IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellant

v.

SAMUEL OKIN, Defendant-Appellee

TRANSCRIPT OF RECORD

Appeal from the District Court of the United States
For the Southern District of New York.

The Legal Intelligencer, 222 N. 15th St., Phila.

STATEMENT UNDER RULE XIII

This suit was commenced on October 2, 1942.

The parties are as set forth in the above caption.

The complaint was filed on October 2, 1942.

The motion for a preliminary injunction was made on October 2, 1942.

The temporary restraining order was made on October 2, 1942.

The motion .to dismiss the complaint and to vacate the temporary restraining order was made on October 3, 1942.

The amended complaint was filed on October 6, 1942.

The stipulation agreeing that defendant's motion to dismiss the complaint and vacate the temporary restraining order shall be considered as addressed to the amended complaint, that defendant's motion shall be heard simultaneously with plaintiff's motion for a preliminary injunction, and that defendant's and plaintiff's affidavits in support of their respective motions shall be deemed in opposition to the other's motion was made on October 6, 1942.

The motions were heard before the Honorable Samuel Mandelbaum, Judge of the United States District Court for the Southern District of New York, on October 6, 1942.

No questions were referred to a commissioner, master or referee.

Defendant was not arrested, bail was not taken and property was not attached, or arrested.

The order appealed from was entered on October 9, 1942.

The appeal was taken on October 10, 1942.

Summons

DISTRICT COURT OF THE UNITED STATES
FOR THE
SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 19-354

SECURITIES AND EXCHANGE COMMISSION
Plaintiff

V.

SAMUEL OKIN Defendant

To the above named Defendant:

You are hereby summoned and required to serve upon Edward H. Cashion and Mayer U. Newfield, plaintiff's attorney, whose address is 120 Broadway, N. Y. C. an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

GEORGE J. H. FOLLMER,
Clerk of Court.

Date: October 3rd, 1942.

[Seal of Court]

[TITLE OF DISTRICT COURT AND CAUSE]

AMENDED COMPLAINT

1. It appears to the plaintiff that the defendant is about to engage in acts and practices which will constitute violations of Section 12 (e) of the Public Utility Act of 1935, 15 U.S.C. 79k (g) and Rule U-61 thereunder. Plaintiff, pursuant to Section 18 (f) of that Act, 15 U.S.C. 79r (f), brings this action to enjoin such acts and practices.

2. This action arises under Section 25 of the Public Utility Act of 1935, 15 U.S.C. 79y.

3. Electric Bond and Share Company is a holding company registered with the Securities and Exchange Commission pursuant to Section 5 (b) of said Act, 15 U.S.C. 79e (b).

4. Pursuant to the authority conferred by Sections 12 (e) and 20 (a) of the Public Utility Act of 1935, the plaintiff, Securities and Exchange Commission, has prescribed Rule U-61 governing the solicitation of proxies regarding any security of a registered holding company. Rule U-61 provides that solicitations of proxies regarding any security of a registered holding company shall be subject to Regulation X-14 adopted by the plaintiff pursuant to Sections 14 (a) and 23 (a) of the Securities Exchange Act of 1934.

5. On September 16, 1942, Electric Bond and Share Company, in compliance with Rule X-14A-4 (b) of Regulation X-14, filed with the plaintiff a notice, proxy statement and form of proxy in connection with an annual meeting of stockholders scheduled to be held on October 14, 1942.

6. On September 24, 1942, the defendant, in purported compliance with Rule X-14A-4 (b) of Regulation X-14 filed with the Commission preliminary copies of a letter addressed to the common stockholders of Electric Bond and Share Company soliciting such stockholders as follows: “DO NOT SIGN ANY PROXIES” solicited by the management of Electric Bond and Share Company and to “REVOKE SAME IF YOU HAVE SIGNED THEM”.

7. The proxy soliciting material described in paragraph 6 and filed by the defendant with the plaintiff contains a statement which, at the time and in the light of the circumstances under which it was made, is false and misleading with respect to material facts, namely:

(a) “. . . the preferred dividend requirements of Electric Bond and Share Company have already caused a deficit of approximately $1,250,000 this year and if the conditions remain the deficit will be approximately $2,500,000 by the end of this year,” when in fact there has been no deficit this year since the net income of the company for the first six months of 1942 amounted to approximately $2,661,000, and its earned surplus as of June 30, 1942, amounted to approximately $61,883,000.

