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by Brudie: Briggs

May 25, 1978

George A. Fisher, Clerk
United States Court of Appeals for
the District of Columbia Circuit
United States Courthouse
Constitution Avenue and John Marshall
Place, N.W.
Washington, D.C. 20001

Re: Securities and Exchange Commission, Plaintiff v. Aminex Resources Corporation, et al., Defendants, Alpha Associates, Aceco Associates, Indian Head Associates, Jimmy Sizemore and Letcher T. White Associates, River Associates, and Spruce Pine Land Associates, Petitioners, No. 78-8026

Dear Mr. Fisher:

Enclosed for filing in the above-captioned action are an original and three copies of the Answer of the Securities and Exchange Commission in Opposition to Petition for Leave to Appeal.

Sincerely yours,

Elisse B. Walter
Attorney

Enclosures

cc: Michael Mukasey, Esquire
Weiss Rosenthal Heller & Schwartzman
James Sargent, Esquire
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MKW/EBW/jss

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Respondent v. AMINEX RESOURCES CORPORATION, et al., Defendants, ALPHA ASSOCIATES, ACECO ASSOCIATES, INDIAN HEAD ASSOCIATES, JIMMY SIZEMORE AND LETCHER T. WHITE ASSOCIATES, RIVER ASSOCIATES, AND SPRUCE PINE LAND ASSOCIATES, Petitioners.	No. 78-8026

ANSWER OF THE SECURITIES AND EXCHANGE COMMISSION
IN OPPOSITION TO PETITION FOR LEAVE TO APPEAL

Pursuant to 28 U.S.C. 1292(b), the petitioners herein seek the extraordinary remedy of interlocutory review of an interim order (the "Order") 1/ entered (per Green, J.) in an action pending in the United States District Court for the District of Columbia. 2/ Because the petitioners were not, and are not, parties to the proceeding below; because the Order neither had the effect of compelling them to do, nor forcing them to refrain from doing, anything;

1/ A copy of the Order was filed by the petitioners with the petition.

2/ On May 8, 1978, the petitioners filed a notice of appeal from the Order as well as the petition for leave to appeal. This case has not otherwise been before this Court. There is another case currently pending before this Court, Securities and Exchange Commission v. Aminex Resources Corporation, No. 77-2054, which is an appeal from orders of the district court permanently enjoining Aminex from violations of the reporting requirements of the federal securities laws (Section 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(a), and the rules and regulations, thereunder) and granting the Commission's motion for summary judgment. That proceeding involves conduct distinct from that which is involved in the action which gave rise to the petition at issue here.

and because the Order, effectively, lasted only one month and has been terminated; the Securities and Exchange Commission, the plaintiff in the action below, respectfully urges this Court to deny the petition, based on the facts that petitioners have failed to meet the criteria for interlocutory appeals set forth in 28 U.S.C. 1292(b), and that the issues the petitioners seek to litigate are simply not appropriate for resolution in this proceeding.

STATEMENT OF FACTS

The Proceedings Below

On March 9, 1978, the Commission instituted an enforcement action against Aminex Resources Corporation ("Aminex"), a publicly-held corporation and 23 other defendants 3/ alleging violations of the antifraud, 4/ periodic reporting, 5/ and books, records and accounting controls 6/ requirements of the federal securities laws (No. 78-0410). The gravamen of the Commission's complaint was that the defendants and others engaged in schemes, undisclosed to Aminex's shareholders or the public, to misappropriate and divert at least $1.24 million of the corporate assets of Aminex and its subsidiaries, disguising these misappropriations by means of false and improper accounting in the books and records of Aminex and its subsidiaries. In addition

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3/ Seventeen of these defendants are Aminex subsidiaries and were added by an amended complaint filed on March 30, 1978.

4/ Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and rules and regulations, thereunder.

5/ Section 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(a), and rules and regulations, thereunder.

6/ Section 13(b)(2) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(b)(2).

to injunctive relief, the Commission sought equitable, ancillary, relief, in the form of, among other things, 7/ a receiver for Aminex and its subsidiaries, which were then engaged in the coal mining business.

Based upon an affidavit, memorandum and other documents filed by the Commission, and an emergency, ex parte, hearing, the court below entered a temporary restraining order on March 9, 1978, and appointed a receiver on March 10, 1978. On May 24, 1978, judgments, by consent, were entered by the district court with respect to the six defendants, other than Aminex and its subsidiaries.

Proceedings under Chapter XI of the Bankruptcy Act

On March 22, 1978, Aminex filed a petition for an arrangement under Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of New York. Upon the petition of the Commission and the request of Aminex's Board of Directors for the appointment of a receiver, the district court in New York appointed Rudolph W. Giuliani as receiver for Aminex on March 24, 1978.

