appellants' knowing acceptance of the establishment of the machinery of which they now complain; and it was satisfied with the well-established propriety of the ancillary relief awarded to the Commission by the consent of all concerned.

The plaintiffs below have appealed that judgment, seeking from this Court what no judicial tribunal previously has permitted--a collateral attack on lawfully conducted, ongoing grand jury proceedings--although the appellants have carefully tailored their brief in this appeal to omit the repeated references to the grand jury that permeated their arguments to the court below and that formed the basis for their unsuccessful request to this Court for extraordinary relief pending this appeal. In response to this unfortunate effort to employ the judiciary to curtail the well-recognized right of a grand jury to determine for itself whether to charge the appellants criminally, the Commission submits this answering brief.

COUNTERSTATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the district court err in holding that the appellants could not collaterally forestall a grand jury from considering the possibility of criminally indicting the appellants?

COUNTERSTATEMENT OF THE CASE

The August 1974 Consent Judgment

On August 5, 1974, the Commission filed an action in the United States District Court for the District of Columbia, seeking injunctive and ancillary relief against Mattel (App. 1). 1/ The complaint alleged, among other things, that Mattel had violated the antifraud and periodic reporting provisions of the Securities Exchange Act 2/ by issuing false and misleading press releases during and after its fiscal year ended February 3, 1973, and by filing false and misleading quarterly reports on Commission Form 10-Q with the Commission during that fiscal year.

On the same day, Mattel (the sole defendant in that case) consented, without admitting or denying the allegations in the Commission's complaint, to

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1/ Securities and Exchange Commission v. Mattel, Inc., Civ. Action No. 74-1185 (D. D.C.). "R. __" refers to pages of the record on appeal. (The record in the Commission's enforcement action against Mattel was incorporated by stipulation into the record in this case (R. 367).) "H. Br. __" refers to pages of the brief filed on behalf of appellants Elliot and Ruth Handler. "App. __" refers to pages of the appendix attached to the Handlers' brief. "R. Br. __" refers to pages of the brief filed on behalf of appellant Seymour Rosenberg. "S.C. Rep. __" refers to pages of the Report of the Special Counsel and Special Auditor for Mattel, filed with the lower court on November 3, 1975.

2/ Sections 10(b) and 13(a) of the Securities Exchange Act, 15 U.S.C. 78j(b) and 78m(a), and Rules 10b-5 and 13a-13 thereunder, 17 CFR 240.10b-5 and 17 CFR 240.13a-13.

the entry of a Judgment and Order of Permanent Injunction and Ancillary Relief (the "judgment") (App. 9). The judgment enjoined Mattel from violating the antifraud and reporting provisions of the Securities Exchange Act and provided for certain ancillary relief, including a requirement that Mattel appoint two additional directors, approved by the court below and satisfactory to the Commission, who had no prior affiliation with Mattel (App. 11). 3/

By the terms of that judgment, Mattel also agreed to establish two committees of its board of directors—a Financial Controls and Audit Committee and a Litigation and Claims Committee—with specified functions and membership. A majority of the members of each committee was required to have had no prior affiliation with Mattel (App. 11-14). The judgment, which was authorized by Mattel's board of directors on July 19, 1974 (R. 371), was the result of extensive negotiations between the Commission and Mattel. Appellants Elliot and Ruth Handler, as members of the Mattel board, personally voted in favor of the resolution authorizing that consent (id.), while Seymour Rosenberg, the

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3/ Contrary to the appellants' assertion (H. Br. 5), Mattel's appointment of two independent additional directors did not give the Commission an "indirect voice in the internal affairs of Mattel * * *."

By the terms of paragraph III of the judgment, the only qualifications placed on Mattel's discretion to appoint these new directors were that "[s]aid persons shall not have had any prior affiliation with MATTEL or any of its subsidiaries other than as may be approved by the plaintiff Commission." The Order recited that "[s]aid persons shall be satisfactory to the COMMISSION and approved by this Court prior to their appointment by MATTEL and after their appointment said persons shall have all of the rights and privileges enjoyed by directors of MATTEL pursuant to its bylaws and certificate of incorporation" (App. 11).

The only function served by the Commission, and by the district court's approval of the directors, was to insure that reputable persons with no conflict of interest or previous association with Mattel would be selected, insuring the new directors' independent exercise of their corporate trust. The appellants have not shown, nor can they, that there was any other purpose.

other appellant, was aware of, and acquiesced in, that judgment (R. 372-374). 4/

As a result of an internal investigation undertaken by Mattel into the circumstances that had led to the Commission's lawsuit (App. 23), one month later, in September 1974, representatives of Mattel voluntarily provided the Commission with information obtained during the course of that inquiry—information which tended to show that Mattel's financial statements and filings with the Commission for fiscal years 1971 and 1972 also had been false and misleading (App. 17-20). This voluntary disclosure to the Commission by Mattel's counsel was authorized by Mattel's board of directors, including the appellants Elliot and Ruth Handler (R. 372).

The Amended Consent Judgment

Following those new disclosures, and after discussions between the Commission and Mattel, on October 2, 1974, the Commission filed an application for further relief with the District Court for the District of Columbia (App. 16). This application alleged that Mattel had been involved in more serious, and widespread, deceptive practices than those covered by the prior judgment and sought additional relief (App. 16-20). On October 3, 1974, the district court entered an Amended Judgment and Order of Permanent Injunction and Ancillary Relief (the "amended judgment") (App. 25-34), with Mattel's consent (App. 21-24), as authorized by its board of directors, including the appellants Elliot and Ruth Handler, who voted in favor of the resolution (App. 23-24; R. 372).

4/ Elliot Handler was a co-founder and formerly Chief Executive Officer and Co-Chairperson of Mattel's board of directors; Ruth Handler, his wife, was a co-founder and formerly President and Co-Chairperson of the Mattel board; Seymour Rosenberg formerly was Mattel's Executive Vice-President for Finance and Administration, and a member of its board of directors (R. 366-367).