8. The proxy soliciting material described in paragraph 6 and filed by the defendant with the plaintiff omits to state material facts necessary to be stated in order to make the statements made therein not false or misleading, as follows:

(a) The defendant states that he “. . . made strenuous protest and succeeded in stopping . . .“ an intended subordination of Electric Bond and Share Company’s claim of

$52,295,000 against United Gas Corporation to a proposed issue of $70,000,000 of United Gas Corporation bonds, which subordination would have caused losses to Electric Bond and Share Company "which might have amounted to as much as $20,000,000" and that he ". . . succeeded in stopping this . . . attempted, outrageous dissipation of assets," when the fact is and the defendant omitted to state that at the time of the proposed financing, proceedings were pending which has been instituted by the plaintiff against Electric Bond and Share Company and United Gas Corporation, in which the status of the latter's indebtedness and the propriety of payment thereon to Electric Bond and Share Company were issues raised by the plaintiff for determination, and that therefore whether or not abandonment of the proposed subordination prevented any losses to Electric Bond and Share Company is necessarily dependent upon the ultimate decision by the plaintiff and by the courts as to the status of such claim.

(b) The defendant states that he ". . . used every means afforded by law to protect and conserve the assets of Electric Bond and Share Company... and in doing it" he was compelled to commence legal action against the company's management and against the plaintiff, when the fact is and the defendant omits to state that he was unsuccessful in all of such litigation and that the litigation was not of a nature that would protect or conserve the assets of the said company even if successful, but would merely relate to the amount of the claims of various classes of security holders to the existing assets.

(c) The defendant states "I own Nine Thousand (9000) shares of the common stock of Electric Bond and Share Company" when the fact is and defendant omits to state that these shares were purchased between December 1941 and April 1942 at an approximate aggregate cost of only $9,000.

(d) The defendant states that he is merely soliciting the common stockholders of Electric Bond and Share Company not to sign the proxies solicited by the management and to "REVOKE SAME IF YOU HAVE SIGNED THEM" and that "The management of the company must be prevented from obtaining a quorum for this stockholders' meeting in order to compel the adjournment of the meeting so that the stockholders of the company can arrange to protect their valuable interests," when the fact is and the defendant omits to state that in the event the stockholders' meeting is adjourned the defendant intends to solicit proxies for the election of a slate of directors to be named by a stockholders' committee which he proposes to form, and that if such slate of directors is elected, the defendant expects to be named an officer of Electric Bond and Share Company.

9. Transmittal of proxy soliciting material containing the statements and omissions set forth in paragraphs 7 and 8 will involve a violation of Rule X-14A-5 of Regulation X-14.

10. The proxy soliciting material described in paragraph 6 fails to comply with the provisions of Item 3 (a) of Regulation X-14.

11. The proxy soliciting material described in paragraph 6 fails to comply with the provisions of Item 8 (b) of Regulation X-14.

12. The proxy soliciting material described in paragraph 6 fails to comply with the provisions of Item 5 (c) in that such material fails to state that in the event the stockholders' meeting is adjourned the defendant intends to solicit proxies for the election of a slate of directors to be named by a stockholders' committee which he proposes to form, and that if such slate of directors is elected the defendant expects to be named an officer of Electric Bond and Share Company.

13. The defendant, unless restrained, will on or about October 2, 1942, use the mails and means and instrumentalities of interstate commerce to transmit to the common stockholders of Electric Bond and Share Company the proxy soliciting material described in paragraph 6.

14. In violation of Rule X-14A-4 (a) of Regulation X-14, the defendant, beginning on September 29, 1942, four (4) days prior to the expiration of the ten-day waiting period prescribed by Rule 14A-4 (b), mailed to approximately 7500 common stockholders of Electric Bond and Share Company the proxy soliciting material described in paragraph 6.

WHEREFORE, the plaintiff demands a temporary restraining order, a preliminary injunction, and a final judgment restraining the defendant, his servants, agents, employees, attorneys and assigns, and each of them from

(a) making use of the mails or of any means or instrumentality of interstate commerce, or otherwise, to solicit or to permit the use of his name to solicit any proxy, consent or authorization with respect to the common stock of Electric Bond and Share Company, or any other security, in contravention of rules and regulations prescribed by the Securities and Exchange Commission pursuant to Sections 12 (e) and 20 (a) of the Public Utility Act of 1935;

(b) making use of the mails or of any means or instrumentality of interstate commerce to solicit any proxy, consent or authorization in respect of the common stock of Electric Bond and Share Company or any other security by means of any form of proxy, notice of meeting or communication containing any statement which at the time and in the light of the circumstances under which it was made is false or misleading with respect to any material fact or omits to state any material fact necessary to be stated in order to make the statements therein not false or misleading concerning:

(1) the company's financial condition;

(2) claims of the company against other persons;

(3) litigation instituted against the company's management;

(4) the defendant's ownership of shares of the company or his financial stake in the company;

(5) the purpose of any solicitation made by the defendant; or any other statement which at the time and in the light of the circumstances under which it is made is false or misleading with respect to any material fact or omits to state any material fact necessary to be stated in order to make the statements made therein not false or misleading, similar to those specifically set forth above or of similar purport or object.

EDWARD H. CASHION,
Counsel.