Aminex's Board of Directors represented that a Chapter XI petition and a petition for the appointment of a Chapter XI receiver would be filed shortly for each of Aminex's subsidiaries. Based, in part, on that representation, the court below, in a March 31 order, extended the temporary restraining order, including the receivership solely for the subsidiaries, and substituted Mr. Giuliani as receiver for Aminex's subsidiaries.

On April 28, 1978, Chapter XI petitions were filed by most of Aminex's

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7/ The Commission also sought the establishment of a trust over the Aminex common stock owned or controlled by Jerome Matusow, and an order directing disgorgement to Aminex of all misappropriated assets.

subsidiaries, including Aminex Coal Development Corp. and Aceco, Inc., in the United States District Court for the Southern District of New York, and Mr. Giuliani was appointed Chapter XI receiver of those companies. Upon Mr. Giuliani's appointment as Chapter XI receiver, under the terms of the order entered by Judge Green in the court below on March 31, 1978, the receivership ordered by that court, as to the companies filing Chapter XI petitions, was vacated.

The Petitioners

Alpha Associates, Aceco Associates, Indian Head Associates, Jimmy Sizemore and Letcher T. White Associates, River Associates, and Spruce Pine Land Associates, the petitioners herein, are six limited partnerships 8/ which have entered into agreements with Aminex, and Aminex Coal Development Corporation 9/ and Aceco, Inc., two of Aminex's subsidiaries. The petitioners have never sought to intervene in the action. They were not, and are still not, parties to that proceeding.

The Order Sought to be Reviewed

On March 20, 1978, the district court entered an order setting forth in specific detail the duties, authorities and responsibilities of the temporary

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8/ Counsel for the receiver has indicated that there is some question as to the validity of the Petitioners' partnership status (A. at 5). That question is not pertinent to the issues discussed in this answer, and the Commission does not express an opinion concerning that question herein.

A reference herein to the petition is denoted as "(P. at)," and a reference to the answer filed by the Rudolph W. Guiliani is denoted as "(A. at)."

9/ Petitioners mistakenly refer to this company as "Aminex Coal Resources Corporation" (P. at 5).

receiver, which were implicit in the order appointing him. The March 20 order, among other things, provided that the receiver would not be liable for good faith action, unless he was grossly neglilgent.

On March 31, 1978, counsel for Mr. Giuliani met with counsel for the petitioners and discussed the contracts between the Aminex companies and the petitioners. The petitioners took the position that these agreements required the receiver to segregate coal allocable to each petitioner from other coal and to treat the proceeds of the sale of such coal as trust funds to be held for the benefit of the petitioners. The petitioners indicated that the receiver would be personally liable if he failed to conduct the business of Aminex's subsidiaries in the manner. The receiver disagreed with the petitioners' position. His position is that the transactions underlying the petitioners' claim are "fraught with irregularity," and that "the business of the Aminex subsidiaries * * * could not be so conducted" without jeopardizing the future viability of Aminex and its subsidiaries (A. at 7).

Accordingly, on April 11, 1978, the receiver sought an order from the district court, insulating him from any personal liability for not segregating coal and not treating the proceeds of the sale of coal as trust funds. The petitioners' objected, orally and in writing, to the entry of such an order. After a hearing, held on April 14, 1978, the district court granted the motion, and entered an order, providing that, effective as of March 31, 1978, the receiver would not be personally liable for not segregating coal or treating proceeds of the sale of coal as trust funds.

On April 26, 1978, the court entered the Order here at issue, which is identical in substance to the order entered on April 14, 1978, except that it includes two additional paragraphs certifying the Order pursuant to 28 U.S.C. 1292(b) and denying a stay, sought by the petitioners, pending

appeal. The Order relates only to the receiver's personal liability for not segregating coal and proceeds of the sale of coal. It does not address the question of whether Aminex and its subsidiaries are liable to the petitioners, or the question of whether the receiver is personally liable to the petitioners for not paying them any sums they are due. As noted above, by virtue of the appointment of Chapter XI receivers for Aceco, Inc. and Aminex Coal Development Corporation, the receivership for these companies in the court below, and, therefore, the Order, as it pertained to the companies pertinent to the petition, expired on April 28, 1978. On May 24, 1978, the equity receivership terminated as to any and all remaining Aminex subsidiaries.

ARGUMENT

This petition relates to a dispute between the petitioners and Aminex's subsidiaries, concerning the coal mining business in which these companies are engaged. The petitioners are concerned that they will not be paid all sums they are due under their contractual arrangements with Aminex's subsidiaries. See, e.g., P. at 8, 9, 10, 14. The Order does not affect that issue. It only insulates the temporary receiver appointed by the court below from personal liability for not segregating coal or treating proceeds of the sale of coal as trust funds. Thus, the Order is not an adjudication of the petitioners' real claim. Under these circumstances, the Commission submits that the petition does not meet the criteria for an interlocutory appeal set forth in 28 U.S.C. 1292(b) and that interlocutory review of the Order in this Court is not the appropriate proceeding in which to adjudicate the issues raised by the petitioners.