In consenting to the entry of the amended judgment, Mattel agreed to

— appoint and maintain persons previously unaffiliated with Mattel as a majority of its board of directors (App. 27); 5/

— establish an Executive Committee of its directors, a majority of the members of which were to be the additional, unaffiliated, directors (App. 28); 6/

— grant to its Financial Controls and Audit Committee (voting power over which was to reside with the new directors) continuing review functions over Mattel's financial controls, accounting procedures, public disclosures, and relations with Mattel's independent auditors (App. 28-29);

— vest in its Litigation and Claims Committee (consisting of three unaffiliated directors) the responsibility to review litigation and claims against past or present Mattel personnel and to approve settlements or dispositions of any claims or actions Mattel might have against persons previously or presently affiliated with it (App. 29-30);

— select a special counsel, with the consent of a majority of Mattel's additional, unaffiliated, directors, 7/ to investigate, among other things, any instances of fraud and other similar violations of the federal securities laws, the facts and circumstances contributing to such conduct, and to suggest appropriate methods by which Mattel could preclude such occurrences in the future (App. 30-31); 8/

5/ The persons appointed were required to be approved by the lower court, and satisfactory to the Commission (App. 27). Despite the appellants' assertions to the contrary (H. Br. 6), and the appellants' pejorative reference to these directors as "SEC directors" (H. Br. 7), the minutes of the meeting of Mattel's board of directors at which this relief was approved expressly state "that the staff of the SEC had made it clear that they did not intend to impose any directors on the Company, but that the staff retained the right to suggest candidates for consideration by the Company" (R. 384).

6/ This Executive Committee was proposed by the Commission as an alternative to the appointment of a Chairman of the Board from among the "additional directors" to be appointed as contemplated by paragraph IV of the amended judgment (R. 384).

7/ Pursuant to the decree, the special counsel was required to be approved by the district court, and satisfactory to the Commission (App. 30).

8/ In addition, the special counsel was to select a special auditor, to report on the accounting practices that had led to the filing by Mattel's of false reports with the Commission (App. 30).

(continued)

— cooperate fully, along with its officers, directors, agents and controlling persons, with its directors' committees, special counsel and special auditor (App. 31).

In short, the amended judgment defined the conditions and parameters of a plan to insure that the prior fraudulent activity which had permeated Mattel's operations over a period of several years would be terminated, and that steps would be taken by Mattel itself to ferret out and rectify such unlawful corporate practices. Mattel and its directors approved of, and consented to, this plan, in part to avoid any possible interference with Mattel's normal business operations that the appointment of a receiver might have entailed (App. 23).

In order to provide for effective judicial oversight of the terms of the consent judgment, by order dated October 3, 1974, District Judge Gesell transferred the Mattel action from the District of Columbia to the United States District Court for the Central District of California.

Implementation of the Amended Judgment

Upon the transfer of the Mattel action to the Central District of California, Mattel set about to implement the amended judgment. It selected

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8/ (continued)

Similarly, upon the approval of Mattel's additional, unaffiliated directors, the special counsel was authorized to take action, including the institution and prosecution of lawsuits and any further action necessary or appropriate for the protection of Mattel's shareholders. In the event of any disagreements between the special counsel and Mattel's additional, unaffiliated directors concerning actions to be taken by the special counsel, the special counsel could apply to the court for orders resolving the disputes (App. 30-31). Mattel agreed not to settle or abandon any material claims with respect to violations either alleged by the Commission or found by the special counsel, except upon notice and explanation to the Commission (App. 31).

seven additional, unaffiliated directors (S.C. Rep. 52), 9/ each of whom was an outstanding leader in the fields of business, law or education. 10/ And, from a number of possible candidates, Seth Hufstedler, Esquire, of the Los Angeles law firm of Beardsley, Hufstedler & Kimble, a former President of the California Bar Association, was employed as Mattel's special counsel with the court's approval (R. 403-404). In turn, the special counsel selected Price, Waterhouse & Co., an internationally known firm of certified public accountants which, at that time, had already been employed by Mattel as its auditor, to serve as Mattel's special auditor. 11/ On February 27, 1975, the district court approved the retention of the special auditor (R. 404).

The Scope of the Investigation Conducted by the Special Counsel and Special Auditor

Although the consent decrees described above provided the foundation for the investigation that was conducted by the special counsel and special auditor, "the nature of the investigation, audit and reports [required was] not further defined" (S.C. Rep. 7). Consequently, the special counsel and special auditor, after consulting with Mattel and the Commission's staff

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9/ On November 26, 1974, after several hearings and submissions by both parties to the transferee court, Judge Francis C. Whelan modified the amended judgment (App. 35-47) in certain respects not material here. Among other things, however, the district judge also determined not to pass upon the qualifications of any of the additional directors to be selected by Mattel.

10/ See S.C. Rep. 52.

Most of the persons chosen were suggested by Mattel, by its previously appointed additional directors, or by an outside personnel placement firm engaged by Mattel and were not personally known to the Commission's staff concerned with the investigation or review of their appointment.

11/ See Mann deposition, January, 1977, at 34-35.

(R. 405-406), developed certain guidelines outlining their respective functions. These included:

(1) investigating and publicly reporting the corporate practices of Mattel which may have been in contravention of the federal securities laws;

(2) examining the relationship between Mattel's past and present management and its staff, in light of the results of the investigation; and

(3) advising the independent members of Mattel's board of directors of the results of the investigation and what, if any, measures should be taken against any person or entity as a consequence of the information compiled in their investigative report. 12/

The investigation undertaken by the special counsel and special auditor took ten months to complete, and examined matters not only covered in the Commission's complaint and its application for further relief, but others matters as well which, in their judgment, appeared to warrant further inquiry.

In every respect, the special counsel's investigation was independent. Thus, although the special counsel solicited the views of the Commission's staff during his investigation, at no time did the Commission's staff instruct him on the manner in which he should conduct his investigation (R. 518), nor did he feel bound to accept any comments or suggestions made by the Commission's staff (id.). Indeed, while the special counsel and special auditor were granted general access to the Commission's investigatory files relating to Mattel (R. 370), they declined to make their files available to anyone, including the Commission's staff, prior to the filing of their reports with the court below (R. 518). And, during this time, the Commission continued its independent investigation into Mattel's conduct--a fact as to which the special counsel and special auditor were aware (R. 519). Consistent with his

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12/ S.C. Rep. 7-9.

status as a Mattel surrogate, the special counsel (and the special auditor) reviewed all available Mattel records, including certain information in the possession of Mattel's outside legal counsel (R. 407).

During, or in advance of, his interviews, the special counsel advised witnesses of their rights, including their right to counsel and their right to refuse to answer questions, and he assured all witnesses that their testimony was voluntary (R. 527). Each of the appellants was interviewed during the special counsel's investigation in accordance with these procedures—they were advised of their rights and they were accompanied by counsel of their choosing who was permitted to participate in the interviews (R. 373). 13/ And, prior to the filing of the reports of the special counsel and special auditor, attorneys representing the appellants and the Commission's staff were given draft copies (R. 410).

The Reports of the Special Counsel and Special Auditor

The reports of the special counsel and special auditor, which were filed with the district court on November 3, 1975, were made public contemporaneously. Prior to this lawsuit, which was instituted two years after the appointment of the special counsel and more than a year after he filed his report, the appellants raised no objection to the substantive contents of the report, nor did they seek an order from the court in the Mattel case sealing the report. 14/

13/ Appellants were not present when other persons were interviewed and, accordingly, they did not cross-examine those witnesses (R. 408).