MAYER U. NEWFIELD,
Attorney.

IRVING J. GALPEER,
Attorney.

SECURITIES AND EXCHANGE COMMISSION,
120 Broadway,
New York, New York.

State of New York
County of New York
City of New York

Edward H. Cashion, being duly sworn, deposes and says that he is Counsel for the Securities and Exchange Commission, plaintiff in the foregoing action, that he has read the amended complaint and that to the best of his knowledge, information and belief there is good ground to support the allegations therein.

EDWARD H. CASHION.

Subscribed and sworn to before me this 5th day of October, 1942.

Notary Public.

[TITLE OF DISTRICT COURT AND CAUSE]

TEMPORARY RESTRAINING ORDER

It appearing to the satisfaction of the Court on a verified complaint, the affidavit and exhibits herein, that prima facie the plaintiff is entitled to an order restraining the defendant from soliciting proxies of the common stockholders of Electric Bond & Share Company to be used at a stockholders' meeting to be held on October 14, 1942, in violation of Section 12 (e) of the Public Utility Act of 1935 and Rule U-61 of the Rules and Regulations thereunder and Rule X-14A-4 (b) of Regulation X-14 promulgated under the Securities Exchange Act of 1934, and

It further appearing to the Court that the defendant at or about the time the complaint in this action was filed, is about to engage in acts and practices which will constitute violations of Section 12 (e) of the Public Utility Act of 1935 and Rule U-61 of the Rules and Regulations thereunder and of Regulation X-14 promulgated under the Securities Exchange Act of 1934, in that he intends to solicit the common stockholders of Electric Bond & Share Company to refuse to sign proxies which have been solicited by the management of Electric Bond & Share Company and to revoke the same if they have been signed by such common stockholders, all in violation of Section 12 (e) of the Public Utility Act of 1935, and

It further appearing that unless a temporary restraining order without notice issue forthwith the defendant, in violation of Section 12 (e) of the Public Utility Act of 1935 will make use of the mails or means or instrumentalities of interstate commerce or otherwise to solicit proxies, consents, or authorizations in respect of the common stock of Electric Bond & Share Company or will make use of the mails or means or instrumentalities of interstate commerce or otherwise to transmit to the common stockholders of Electric Bond & Share Company the proxy material described in the complaint before plaintiff's motion for a preliminary injunction can be heard or determined and that it the plaintiff will therefore be denied effective relief

It is hereby ordered that the defendant SAMUEL OKIN, his servants, agents, employees, attorneys and assigns, and each of them, be restrained from

(a) making use of the mails or of any means or instrumentality of interstate commerce or otherwise to solicit or to permit the use of his name to solicit any proxy, consent or authorization with respect to the common stock of Electric Bond & Share Company or any other security in contravention of the Rules and Regulations prescribed by the plaintiff Securities and Exchange Commission pursuant to Section 12 (e) and Section 20 (a) of the Public Utility Act of 1935;

(b) making use of the mails or of any means or instrument of interstate commerce to solicit any proxy, consent or authorization in respect of the common stock of Electric Bond & Share Company or any other security by means of any form of proxy, notice of meeting or communication containing any statement which at the time and in the light of the circumstances under which it was made, is false or misleading with respect to any material fact, or omit to state any material fact necessary to be stated in order to make the statement therein not false and misleading concerning:

(1) the company's financial condition;

(2) claims of the company against other persons;

(3) litigation instituted against the company or its management;

(4) the defendant's ownership of shares of the company or his financial stake in the company;

(5) the purpose of any solicitation made by the defendant

or any other statement which at the time and in the light of the circumstances under which it is made is false or misleading with respect to any material fact, or omitting to state any material fact necessary to be stated in order to make the statement made therein not false or misleading, similar to those specifically set forth above or of similar purport or object;

(c) making use of the mail or of any means or instrumentality of interstate commerce or otherwise to transmit to the common stockholders of Electric Bond & Share Company proxy material soliciting stockholders to refuse to sign proxies which have been solicited by the management of Electric Bond & Share Company or to revoke such proxies if they have been signed with respect to a stockholders' meeting to be held on October 14, 1942, in violation of Section 12 (e) of the Public Utility Act of 1935 or in contravention of Rule U-61 thereunder or Regulation X-14 promulgated under the Securities Exchange Act of 1934.

It is further ordered, for good cause shown, that notice of motion for a preliminary injunction shall be sufficient if given on or before the 6th day of October, 1942; that a copy of this order, together with a copy of the complaint filed herein, be served on the defendant forthwith, and that this order shall expire at 2 P. M. on the 9th day of October, 1942.

(s) ALFRED C. COXE,
U. S. D. J.

Dated: Oct. 2, 1942
New York, N. Y.
5:30 P.M.