I. THE ORDER DOES NOT MEET THE CRITERIA FOR INTERLOCUTORY APPEAL SET FORTH IN 28 U.S.C. 1292(b)

Assuming, arguendo, that the petitioners have standing to bring an appeal from the Order, 10/ and that there are any issues for this Court to resolve, 11/ the Order at issue here does not meet the criteria set forth in 28 U.S.C. 1292(b), and the Commission urges this Court to refuse to permit an appeal to be taken from that order.

The Order does not present a controlling question of law — a question of law "central to the litigation that if answered as the applicant thinks it should be answered will make unnecessary a considerable expense of effort by the courts and parties." 9 Moore, Federal Practice ¶205.04, at 1110 (2d ed., 1975). The litigation in which the Order was entered is primarily concerned with violations of the federal securities laws by Aminex and the other defendants. The Order has no relation to the central issues presented by that litigation. In contrast, it relates to the conduct of a temporary equity receivership for certain of Aminex's subsidiaries,

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10/ There is a substantial question as to whether the petitioners have standing to raise the issues they seek to litigate before this Court, because they neither sought to intervene nor were parties to the district court action. See, e.g., Moten v. Bricklayers, Masons and Plasterers Int'l Union, 177 U.S. App. D.C. 77, 80, 543 F.2d 224, 227 (1976). The Commission does not suggest that the petitioners are not entitled to be heard by a court. Moreover, receiverships are intended to protect creditors, as well as investors. Nonetheless, the issue here is not whether the petitioners have the right to present their views to a court, but whether interlocutory appeal of the Order is appropriate.

11/ In our view, if this Court were inclined to grant the petition, a threshhold issue — whether the Order is moot — would have to be decided. This Court would have to confront the question of whether there are any issues remaining to litigate. The Order has expired, and it is not at all clear that, with this expiration, there are any collateral consequences to the petitioners. We raise this matter here only to suggest the inappropriateness of interlocutory review of the Order. See pp. 10-12 infra.

and the receivership is no longer in effect. Thus, no question of law "central to the litigation" is presented by the Order.

Nor will reversal of the Order save effort by the courts and the parties. As noted above, the equity receivership and, consequently, the Order are no longer in effect. 12/ Further consideration by the court below of issues relevant only to the equity receivership would certainly not be a conservation of effort.

Furthermore, immediate appeal of the Order will not "materially advance the ultimate termination of the litigation." Appellate consideration will not avoid any trial proceedings that may be necessary and will not curtail or simplify the proceedings below. The petitioners merely assert that the litigation will be advanced without any reference to the action in which the Order was entered. See P. at 12. Rather, they continually refer to the "continuing" conduct of the receiver and claim that advancement will take place because the receiver must "be compelled to deal with the operation of the Aminex subsidiaries in a realistic way." Id. Yet, the receivership of which they complain no longer exists. If they are adversely affected

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12/ It is simply not the case, as the petitioners assert, that "the Receiver may indefinitely continue to conduct the affairs of the Aminex subsidiaries without regard to the contractual obligations placed upon him by the agreements with the [petitioners]" or that "the [Order] amounts to a premature determination of the validity of the trust provisions of the Aceco agreements, the right and title to the coal and the [petitioners'] status as creditors of Aceco." (P. at 12, 14). Not only is the Order no longer operative, but it related only to the personal liability of the receiver for not segregating. It did not address the issue of any liability Aminex and its subsidiaries may have to the petitioners, or the issue of any personal liability the receiver may have for failure to pay the petitioners any sums they were due. Nevertheless, the receiver's failure to pay appears to be the focus of the petitioners' complaints about his conduct of the affairs of Aminex's subsidiaries. See, e.g., P. at 8, 10.

by the conduct of the receivership commenced and operating in the Chapter XI proceedings, this is not the appropriate forum to air these grievances. Termination of this securities enforcement litigation will not be aided in any way by the granting of the petition.

Appeal does not necessarily follow when the district court makes the certification necessary under 28 U.S.C. 1292(b). The court of appeals must still, in its discretion, grant permission to appeal. Although, as appellate courts have noted,

> "the statute does not expressly lay down standards to guide the court of appeals in its exercise of judicial 'discretion,' it would seem that the appellate court should at least concur with the district court's opinion that the proposed appeal presents a difficult central question of law which is not settled by controlling authority, and that a prompt decision by the appellate court * * * would serve the cause of justice by accelerating 'the ultimate termination of the litigation.'"