14/ Attorneys for Mr. and Mrs. Handler did write to the special counsel on November 2, 1975, requesting that the report be sealed upon delivery to the court, in effect because the report had not been the product of an adversary process (R. 494-495). This request was denied by the special counsel as "entirely outside of the intent of the * * * " consent decree (R. 496).

Consistent with their recognition at the outset that their investigation might ultimately lead to a criminal investigation by the Department of Justice (R. 404), the special counsel and special auditor stated in their reports:

> "Our determinations should not be treated as factual findings of the kind that might be entered by a court after a trial on the merits. They are based upon our analysis of documentary materials, interviews and, in some cases, affidavits or depositions. Most of those interviewed were represented by counsel. However, those persons whom we charge with involvement in the irregularities did not have full access to all information disclosed by the investigation or the right to confront or cross-examine the witnesses who supplied the information. Some of the evidence is controverted, and many of our findings involve the weighing of such conflicting evidence." (S.C. Rep. 3,6) (emphasis supplied).

Despite the Commission staff's recommendation, the special counsel determined not to identify particular individuals with specific acts or practices discussed in the report (R. 409). Accordingly, references in the report generally attribute conduct to generic positions (for example, senior management executives, accounting management, etc.) rather than to named individuals, and specific wrongful actions were not attributed to the appellants in the report. The appellants, however, were identified by name at the beginning of the report (S.C. Rep. 11), where the special counsel stated that he had recommended to Mattel that it take whatever steps might be necessary to pursue claims against them.

Contemporaneously with the filing of the reports, Mattel issued a press release describing, among other things, the findings of its special counsel and special auditor (R. 370). A copy of the reports of the special counsel and special auditor was subsequently filed by Mattel with the Commission as an attachment to a Current Report for the month of November 1975, a Current Report on Commission Form 8-K, which has been available for public insepection. In addition, Mattel

indicated that the report could be obtained from it upon request (id.). 15/

Activities Subsequent to Filing of the Reports

The Commission's staff discussed the content of the reports with representatatives of the special counsel and special auditor both before and after they were filed (R. 369-370). Following the filing and publication of the reports, the Commission's staff made copies available to the Office of the United States Attorney for the Central District of California (R. 358). Pursuant to Commission authorization, the Commission's nonpublic investigative files, including copies of investigative material received from the special counsel, were referred to the United States Attorney for possible criminal prosecution (R. 370) 16/ and, as is customary in cases of this nature, the Commission's staff has been, and is, assisting the United States Attorney in evaluating the material and preparing a case for grand jury consideration (R. 358).

Proceedings Below

On January 7, 1977, approximately fourteen months after the reports were publicly filed in the district court, the appellants instituted this action, asking the court to declare void the negotiated settlement procedures relating to the special counsel and special auditor and to expunge all remnants of its existence from the public domain (R. 1). Their total concern (see, e.g.,

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15/ The special counsel's efforts have already borne impressive fruit for Mattel and its public stockholders. Its former auditor—Arthur Andersen & Co.—agreed to pay $900,000 in settlement of certain claims against Andersen. See "Arthur Andersen Agrees To Pay $900,000 Toward Settling Lawsuits in Mattel Case," Wall Street Journal, Apr. 27, 1977, p. 21

16/ The discretion whether to institute criminal prosecution is vested by statute with the Attorney General of the United States. See, e.g., Section 21(d) of the Securities Exchange Act, 15 U.S.C. 78u(d).

R. 134-136) was the possible criminal indictment that might be issued by the grand jury that has been considering their prior conduct. On March 14, 1977, subsequent to an expedited briefing schedule and limited discovery, the court below denied the appellants' requested relief, and granted the appellees' motion for summary judgment (R. 531). In so doing, the court held that

> (1) the consent decress should not be voided because it was within the equitable power of the court to implement such a remedy, "particularly when it was in furtherance of a decree which was agreed to by the parties" (R. 526);
>
> (2) the appellants have no standing to attack the validity of the decree (id.);
>
> (3) the appellants' constitutional rights had not been violated by the operation of the decree because "each could have asserted his or her rights under the Fifth Amendment in refusing to respond to interview questions" (R. 527);
>
> (4) there was no delegation of power, unlawful or otherwise, from the Commission to the special counsel (id.);
>
> (5) the appellants' lawsuit was a premature attempt to suppress evidence in a criminal action and brought in the wrong forum (R. 528);
>
> (6) Elliot and Ruth Handler, because of their consents as directors to the settlement negotiated by Mattel, were estopped from now complaining of its defects (id.); and
>
> (7) the reports of the Special Counsel and Special Order were not to be expunged from the records of the court (R. 530). 17/

From the decision of the court below, the plaintiffs have taken this appeal. 18/

17/ The court did, however, order that copies of the reports in its files be sealed until further order (R. 530). This order does not apply to copies of the reports that may be obtained elsewhere, including the Commission's public files or those which can be acquired directly from Mattel.

18/ Almost thirty days after the district court dismissed this action, the plaintiffs filed with this Court an "emergency" motion for a temporary restraining order and an injunction pending appeal, seeking to prevent the appellees from utilizing the special counsel's report in any civil or criminal proceeding. On April 28, 1977, the appellants' motion was denied in all respects (per Wright and Wallace, J.J.).

STATUTES AND RULES INVOLVED

Sections 10(b), 13(a), 21(d) and 27 of the Securities Exchange Act, 15 U.S.C. 78j(b), 78m(a), 78u(d) and 78aa, respectively, constitute the statutory background out of which the issues involved arise. The pertinent rules under the Securities Exchange Act are Rules 10b-5, 17 CFR 240.10b-5, and Rule 13a-13, 17 CFR 240.13a-13. Rules 6, 7(b) and 7(d) of the Securities and Exchange Commission Rules Relating to Investigations are codified in 17 CFR 203.6, 203.7(b) and 203.7(d). These provisions are set forth in the statutory appendix to this brief, at pages 1a-4a, infra.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE APPELLANTS MAY NOT, THROUGH THEIR BELATED COLLATERAL ATTACK, PRECLUDE A GRAND JURY FROM CONSIDERING ANY AVAILABLE EVIDENCE OR FORESTALL THEIR POSSIBLE CRIMINAL INDICTMENT.

Despite the pose they seek to assume at this stage of their appeal, the appellants have made clear, both in the court below and in seeking extraordinary relief from this Court, that the sole purpose of this action is to stop a lawfully-constituted grand jury from considering the special counsel's report (and any information derived therefrom) in determining whether to indict the appellants. 19/ They worry that, if left to its normal processes, the grand jury will indict them for their prior conduct when they were responsible for the stewardship of Mattel.