[TITLE OF DISTRICT COURT AND CAUSE]

AFFIDAVIT OF NATHAN SAMETH

STATE OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

Nathan Sameth, being duly sworn, deposes and says:

I am employed by the Securities and Exchange Commission as Associate Analyst in the Commission's Proxy Unit.

Mr. Samuel Okin called at my office at 4:30 P. M. on Thursday, September 24, 1942, and left with me three copies of a letter which he stated he proposed to send to common

stockholders of Electric Bond and Share Company. A copy of the proposed letter, marked Exhibit A, is attached hereto and made a part hereof. He explained that because of the proximity of the date of the stockholders' meeting he wished to obtain acceleration of the 10-day "waiting period" prescribed by Rule X-14A-4 (b) of Regulation X-14, and to that end he requested that I give him in the conference any suggestions I might have as to the manner in which the material should be revised so that a recommendation to the Commission for acceleration of the 10-day "waiting period" could be made forthwith by the staff. In the course of my conference with Mr. Okin, which lasted for three hours, I indicated the general character of certain revisions that I considered necessary but stated that I wished to confer with other members of the staff including members of the Commission's Public Utility Division before I gave him my final comments.

Mr. Okin returned to my office the next afternoon, Friday, September 25. Upon completion of certain discussions on the matter with other members of the staff, at approximately 7 P.M. I entered into a conference with Mr. Okin which lasted until 11 P.M. Mr. Okin agreed to make several changes, but there were a number of suggested revisions which Mr. Okin refused to incorporate in his soliciting material, and these were left pending at the close of the conference with the understanding that Mr. Okin was to telephone me about noon the next day (Saturday, September 26) for a final decision as to the position of the office on these particular points. I had in my hands at the end of the conference, (1) a copy of Mr. Okin's original letter on which I had noted the exact language of the revisions which Mr. Okin had agreed to make, (2) two riders written by Mr. Okin which he agreed to place at appropriate places in the original letter, and (3) a statement which Mr. Okin had prepared which he stated he intended to transmit to stockholders in the same envelope with his soliciting letter.

Mr. Okin telephoned me on Saturday, September 26, and I told him that it was the opinion of members of the staff that he should make the changes which had been left pending for final determination on the previous evening but which had not been incorporated in the revised document I had on hand. Mr. Okin stated that he would not make these changes and that he was abandoning any request he might have previously made for acceleration of the 10-day period. He stated that whatever revisions he had agreed to make the previous evening were concessions on his part which he made merely to facilitate acceleration, but since such acceleration was no longer an issue, he proposed to mail out his letter in its original form without changes or additions at the expiration of the 10-day period. He stated that in his opinion the receipt by the Commission of a single copy of the letter on September 23 constituted a preliminary filing even though Rule X-14A-4 (b) requires three copies to be filed, inasmuch as he provided me on September 24 with several additional copies of his proposed letter. He said that under the circumstances he would begin mailing his letter 10 days subsequent to Wednesday, September 23.

I made it clear to Mr. Okin that his letter very patently failed to comply with the requirements of Item 3 of Regulation X-14 concerning the costs of the solicitation but Mr. Okin did not revise his earlier statement that he proposed to mail out the letter in its original form without any changes or additions.

The following were among the points I discussed with Mr. Okin in the above-mentioned conferences:

(1) Mr. Okin's letter states that he forced the management of Electric Bond and Share Company to abandon the proposed subordination of its claim of $52,295,000 of indebtedness against United Gas Corporation to a proposed issue of $70,000,000 of United Gas bonds thereby preventing an "outrageous dissipation of assets" and "losses which might have amounted to as much as $20,000,000." I informed Mr. Okin that this statement would be misleading, unless he also advised stockholders that at the time of the proposed financing, proceedings were pending which had been instituted by the Securities and Exchange Commission against Electric Bond and Share Company and United Gas Corporation in which the status of the latter's indebtedness and the propriety of payment thereon to Electric Bond and Share Company were issues specifically raised by the Commission for determination and that, therefore, any judgment as to whether or not abandonment of the proposed subordination prevented any losses to Electric Bond and Share Company was necessarily dependent upon the ultimate decision by the Securities and Exchange Commission and possibly by the courts as to the status of the claim.

(2) Mr. Okin's letter stated that he was compelled to cause certain actions to be commenced against the management of Electric Bond and Share Company in the Supreme Court of the State of New York and against the Securities and Exchange Commission. I advised Mr. Okin that the statement would be misleading unless supplemented by a statement that in his action for injunctive relief his petition for temporary injunction had been denied; that in his mandamus proceeding his petition was denied and a cross action for dismissal was granted; and that his action against the Securities and Exchange Commission for an injunction was dismissed on motion of the Commission.