In re Heddendorf, 263 F.2d 887, 889 (C.A. 1, 1959); see 16 Wright, Miller, Cooper & Gressman, Federal Practice and Procedure, §3929, at 141 (1977). 13/ For the reasons set forth above, we believe that this Court should not concur with the district court's certification. Permission to appeal should be granted by the courts of appeals "sparingly and with discrimination * * *." Control Data Corp. v. International Business Machines Corp., 421 F.2d 323, 325 (C.A. 8, 1970) (citations omitted).

13/ Courts have stated that Section 1292(b) should be utilized only in "exceptional" cases. E.g., Kraus v. Board of County Road Comm'rs, 364 F.2d 919 (C.A. 6, 1966); United States Rubber Co. v. Wright, 359 F.2d 784, 785 (C.A. 9, 1966); Gottesman v. General Motors Corp., 268 F.2d 194, 196 (C.A. 2, 1959); see Report of the Committee on Appeals from Interlocutory Orders of the District Court, 1958 U.S. Code Cong. and Admin. News 5260-5261.

II. THE ISSUES SOUGHT TO BE PRESENTED ON REVIEW OF THE ORDER ARE NOT APPROPRIATE FOR RESOLUTION IN THIS PROCEEDING

Assuming, arguendo, that this Court finds that the petition meets the criteria set forth in 28 U.S.C. 1292(b), the Commission nevertheless urges this Court, in the exercise of its discretion, to refuse to entertain an appeal by the petitioners from the Order, because the issues presented by the Order are not appropriate for resolution by this Court in this proceeding. The Order only provided that the receiver — during the period from March 31 to April 28, 1978 — would not be personally liable for not segregating coal or treating as trust funds proceeds of the sale of coal. It does not apply to the conduct of the Chapter XI receiver, whose liability is governed by applicable law and any orders entered by the bankruptcy court. Thus, the Order does not "allow the Receiver to demand the benefits of the executory contracts with the [petitioners] without accepting the burdens as well," as the petitioners claim (P. at 14). In addition, as noted above, the Order did not address the issue of any personal liability the receiver may have for not paying the petitioners any sums they are due. See note 12, supra.

If all sums the petitioners are due eventually are paid to them, they will have no quarrel with the fact that the receiver did not treat proceeds of sale of coal as trust funds and did not segregate coal. Moreover, if a court faced with the issue finds that no sums are due to the petitioners, they were not harmed by the receiver's failure to segregate. And, if that court finds that money is owing to the petitioners, but the receiver was not at fault, or less than grossly negligent, 14/ in not segregating, the

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14/ The March 20 order of the court below provided that the receiver would not be liable for good faith action, unless he was grossly negligent. See pp. 4-5 ,supra.

petitioners would not have a personal claim against the receiver. Accordingly, if any of these situations arises in the future, the issues presented on review of the Order, if any, would be mooted. 15/

The remaining possible fact situation is a finding by a court that the petitioners are due certain sums, which have not been paid, and that the receiver's failure to segregate was improper. If the petitioners can establish that the receiver's failure to segregate was improper, they should also be able to demonstrate to that court that the receiver's failure to pay them was improper. If that court, in the absence of the entry of the Order, would hold that the receiver is personally liable to the petitioners because he failed to pay them, the court must confront the issue of whether the Order has any collateral estoppel effect which would preclude it from holding that the receiver is personally liable for failure to pay the petitioners. That is the only fact situation in which the issues presented on review of the Order could possibly be of any import to the petitioners. We submit that the petitioners would have an opportunity to bring their concerns before a judicial tribunal at that juncture, and that, particularly since it is only if a series of contingencies should occur that the petitioners could be aggrieved by the Order, this Court should refuse to entertain an interlocutory appeal from the Order.

15/ See n. 11, supra. "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." North Carolina v. Rice, 404 U.S. 244, 246 (1971); see, e.g., Weinstein v. Bradford, 423 U.S. 147, 149 (1975); DeFunis v. Odegaard, 416 U.S. 312, 319 (1974). Even if a court were not barred jurisdictionally from hearing the issues, we submit that a court, as a matter of sound judicial administration, should refuse to decide the questions. See Alton & Southern Ry. Co. v. International Ass'n of Machinists & Aerospace Workers, 150 U.S. App. D.C. 36, 40-42, 463 F.2d 872, 876-878 (1972).

CONCLUSION

For the foregoing reasons, this Court should deny the petition for leave to appeal.

Respectfully submitted,

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ELISSE B. WALTER
Attorney

Dated: May 25, 1978
Washington, D.C.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 25th day of May, 1978, a copy of the Answer of the Securities and Exchange Commission in Opposition to Petition for Leave to Appeal was caused to be served on each of the following by depositing said copies in the United States mail, postage prepaid, at Washington, D.C.:

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