But, such an action, reduced to its essentials, seeks a judgment the court below correctly held was beyond its jurisdiction to grant. At best, as the district court recognized (R. 528), this action seeks an advisory

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19/ See, e.g., R. 133-135; appellants' Emergency Motion for an Injunction Pending Appeal and Temporary Restraining Order and Memorandum of Points and Authorities and Affidavit of Charles S. Battles, Jr., in Support Thereof at p. 18, filed with the court on April 13, 1977.

opinion based on hypothetical facts—that is, if the appellants should some day be indicted, could they successfully suppress certain evidence at an ensuing criminal trial. In adopting Article III of the Constitution, however, the founders wisely sought to preclude the judiciary from opining on such abstract questions involving circumstances that might never arise. 20/

We submit, therefore, that the district court was correct in holding that the appellants' action was "premature." As the court below noted,

> "Should a grand jury indict any of them, the person or persons so indicted have the right to suppress evidence in the criminal case. Such motion, of course, is only proper where criminal charges have been filed by way of indictment" (R. 528). 21/

The district court's ruling, in this respect, is fully consistent with the well-established policy of the federal courts to avoid interfering with the orderly consideration of criminal matters until someone is formally accused of a crime, and the rights of the accused have become fixed. 22/ Even in situations in which it has been alleged that basic civil rights were unlawfully compromised or subverted as a result of an abuse of process,

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20/ See 2 Farrand, The Records of the Federal Convention of 1787 340-341 (Rev. ed., 1937).

21/ Similar considerations apply to whatever civil suits may have been, or may in the future be, instituted against the appellants. Government, or private, plaintiffs, as the case may be, must meet their burdens and prove their cases with evidence. If any of that evidence may not properly be used, for whatever reason, the appellants' remedy is to move to preclude the use of such evidence in that forum. The presiding judicial officer is in the best position to rule on an exclusionary or suppression motion.

22/ Kugler v. Helfant, 421 U.S. 117 (1975); Younger v. Harris, 401 U.S. 37 (1971); United States v. Blue, 384 U.S. 251 (1966).

absent a showing of bad faith and harassment the courts have uniformly declined to intervene. Kugler v. Helfant, 421 U.S. 117 (1975); Younger v. Harris, 401 U.S. 37 (1971). This policy of restraint is founded on "the basic doctrine of equity jurisprudence that courts of equity * * * should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." Younger v. Harris, supra, 401 U.S. at 43-44.

This view is all the more compelling where, as here, the request for equitable relief is premised solely upon the appellants' conjecture and speculation about a criminal action that has not been, and might never be, brought against them. "Under traditional principles * * *," the appellants have "no standing to invoke the exclusionary rule." United States v. Calandra, 414 U.S. 338, 352 n.5 (1974). And see, e.g., Hill v. United States, 346 F. 2d 175 (C.A. 9, 1965). 23/

23/ In Hill, a case analogous to the one at bar, a taxpayer filed a motion for the return and suppression of records which were allegedly in the hands of the Internal Revenue Service ("IRS") pursuant to a consensual agreement whereby the IRS was permitted to make copies of such records. The District Court for the Southern District of California denied the taxpayer any relief and he appealed. This Court held:

> "Since this attempt to suppress evidence has developed before any action has even been commenced, and, for that matter, has developed where an action may never even be commenced, we find this motion is nothing more than a premature request. If a criminal prosecution does subsequently take place, appellant can raise a motion to suppress any evidence which the government may have secured in violation of his constitutional rights." Id. at 178.

This Court has expressed similar views with respect to premature attempts to enjoin the use of evidence in a civil action that had not yet been instituted. See, e.g., Midwest Growers Cooperative Corp. v. Kirkemo, 533 F. 2d 455, 466 (1976).

The deferral of a suppression motion until after an indictment is returned reflects not only the important considerations of judicial economy and the adequacy of remedies precluding premature equitable relief, but also the fact that a grand jury should be free to consider any and all evidence available to it, whatever its source. United States v. Calandra, 414 U.S. 338, 344-345 (1974). In fact, "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act." Costello v. United States, 350 U.S. 359, 362 (1956). To effectuate its important mission, the investigatory powers of the grand jury must be accorded wide latitude. Branzburg v. Hayes, 408 U.S. 665, 700 (1972); Costello v. United States, supra, 350 U.S. at 364.

To this end, the Supreme Court has repeatedly held that a grand jury may (1) ask questions based on evidence seized in violation of the Fourth Amendment, United States v. Calandra, supra, 414 U.S. at 349-352; (2) consider evidence obtained in violation of the Fifth Amendment, United States v. Blue, 384 U.S. 251, 255 (1966); and (3) rely upon hearsay or otherwise incompetent evidence, Costello v. United States, supra, 350 U.S. at 363-364. Moreover, the Supreme Court has held that the federal courts should not conduct a preliminary hearing to determine the source of the evidence upon which a grand jury interrogation is based. Lawn v. United States, 355 U.S. 339, 350 (1958). 24/ As the courts have recognized, premature intervention in a criminal prosecution would "increase to an intolerable degree interference with the public interest in having the guilty brought to book."

24/ These cases have been followed by this Court. See, e.g., United States v. Rafferty, 534 F. 2d 854 (C.A. 9, 1976); Hunter v. United States, 405 F. 2d 1187, 1188 (C.A. 9, 1969).

United States v. Blue, ~~supra,~~ 384 U.S. ~~at~~ 255, 257, (1966). Chakejian ~~v. Trout, 295 F. Supp. 97, 103 (E.D. Pa., 1969).~~

Where, as here, the appellants have not been criminally charged, and, in any event, even if ultimately charged, they will have ample an opportunity to raise any objections they may have to the manner in which evidence sought to be introduced at trial was obtained (as well as to the admissability of the evidence itself), their action is not presently entitled to judicial consideration. United States v. Blue, supra, 384 U.S. at 255; Hunter v. United States, 405 F.2d 1187, 1188 (C.A. 9, 1969). The appellants' objections will not, however, be lost in the interim; rather, they will be preserved, to be raised at an appropriate time, and they will thus become, if at all valid, all the more apparent.

II. THE APPELLANTS MAY NOT COLLATERALLY ATTACK THE FINAL ORDERS ENTERED IN THE MATTEL ACTION.

The broadside attack the appellants belatedly, and collaterally, seek to raise against the consent decree entered in the Commission's Mattel case—an action to which the appellants were not parties—should be placed in context. Even if it could be assumed that the appellants could have challenged that decree when it was entered, a dubious proposition at best, 25/ they may

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25/ It is highly doubtful that the appellants, who were not parties to the Mattel action, could have challenged the provisions of the decree they only recently have found to be so troublesome--the appointment of a special counsel to investigate the facts and circumstances leading to Mattel's violations of the federal securities laws, and to make recommendations to Mattel's board of directors concerning the action to be taken in response to those facts.