(3) Mr. Okin's letter states that "The present management of Electric Bond and Share Company refuses to enforce the legal right of Electric Bond and Share Company to purchase its preferred stock by tenders or in the open market using therefor the $24,000,000 in cash and short-term securities which produce hardly any income, whereas the preferred dividend requirements of the Electric Bond and Share Company have already caused a deficit of approximately $1,250,000 this year, and if the conditions remain the deficit will be approximately $2,500,000 by the end of this year." I told him that this statement would be misleading unless he avoided use of the term "deficit" in view of the fact that the company's net income for the first six months of 1942 amounted to $2,661,000 and its earned surplus at June 30, 1942, amounted to $61,883,000.

(4) I told Mr. Okin that in order to comply with the provisions of Item 3 (a) of Regulation X-14, he must add to his letter a statement to the effect that the expenses of the proxy solicitation would be borne by him and, that in order to comply with the provisions of Item 3 (b), he must state that he proposed to make solicitations by telephone at an estimated aggregate cost of $50.

(5) I told Mr. Okin that, in order to comply with the provisions of Item 5 (c) of Regulation X-14, he should state in his letter that, in the event the stockholders' meeting was adjourned, he intended to solicit proxies for the election of a slate of directors to be named by a "stockholders' committee" which he proposed to form and that if such slate of directors were elected, he expected to be named an officer of Electric Bond and Share Company.

(6) Mr. Okin's letter states that he is the owner of 9,000 shares of common stock of Electric Bond and Share Company. In light of the representations he was making to other stockholders, in view of his intention to become an officer of the company, and in view of the fact that stockholders might contemplate his financial stake in Electric Bond and Share Company in terms of the cost of their own shares, whereas he purchased his shares at an approximate aggregate cost of only $9,000, I stated that his statement of stock ownership would be misleading unless supplemented by a statement that all these shares were purchased between December 1941 and April 1942.

/s/ NATHAN SAMETH

Sworn to and subscribed before me this 2nd day of October 1942.

/s/ EDITHA L. HILL,
Notary Public.

EXHIBIT "A"

IMPORTANT
DO NOT SIGN ANY PROXIES
REVOKE SAME IF YOU HAVE SIGNED THEM

SAMUEL OKIN
32 Broadway
New York
Whitehall 4-5800

September 18, 1942.

TO THE COMMON STOCKHOLDERS OF ELECTRIC BOND AND SHARE COMPANY

I own Nine thousand (9,000) shares of the common stock of Electric Bond and Share Company.

In January, 1942, the present management of the Electric Bond and Share Company, without the consent of stockholders, agreed to subordinate the claims of $52,925,000 which the Electric Bond and Share Company has against the United Gas Corp. These

claims represent the sum of $52,925,000 paid by Electric Bond and Share Company to United Gas Corp. for bonds aggregating $25,000,000 and advances amounting to $27,925,000. The present management of Electric Bond and Share Company agreed to make this subordination in order to enable the United Gas Corp. to sell $75,000,000 in bonds to insurance companies and instead of the United Gas Corp. using these moneys to pay to the Electric Bond and Share Company the $52,925,000, as aforesaid, the present management of Electric Bond and Share Company intended to permit the United Gas Corp. to use these moneys to redeem the first preferred stock of the United Gas Corp., pay a premium for redemption and arrearages thereon, all of which would have amounted to approximately $55,000,000.

When I learned of the foregoing, I made strenuous protest and succeeded in stopping this intended subordination and attempted, outrageous dissipation of assets.

If the subordination had taken place, it would have caused losses to Electric Bond and Share Company which might have amounted to as much as $20,000,000 and would undoubtedly have buried for all future time this $52,925,000 claim, which is the most important asset which the Electric Bond and Share Company owns.

Since January, 1942, I have used every means afforded by law to protect and conserve the assets of Electric Bond and Share Company which have a value of approximately $174,000,000, and in doing it, I have been compelled to cause an action and proceeding to be commenced in Supreme Court of the State of New York against the present management of Electric Bond and Share Company; and against the Securities and Exchange Commission for an injunction, which action is now the subject matter of an appeal in the United States Circuit Court of Appeals, Second Circuit, which is to be argued in the early part of October, 1942.

The present management of Electric Bond and Share Company refuses to enforce the legal right of Electric Bond and Share Company to purchase its preferred stock by tenders or in the open market, using therefor the $24,000,000 in cash and short term securities which produce hardly any income, whereas the preferred dividend requirements of the Electric Bond and Share Company have already caused a deficit of approximately $1,250,000, this year, and if the conditions remain the deficit will be approximately $2,500,000 by the end of this year. The Securities and Exchange Commission, in my opinion without any authority in law, has refused to permit the use of any further cash by the company in the purchase of its preferred stock "pending formulation by the company of an exchange plan or other plan or plans for *distribution of assets to the preferred stockholders*," with the indication that the preferred stockholders should receive substantially more than market value. After many months, instead of in the meantime invoking the aid of a tribunal to enforce the rights of the company and prevent the deficit, now the company files a plan for exchange which does not recite any method and is neither practical nor feasible. At this time it is impossible and time does not permit me to discuss the plan nor to explain at length the many things which have happened since

January, 1942, in my efforts to conserve the assets of the company. Reference to some of the foregoing will be found in financial statistical reports.