At the time the special counsel was appointed, it was wholly speculative whether he would conclude that the appellants had engaged in violative conduct, or whether he would recommend that action be taken against them. But, speculative injury itself would not have been sufficient to confer standing on the appellants, see, e.g., Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976); United States v. SCRAP, 412 U.S. 669, 688-689 (1973); Warth v. Seldin, (continued)

not do so now, and certainly not in this action.

The case law makes quite plain the judicial reluctance to reopen consent decrees at the behest even of a party to the original action who consented to the entry of that decree. This is so, in large part, because a consent decree has "the same force and effect as any other judgment, and is a final adjudication of the merits," 26/ and the approval of the terms of a consent order is a "judicial act," Pope v. United States, 323 U.S. 1, 12 (1944), which "involves a determination by the chancellor that it is equitable and in the public interest." United States v. Radio Corporation of America, 46 F. Supp. 654, 655 (D Del., 1942).

Thus, before a consent decree will be reopened at the behest of a consenting party, "[n]othing less than a clear showing of grievous wrong evoked by new and unforseen conditions * * *" is required. United States

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25/ (continued)

422 U.S. 490, 509 (1975), and any harm resulting as a collateral consequence of an investigation—such as the allegation here that litigation possibly might be commenced against the appellants as a result of the investigation—is not subject to redress in the courts. Jenkins v. McKeithen, 395 U.S. 411, 423-424 (1960); Hannah v. Larche, 363 U.S. 420 (1960); cf. United States v. Los Angeles & Salt Lake Railroad Co., 273 U.S. 299, 309-310 (1927).

The appellants lacking standing to maintain this action even had it been timely brought, we fail to perceive how the considerable delay since the appointment of the special counsel, the completion of his report, and the publication of his findings in any way creates a right in the appellants to maintain this action two years after the operative events of which they now complain.

26/ Securities and Exchange Commission v. Thermodynamics Inc., 319 F. Supp. 1380, 1382 (D. Colo., 1970), affirmed, 464 F. 2d 457 (C.A. 10, 1972), certiorari denied sub nom. Strawn v. Securities and Exchange Commission, 410 U.S. 927 (1973). Accord, e.g., Utah Power & Light Co. v. United States, 42 F. 2d 304, 308 (Ct. Cl., 1930).

v. Swift & Co., 286 U.S. 106, 119 (1932). 27/ Indeed, "in the absence of fraud or mistake, [a consent decree] is valid and binding as such between the parties thereto and their privies." Utah Power & Light Co. v. United States, 42 F. 2d 304, 308 (Ct. Cl., 1930).

This judicial reluctance to reopen consent decrees at the behest of a party, however, turns into a judicial refusal to consider a collateral attack on a consent decree by a person who was not a party to the original action, even if that person could, unlike the appellants here, show serious injury flowing from the consent decree. 28/ As the courts have recognized, to permit third parties collaterally to challenge carefully drafted and considered consent decrees would disrupt the orderly disposition of litigation

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27/ Accord, e.g., Securities and Exchange Commission v. Jan-Dal Oil & Gas, Inc., 433 F. 2d 304 (C.A. 10, 1972); Securities and Exchange Commission v. Thermodynamics, Inc., supra, 319 F. Supp. 1380; Humble Oil & Refining Co. v. American Oil Co., 405 F. 2d 803 (C.A. 8), certiorari denied, 395 U.S. 905 (1969).

28/ See, e.g., Black and White Children of the Pontiac School System v. School District of Pontiac, 464 F. 2d 1030 (C.A. 6, 1972); McAleer v. American Telephone and Telegraph Company, 416 F. Supp. 435, 438, (D. D.C., 1976); Securities and Exchange Commission v. Thermodynamics, Inc., supra, 319 F. Supp. at 1382; Construction Industry Combined Committee v. International Union of Operating Engineers, 67 F.R.D. 664 (E.D. Mo., 1975).

McAleer, supra, is particularly instructive. There, a white male employee and his union alleged that American Telephone and Telegraph Company ("AT&T"), the white male's employer, had denied the employee a promotion in favor of a less qualified and less senior female employee solely because of her sex, in accordance with the terms of a consent decree entered into between AT&T and the Equal Employment Opportunity Commission. Under the decree, AT&T had agreed to establish an affirmative action program to improve the employment situation for women and minorities. On motion for summary judgment, the court held that the consent judgment could not be collaterally attacked with respect to the legality of the affirmative action plan contained in the decree. Simply stated, the consent decree was deemed to be a binding adjudication of the rights of AT&T, and the employee was held to lack standing to challenge the consent order.

and would be productive of nothing more than "mischief" and confusion. See, e.g., McAleer v. American Telephone & Telegraph Co., 416 F. Supp. 435, 438 (D. D.C., 1976). 29/

Of course, even if a collateral attack on the consent decree could be maintained by the appellants, they must be deemed to have waived such rights as they once may have had. Thus, although the appellants were not parties to the Mattel action, they were well aware of the relief being sought by the Commission, and they knowingly accepted the propriety of the entry of that relief. As noted above, at all times relevant to this investigation, to the filing of the civil suit against Mattel, and to the request for further relief, appellants Elliot and Ruth Handler were members of the Mattel board of directors. As such, they voted in favor of board resolutions pursuant to which Mattel consented to the entry of the judgments and orders which they now seek to attack. The other appellant, Seymour Rosenberg, at the same time, while no longer a member of Mattel's board, was not only aware of the Commission's injunctive action, but became aware of the terms of the amended judgments shortly after their entry. 30/

29/ If the appellants are correct that a criminal prosecution cannot be predicated upon information contained in, or derived from, the special counsel's report, they will, as noted, have an opportunity to raise that issue if and when they are indicted. And, if the appellants believe they have been injured as a result of Mattel's consent to the decree here under attack, they presumably could seek damages against Mattel. Cf. McAleer v. American Telephone & Telegraph Co., supra, 416 F. Supp. at 439.

30/ Moreover, each of the appellants voluntarily testified during the special counsel's investigation and were represented by counsel. But, the appellants did not seek to assert any Constitutional rights, nor did they object to the inquiry, even though the special counsel advised them of their right to do so.

And yet, at no time prior to the institution of this action did any of the appellants move to intervene in the Commission's action against Mattel in order to protect the rights which they now contend have been transgressed, nor did they file any motion to prevent or modify the consent decree or the ultimate publication of the reports of the special counsel and the special auditor. By the time the appellants finally found it propitious to file the instant law suit, some two years had elapsed since the entry of the consent decree, and some fourteen months had passed since the filing of the reports of which appellants complain. As was their right, they speculated that the special counsel's report might not uncover any basis for challenging their corporate stewardship. Having made a knowing choice in that regard, the appellants should not now be heard to complain when the court of equity whose jurisdiction they sought to invoke properly concluded that they waived any rights they once may have had. As the Supreme Court long ago noted, it "is thoroughly settled" that courts of equity properly may "withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time * * *." O'Brien v. Wheelock, 184 U.S. 450, 493 (1902). 31/

31/ We do not contend that even the most flagrant inequitable conduct may work to deprive a person of basic constitutional rights, but the appellants were not, and are not, being deprived of such rights. As we have already shown, supra, their rights will be protected by the criminal court judge if ever they should be indicted, and by the presiding judicial officers in civil litigation.

In this context, it also bears emphasis that the appellants may not seek a vain act from a court of equity as they have attempted here by their request that the court somehow turn back the clock to the moment before the filing of the special counsel's report on November 3, 1975, and thereby eradicate in all respects the purported harms visited upon the appellants as result of the investigation which they now allege was unlawful.

(continued)

III. THE APPOINTMENT OF A SPECIAL COUNSEL IN THE MATTEL CASE, UPON THE CONSENT OF THE PARTIES, WAS BOTH LAWFUL AND APPROPRIATE.

As we have seen, the lower court properly held that it lacked jurisdiction to consider, and that the appellants lacked standing to raise, the issues sought to be presented on this appeal. Nevertheless, the appellants strenuously seek to have this Court render an advisory opinion whether the Commission would have been entitled to the ancillary equitable relief ultimately agreed to by the parties in the Mattel case, had that case been litigated rather than settled. 32/ As we show below, however, the relief agreed to by the parties was both lawful and appropriate and is neither startling nor unprecedented, the appellants' contentions to the contrary notwithstanding.

31/ (continued)

Such a remedy is, of course, impossible. This Court cannot "expunge" the memories or collective knowledge which currently exists with regard to the information which was contained in reports that have been publicly disseminated. Nor can the Court restore the professional reputations of these appellants, as they appear to ask, by mere edict. Such vindication, if there is any to be had, could come only as a result of an airing in a proper court of the merits of the charges and defenses thereto, a confrontation which the appellants, by having instituted their lawsuit, are consciously attempting to avoid.

32/ In this regard, the appellants seriously misperceive the nature of the ancillary relief entered in the Mattel case, and the manner in which that relief was obtained. Above all else, they effectively have lost sight of the fact that the appointment of a special counsel was consented to by Mattel, something to which it was well within Mattel's power to consent.

And, contrary to the appellants' suggestions (H. Br. 26-27, 31), the special counsel's authority to investigate and make representations to Mattel emanated from Mattel, not the Commission or the court. The appointment of the special counsel was intended to benefit Mattel and, most importantly, its public investors, who had purchased and sold hundreds of thousands of shares of Mattel securities over the several years Mattel had been disseminating false and misleading reports of the results of its operations. The Commission did not delegate any of its authority to the special counsel, and the special counsel explicitly acknowledged that "I don't represent the SEC in any way nor do I take instructions from the SEC." Transcript of Proceedings, March 1, 1975, at pp. 127-128. Indeed, even though the special counsel conducted his own review, the Commission's staff continued its own, independent investigation of Mattel.

When the Commission seeks to invoke the aid of the district courts in enforcing the federal securities laws, the Commission appears "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." 33/ And, the Commission "in no way stands in the shoes of a private litigant with respect to its claims for ancillary relief." 34/

Thus, the courts have repeatedly upheld the Commission's authority to seek, and the district court's equitable power to grant, relief ancillary to the injunctive relief the Commission is specifically authorized to obtain. Ancillary remedies, such as disgorgement or the appointment of a receiver are not merely useful, they are essential to the effective enforcement of the federal securities laws. 35/ An "injunction against future violations while of some deterrent force, is only a partial remedy since it does not correct the consequences of past conduct." Securities and Exchange Commission v. Golconda Mining Co., 327 F. Supp. 257, 259 (S.D. N.Y., 1971). To insure the complete

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33/ Securities and Exchange Commission v. Management Dynamics, Inc., 515 F. 2d 801, 808 (C.A. 2, 1975).

34/ Securities and Exchange Commssion v. Petrofunds, Inc., 420 F. Supp. 958, 960 (S.D. N.Y., 1976), appeal dismissed with prejudice, No. 76-1684 (C.A. 2, Apr. 13, 1977). See also, Securities and Exchange Commission v. Penn Central Co., 425 F. Supp. 593, 599 (E.D. Pa., 1976).

35/ "The propriety of appointing a receiver in an injunctive action brought by the Commission to enforce the federal securities laws is well settled" Securities and Exchange Commission v. R. J. Allen and Associates, Inc., 386 F. Supp. 866, 878 (S.D. Fla., 1974). See also, e.g., Securities and Exchange Commission v. United Financial Group, 474 F.2d 354 (C.A. 9, 1973) (receiver); Los Angeles Trust Deed and Mortgage Exchange v. Securities and Exchange Commission, 285 F.2d 162 (C.A. 9), certiorari denied, 366 U.S. 919 (1961) (receiver); Securities and Exchange Commission v. Shapiro, 494 F.2d 1301, 1309 (C.A. 2, 1974) (trustee and disgorgement); Securities and Exchange Commission v. Koenig, 469 F.2d 198, 202 (C.A. 2, 1972)(receiver); Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1103-1106 (C.A. 2, 1972) (trustee and disgorgement); Securities and Exchange Commission v. Bowler, 427 F.2d 190 (C.A. 4, 1970) (receiver); Securities and Exchange Commission v. Keller Corp., 323 F.2d 397 (C.A. 7, 1963) (receiver); Securities and Exchange Commission v. Bartlett, 422 F.2d 475, 477-479 (C.A. 8, 1970) (receiver).

protection of investors, particularly where fraud or mismanagement has occurred, "the appointment of a trustee-receiver becomes a necessary implementation of injunctive relief." Securities and Exchange Commission v. Keller Corp., 323 F.2d 397, 403 (C.A. 7, 1963).

This conclusion is buttressed by those decisions of the Supreme Court recognizing that the federal district courts are possessed of the power "to do equity and to mould each decree to the necessities of the particular case," Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944), a principle that repeatedly has been carried over to remedial statutues, like the federal securities laws, even in the absence of specific statutory authority justifying the particular decree entered. See, e.g., Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291-292 (1960); Porter v. Warner Holding Co., 328 U.S. 395, 398 (1945); J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391 (1970). As the Supreme Court noted in Porter v. Warner Holding Co., supra, 328 U.S. at 398:

> "Unless provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is a stake.
>
> "Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' Brown v. Swann, 10 Pet. 497, 503 * * *." 36/

36/ As the Court noted in Mitchell v. Robert DeMario Jewelry, Inc., supra, 361 U.S. at 291-292:

> "[W]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."