The important thing at the present moment is that the present management has sent out requests for proxies to stockholders, for the annual meeting of stockholders on October 14th, 1942.

The management of the company must be prevented from obtaining a quorum for this stockholders' meeting in order to compel the adjournment of the meeting so that the stockholders of the company can arrange to protect their valuable interests.

Do not sign any proxies — if you have signed any proxy, immediately revoke the same by writing a letter to the Electric Bond and Share Company revoking the same — if your stock is in the name of your stock broker, immediately notify him not to sign any proxy and if a proxy has been signed, to immediately revoke the same.

It is important to prevent the management from getting the necessary proxies and thereby protect your valuable interests.

Please read this letter very *carefully* and make certain to follow the suggestions.

As soon as possible, I intend to again communicate with you and would appreciate any comments you care to make on the foregoing. **It is important that you inform me if you notified the Electric Bond and Share Company to revoke your proxy so I can make certain your proxy is not used at the stockholders' meeting.**

SAMUEL OKIN

[TITLE OF DISTRICT COURT AND CAUSE]

ORDER TO SHOW CAUSE AND AFFIDAVIT

UPON the annexed affidavit of SAMUEL OKIN sworn to the 3rd day of October, 1942, the summons and complaint and the temporary restraining order dated the 2nd day of October, 1942, in the above entitled action, the letter of Samuel Okin dated the 18th day of September, 1942, LET the plaintiff above-named or its attorneys show cause before this Court at the United States Courthouse, Room 506, in the Borough of Manhattan, City of New York, on the 5th day of October, 1942, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order should be made dismissing the complaint herein on the ground that the complaint fails to state facts sufficient to constitute a cause of action against the defendant and on the ground that the letter of Samuel Okin dated September 18th, 1942 in no way shape or manner violates Section 12 (e) of the Public Utility Holding Company Act of 1935, 15 U. S. C. 79k (g) or Rule U-61 of the Rules and Regulations thereunder or Regulation X-14 promulgated by

the Securities and Exchange Commission under the Securities Exchange Act of 1934 and upon the further ground that the letter of September 18, 1942 is not and does not constitute a solicitation of any proxy, power of attorney, consent or authorization regarding any security of a registered holding company or a subsidiary company thereof as provided in said Section 12 (e) of the Public Utility Holding Company Act of 1935, and upon the further ground that the said letter of Samuel Okin dated September 18, 1942, is true in every respect and that not a single statement therein is in any way, shape or manner, false or misleading, and why an order should not be made vacating the temporary restraining order dated the 2nd day of October, 1942, and for such other and further relief in the premises as to the Court may seem just and proper.

SUFFICIENT CAUSE appearing therefor let service of a copy of this order and the affidavit upon which it is granted upon the attorneys for the plaintiff, Securities and Exchange Commission, on the 3rd day of October, 1942, at or before 1 P. M. be good and sufficient.

Dated, New York, October 3rd, 1942.

ALFRED C. COXE,

United States District Judge.

[TITLE OF DISTRICT COURT AND CAUSE]

STATE OF NEW YORK
COUNTY OF NEW YORK

SAMUEL OKIN being duly sworn deposes and says that [sic] is the defendant above-named and is fully familiar with all the facts hereinafter stated.

Deponent is an attorney duly admitted to practice law in this State since 1923 and is the owner of Nine thousand (9,000) shares of the common stock of Electric Bond and Share Company and is one of the largest individual common stockholder [sic] of record of the said corporation.

Prior to the early part of December, 1941, deponent was interested in investing a substantial amount of money and having been the owner of common stock of the Electric Bond and Share Company in 1937 when the same was selling for approximately $20 a share and the same having fallen in market value until it was selling for approximately $1.50 in the latter months of 1941, deponent became very much interested in the same as a possible investment particularly where the various market statistical reports estimated the net asset value of each share of common stock of said Electric Bond and Share Company to be approximately $8. Deponent became convinced from the said market reports that the said common stock had become depressed in market value because of

certain language used by the Securities and Exchange Commission in various of its Releases with respect to the sum of $52,925,000 which the said Electric Bond and Share Company claimed was due it from the United Gas Corporation by reason of the fact that the said Electric Bond and Share Company had purchased certain bonds from the said United Gas Corporation for which the former paid the latter $25,000,000 and accrued interest and the sum of $27,925,000 representing moneys loaned by the said Electric Bond and Share Company to the United Gas Corporation and which indebtedness was evidenced by the demand note of $25,925,000 of the United Gas Corporation and an open account indebtedness of $3,000,000 which had been reduced by payment to $2,000,000.