Despite the broad equitable powers of the courts, however, the appellants suggest (H. Br. 1-2) that the ancillary relief agreed to by the parties in the Mattel case somehow presents a difficult question of first impression. While that might have been the case nearly two decades ago, prior to this Court's decision in Los Angeles Trust Deed and Mortgage Exchange v. Securities and Exchange Commission, 285 F.2d 162, 181-182 (C.A. 9, 1960), certiorari denied, 366 U.S. 919 (1961), this Court's holding in that case -- that a court of equity has broad powers to compel relief necessary "to give effect to the policy of the legislature" -- should foreclose such a basic questioning of the inherent powers of equity courts. 37/

There is no necessary limitation to the variety and application of equitable relief, since such ancillary relief reflects a "common sense solution of the problem courts * * * face in attempting to do complete justice * * *." Morrow v. District of Columbia, 417 F.2d 728, 738 (C.A. D.C., 1969). Nor is the lack of precedent, or a mere novelty in incidence, an obstacle to the award of ancillary relief. As this Court has stated, "any circumstance * * * [may command] itself to a court of equity as a reason for granting the relief sought." View Crest Garden Apts., Inc. v. United States, 281 F. 2d 844, 849 (C.A. 9, 1960). "Once the equity jurisdiction of the district court has been properly invoked * * *, the court possesses the necessary power to fashion an appropriate remedy." Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1103 (C.A. 2, 1972).

The appellants do not, and cannot, contest the ample judicial authority upholding the power of the federal courts to appoint receivers at the request of the Commission, including receivers who conserve the assets

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37/ And see the cases set forth in n. 35, supra.

and manage the business of corporate defendants on Commission actions, 38/ receivers who preside over the orderly liquidation of the assets of a corporation, 39/ and receivers who make an investigation and pursue claims on behalf of the corporations they were appointed to serve. 40/ And yet, the appellants assert (H. Br. 2) that no litigated case has ever upheld the Commission's entitlement to relief comparable to the special counsel appointed in the Mattel case. That assertion is erroneous.

Thus, for example, in Securities and Exchange Commission v. Koenig, 469 F.2d 198 (C.A. 2, 1972), the court of appeals had occasion to review an order of the district court appointing a so-called "limited receiver" with the power, inter alia, to supervise a defendant corporation's public disclosures, to investigate and make a public report on certain "secret securities transactions" and to make preparation for, and hold, a shareholders' meeting at which directors would be elected. Refusing to overturn the district court's exercise of its discretion, the court of appeals found each and every power given to the receiver "appropriate to the facts of the case." Id. at 202.

And, in Securities and Exchange Commission v. Fifth Avenue Coach Lines, Inc., 289 F. Supp. 3, 42 (S.D. N.Y., 1968), affirmed, 435 F.2d 510 (C.A. 2, 1970), the district court appointed a receiver not only to administer the affairs of the corporate defendant, but also "to prosecute * * *" an action

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38/ See, e.g., Securities and Exchange Commission v. United Financial Group, supra, 474 F.2d at 358-359.

39/ See, e.g., Securities and Exchange Commission v. Arkansas Loan & Thrift Corp., 294 F. Supp. 1233, 1237 (W.D. Ark., 1969), affirmed sub nom., Securities and Exchange Commission v. Bartlett, 422 F.2d 475 (C.A. 8, 1970).

40/ See, e.g., Securities and Exchange Commission v. Koenig, 469 F. 2d 198 (C.A. 2, 1972); Securities and Exchange Commission v. Arkansas Loan & Thrift Corp., supra.; Securities and Exchange Commission v. Fifth Avenue Coach Lines, Inc., 289 F. Supp. 3, 42-43 (S.D.N.Y., 1968), affirmed, 435 F.2d 510, 518 (C.A. 2, 1970).

administer the corporate defendant, but also "to prosecute * * *" an action against a former corporate insider and "to investigate and ascertain whether there are other actions that can be maintained." 41/

Similarly, in Securities and Exchange Commission v. Arkansas Loan & Thrift Corp., 294 F. Supp. 1233, 1237 (W.D. Ark., 1969), affirmed, sub nom., Securities and Exchange Commission v. Bartlett, 422 F.2d 475 (C.A. 8, 1970), the district court authorized the appointment of a receiver with powers

> "to institute, prosecute and defend, * * * intervene in or become party to such actions or proceedings in state or federal courts as may in his opinion be necessary or proper for the protection, maintenance and preservation of the assets of the defendants or the carrying out of the terms of the order * * *."

And, in Securities and Exchange Commission v. Beisinger Industries Corporation, 421 F. Supp. 691 (D. Mass., 1976), affirmed, 552 F.2d 15 (C.A. 1, 1977), the Commission moved for the appointment of a "special agent" to bring a registrant in compliance with the periodic reporting requirements of the Securties Exchange Act, after the registrant had failed to comply with a court order to file its reports. Noting that "[t]here can be little doubt of the power of the court to fashion such remedial relief as may be required to effecutate the purposes of the federal securities laws and to provide effective enforcement of its decrees," the court ordered the appointment of a special agent "to bring the registrant into compliance with the reporting requirements

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41/ The action in Fifth Avenue was brought pursuant to both the Securities Exchange Act and the Investment Company Act of 1940, 15 U.S.C. 80a-1, et seq. While Section 42(e) of the latter statute, 15 U.S.C. 80a-41(e), does specifically authorize a district court, "as a court of equity * * *," to appoint a receiver, there is no explicit authorization in the Act for the appointment of a receiver to perform investigative and prosecutorial functions. Those duties were authorized in Fifth Avenue pursuant to the same equitable powers that permitted the district court in the Mattel case to approve an analogous special counsel.

of the [Securities] Exchange Act," 42/ and to ascertain and report on the affairs of the registrant, and to report "to the court any and all transactions he considers violative of the Order of Preliminary Injunction, and to seek immediately to restrain such transactions by the court." 43/

While precise precedents for the Mattel consent decree are not necessary (see page 27, supra), the foregoing examples of litigated decrees should serve to dispel the appellants' mistaken view that the Mattel consent decree was unusual, unprecedented or inappropriate. 44/

42/ 421 F. Supp at 695-696.

43/ Cf. International Controls Corp. v. Vesco, 490 F.2d 1134 (C.A. 2), certiorari denied, 417 U.S. 932 (1974), where the court of appeals affirmed an injunction preventing the former shareholders of International Controls Corporation from interfering, through a state court action, with the activities of a special counsel appointed by consent in a Commission enforcement action.