Before purchasing any common stock, deponent went to the office of the Securities and Exchange Commission at 120 Broadway, New York City, and read every Release previously issued by the said plaintiff Commission with respect to the said Electric Bond and Share Company and United Gas Corporation and their affiliated companies with the view of determining whether or not the said Commission conceded that the said sum of $52,925,000 had actually passed from the Electric Bond and Share Company —to the United Gas Corporation which represented this indebtedness and also the applications of the United Gas Corporation to issue $75,000,000 of bonds to bear 3 1/4 percent which it had arranged to sell to insurance company and the proceeds of which the said United Gas Corporation intended to pay the said indebtedness of $52,925,000 due the said Electric Bond and Share Company as hereinbefore stated. Deponent also read the Releases of the said Securities and Exchange Commission with respect to the application of Electric Bond and Share Company to use the said sum of $52,925,000 which it expected to receive from the United Gas Corporation together with other moneys from its own treasury making an aggregate sum of $60,000,000, in the purchase of the preferred stock of the said Electric Bond and Share Company. There was also read by deponent the subsequent application of Electric Bond and Share Company to use $5,000,000 of its own money in the purchase of its own preferred stock which application was approved by order of the plaintiff Commission in September, 1941.

Having thoroughly digested all the aforesaid Releases and after carefully considering the provisions of the Public Utility Holding Company Act of 1935 in so far as it granted certain power to the Securities and Exchange Commission, and being thoroughly familiar with the United States Supreme Court decisions referred to in said Releases, deponent became convinced that the common stock of Electric Bond and Share Company was a splendid investment, worth many times what it was selling for, and with that conclusion in mind deponent during December and the early part of January, 1942, purchased Four thousand (4,000) shares of the common stock of Electric Bond and Share Company on the New York Curb Exchange.

In the meantime on December 31, 1941, the said Electric Bond and Share Company filed another application to use a second sum of $5,000,000 in the purchase of the preferred stock of the said corporation and deponent being in accord with the said procedure did not even appear at the hearing set by the Securities and Exchange Commission with respect to said application in the early part of January, 1942, because deponent was of the

belief that the plaintiff Commission would grant the second application of the said Electric Bond and Share Commission as it had granted the first.

Prior thereto hearings had been held with respect to the aforesaid applications of United Gas Corporation to issue $75,000,000 in bonds and the application of Electric Bond and Share Company to use $60,000,000, as aforesaid, in the purchase of its preferred stock, and deponent did not appear because he was of the assumption during the aforesaid time that there was nothing wrong and everything was proceeding as it should.

On January 24th, 1942, deponent had a very sad awakening with respect to the said Four thousand (4,000) shares of the common stock of the said Electric Bond and Share Company which he had purchased as aforesaid in the prior month of December.

On January 24th, 1942, deponent's attention was called to the fact that there had appeared on the Dow Jones Wall Street Ticker a report to the effect that arrangements were being made in the United Gas Corporation refinancing whereby instead of the Electric Bond and Share Company receiving payment of its indebtedness of $52,925,000 from the United Gas Corporation from the proceeds of the said bonds which the latter intended to sell to insurance companies, an agreement was being made whereby Electric Bond and Share Company was to subordinate its claim of $52,925,000 to an issue of bonds in the sum of $70,000,000 by the United Gas Corporation which proceeds the United Gas Corporation with the permission of Electric Bond and Share Company would use in the redemption of the first preferred stock of the said debtor, United Gas Corporation, together with a premium for redemption and the arrearages thereon, all of which would have amounted to approximately $55,000,000.

As soon as deponent learned of the foregoing, he immediately communicated with the office of the said Electric Bond and Share Company in his effort to obtain information as to the foregoing, and being unable to due to the fact that the President of the Company was away from his office, and the Chairman of the Board of Directors did not come in on Friday which was the 24th, and since the Treasurer of the company could not give deponent the necessary information, deponent went that afternoon at about 5 P. M. and saw Mr. Priest and Mr. Boone of Reid and Priest, attorneys for Electric Bond and Share Company. The said attorneys told deponent that all they knew about the proposed subordination was that it had been the subject matter of round the table discussions between officials of the Electric Bond and Share Company, United Gas Corporation and members of the public utility staff of the plaintiff, Securities and Exchange Commission, and that it was proposed to file amendments with respect to the foregoing and have a hearing with respect to the same on either Tuesday or Wednesday, January 27th or 28th, 1942. Deponent was also told by the said attorneys for Electric Bond and Share Company that the reason why the said proposed subordination was contemplated was because they were concerned with working out the problems of the Electric Bond and Share Company system with the Securities and Exchange Commission. Deponent thereupon told the said attorneys that as a stockholder of Electric Bond and Share Company, his rights were governed solely by the said corporation and that deponent was in no way concerned with any system of companies or any other company and that he was strenuously opposed to

the said subordination which deponent then stated was in effect a present of this sum of $52,925,000 to the preferred stockholders of the debtor, United Gas Corp., that deponent when he purchased his 4000 shares of common stock in the previous month of December, 1941, had relied upon this debt of $52,925,000 being paid, and that deponent never even had the slightest notion that this debt would be subordinated and that deponent intended to use every means in his possession to prevent an unlawful raid on the treasury of the Electric Bond and Share Company.