44/ The appellants' remaining, constitutional, arguments merit only brief response.

Thus, they assert (H. Br. 16) that the Mattel court's reservation of jurisdiction with respect to the consent decree violates Article III of the Constitution because the court is not called upon to exercise any of its judicial powers. But, that argument overlooks the fact that the court made a judicial determination when the consent decrees were entered, and that its retention of jurisdiction properly invokes judicial processes to insure that the court's mandate is carried out. See, e.g., Securities and Exchange Commission v. Beisinger Industries Corp., supra, 552 F.2d 15, and Securities and Exchange Commission v. Radio Hill Mines Co., Ltd., 479 F.2d 4 (C.A. 2, 1974). And, nothing in the consent decree contemplated that the special counsel would (or will) make proposals for the court to implement. In this context, the appellants' reliance upon Vermont v. New York, 417 U.S. 270 (1974), is misplaced. There, the Supreme Court, exercising its original jurisdiction, had appointed a special master to work out a settlement between the parties. The special master recommended a consent decree which would have authorized the appointment of a second special master to oversee the terms of the consent decree. The Court disapproved this proposal because, unlike the situation here, the special master would have had to administer the specific terms of the settlement decree and seek advisory rulings from the Court with respect to contested issues of fact.

(continued)

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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September 1977

44/ (continued)

Equally unavailing is the appellants' inconsistent argument (H. Br. 17) that the Mattel court violated Article III of the Constitution because it thrust itself into "the decidedly unjudicial realm" of supervising an investigation into violations of the federal securities laws. But, the decree does not require, or contemplate, any involvement by the court in a law enforcement investigation. All that occurred here was the court's retention of jurisdiction until its order is completely effectuated. While the special counsel could, and did, consult with the court concerning the scope of the order, the court at no time, sua sponte, made suggestions as to the substantive content of the investigation or the manner in which it should be conducted. Webster Eisenlohr v. Kalodner, 145 F. 2d 316 (C.A. 3, 1944), upon which the appellants rely (H. Br. 17), is, therefore, irrelevant here. In that case, a judge had attempted, sua sponte, to appoint a special master to investigate the circumstances of an event with which the judge was personally dissatisfied.

STATUTORY APPENDIX

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b)

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

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

Section 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(a)

SEC. 13.- (a) Every issuer of a security registered pursuant to section 12 of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 12, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

Section 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(d)

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States, the district court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. 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.

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C.78aa

SEC. 27. The district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

Rule 10b-5 under the Securities Exchange Act of 1934, 17 CFR 240.10b-5

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

(a) To employ any device, scheme, or artifice to defraud,

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

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Rule 13a-13 under the Securities Exchange Act of 1934, 17 CFR 240.13a-13

(a) Except as provided in paragraphs (b) and (c) of this section, every issuer which has securities registered pursuant to section 12 of the Act and which is required to file annual reports pursuant to section 13 of the Act on Form 10-K (§ 249.310 of this chapter), 12-K (§ 249.312 of this chapter) or U5S (§ 249.450 of this chapter) shall file a quarterly report on Form 10-Q (§ 249.308a of this chapter) within the period specified in General Instruction A to that form, for each of the first three fiscal quarters of each fiscal year of the issuer, commencing with the first such fiscal quarter which ends after securities of the issuer become so registered.

(b) The provisions of this rule shall not apply to the following issuers:

(1) Investment companies required to file quarterly reports pursuant to § 240.13a-12; or

(2) Foreign private issuers required to file reports pursuant to § 240.13a-16.

(c) Part I of the quarterly report on Form 10-Q need not be filed by the following issuers:

(1) Life insurance companies and holding companies having only life insurance subsidiaries for quarters in fiscal years ending on or before December 25, 1978, if they do not meet the tests specified in § 210.3-16(t)(1)(i)(B);

(2) Mutual life insurance companies; or

(3) Mining companies not in the production stage but engaged primarily in the exploration for or the development of mineral deposits other than oil, gas or coal, if all the following conditions are met:

(i) The registrant has not been in production during the current fiscal year or the two years immediately prior thereto; except that being in production for an aggregate period of no more than eight months over the three-year period shall not be a violation of this condition.

(ii) Receipts from the sale of mineral products or from the operations of mineral producing properties by the registrant and its subsidiaries combined have not exceeded $500,000 in any of the most recent six years and have not aggregated more than $1,500,000 in the most recent six fiscal years.

(d) Public utilities, common carriers and pipeline carriers which submit financial reports to the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission or the Interstate Commerce Commission may, at their option, in lieu of furnishing the information called for by Part I of Form 10-Q, file as exhibits to reports on this form copies of their reports submitted to such Board or Commission for the preceding fiscal quarter or for each month of such quarter, as the case may be, together with copies of their quarterly reports, if any, for such periods sent to their stockholders.

(e) Notwithstanding the foregoing provisions of this section, the financial information required by Part I of Form 10-Q, or financial information submitted in lieu thereof pursuant to paragraph (d) of this section, shall not be deemed to be "filed" for the purpose of section 18 of the Act or otherwise subject to the liabilities of that section of the Act but shall be subject to all other provisions of the Act.

Rule 6 of the Securities and Exchange Commission Rules Relating to Investigations, 17 CFR 203.6

Transcripts, if any, of formal investigative proceedings shall be recorded solely by the official reporter, or by any other person or means designated by the officer conducting the investigation. A person who has submitted documentary evidence or testimony in a formal investigative proceeding shall be entitled, upon written request, to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees: *Provided, however,* That in a nonpublic formal investigative proceeding the Commission may for good cause deny such request. In any event, any witness, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.

Rule 7(b) and (d) of the Securities and Exchange Commission Rules Relating to Investigations, 17 CFR 203.7(b) and (d)

(b) Any person compelled to appear, or who appears by request or permission of the Commission, in person at a formal investigative proceeding may be accompanied, represented and advised by counsel, as defined in § 201.2(b) of this chapter (Rule 2(b) of the Commission's rules of practice): *Provided, however,* That all witnesses shall be sequestered, and unless permitted in the discretion of the officer conducting the investigation no witness or the counsel accompanying any such witness shall be permitted to be present during the examination of any other witness called in such proceeding.

* * *

(d) Unless otherwise ordered by the Commission, in any public formal investigative proceeding, if the record shall contain implications of wrongdoing by any person, such person shall have the right to appear on the record; and in addition to the rights afforded other witnesses hereby, he shall have a reasonable opportunity of cross-examination and production of rebuttal testimony or documentary evidence. "Reasonable" shall mean permitting persons as full an opportunity to assert their position as may be granted consistent with administrative efficiency and with avoidance of undue delay. The determination of reasonableness in each instance shall be made in the discretion of the officer conducting the investigation.