The next evening, Saturday, January 25th, 1942, deponent went to the home of Mr. Groesbeck, the Chairman of the Board of Directors of Electric Bond and Share Company, and in no uncertain terms expressed his indignation at this attempted raid on the treasury of the Electric Bond and Share Company for the benefit of the preferred stockholders of United Gas Corp. and deponent thereupon sought to prevail upon the said Mr. Groesbeck to have the said proposed subordination withdrawn and after arguing strenuously with the said Chairman of the Board of Directors of Electric Bond and Share Company and again hearing about the so-called problems of the Electric Bond and Share Company system with the Securities and Exchange Commission which was the reason why the subordination was being agreed to, and after again telling Mr. Groesbeck that this subordination was nothing more than an unlawful raid upon the treasury of Electric Bond and Share Company for the benefit of the preferred stockholders of United Gas Corp., finally deponent told Mr. Groesbeck that deponent intended to go to Washington and arrange to be there Monday morning, January 26th, 1942, in order to express his opposition to the members of the Securities and Exchange Commission and the public utility staff of the said Commission and to explain how unlawful, unfair and unjust this proposed plan was to the stockholders of Electric Bond and Share Company. Deponent then suggested to Mr. Groesbeck that since there were legal questions involved necessitating opinions before he as a lay person could determine whether or not the legal advice being given to him and to the Company was correct under the circumstances, that an appointment be arranged for Monday morning, January 26th, 1942, in New York, that deponent would delay his trip to Washington one day, in order to thrash out the legal questions with the attorney for the Electric Bond and Share Company in the presence of Mr. Groesbeck. The latter agreed to this suggestion and said he would arrange an appointment for Monday morning, January 26th.

In the meantime on Saturday, January 24th, 1942, deponent telephoned Washington, D.C. and spoke to Mr. Milton Cohen who was a member of the Public Utility Staff of Securities and Exchange Commission and deponent expressed to Mr. Cohen over the telephone in no uncertain terms his opposition and indignation with the [sic] respect to the proposed plan of subordination and that deponent intended to be in Washington, D. C. either Monday or Tuesday, January 26th or 27th, and would see Mr. Cohen and intended to appear on any hearing to be held either Tuesday or Wednesday, January 27th or 28th.

On Monday morning, January 26th, 1942, deponent was informed by Mr. Groesbeck that he had arranged an appointment for deponent with the attorney for Electric Bond and Share Company and when deponent arrived at the office of the said attorney for the company and found that Mr. Groesbeck did not intend to be present, deponent insisted

that he be present at the discussions and another appointment was made for 2 P. M. that afternoon at the offices of the Company. Immediately thereafter deponent went to the office of Mr. Simpson, one of the directors of the Electric Bond and Share Company at 1 Wall Street and deponent expressed to Mr. Simpson the outrageousness of the proposed subordination and deponent suggested that in order to avoid any trouble that Mr. Simpson be present at the meeting to take place that afternoon as aforesaid.

At 2 P. M. on January 26th, 1942, deponent attended a meeting in the offices of the Electric Bond and Share Company at which time there were present Mr. Groesbeck, Mr. Murphy, the President of Electric Bond and Share Company, Mr. Simpson, the Director, Mr. MacLane, the Company counsel, an associate of deponent's and deponent.

This session was most hectic and deponent in no uncertain manner registered his strenuous opposition to the proposed subordination and all deponent could get from the representatives of the Company were statements about the problems of the system companies of Electric Bond and Share Company, and Mr. MacLane even ventured an opinion that the common stock had no value and that the subordination was being agreed to because they hoped in that manner to work out various problems of the various companies in the system and that while no one knew of any defect in the obligations due the Electric Bond and Share Company from the United Gas Corporation, nevertheless the Electric Bond and Share Company and its Directors intended to go through with the subordination and that if deponent did not like that fact, deponent was told by Mr. MacLane he could resort to the Courts.

Deponent told them that he knew what his rights were and that he intended to resort to all legal means to prevent this raid on the treasury of the Electric Bond and Share Company and the burial of the claim of $52,925,000 so that it would be beyond the possibility of payment by the said United Gas Corporation. Deponent stated that it was inconceivable that Directors and Officers of the Company would take it upon themselves to subordinate so large a claim constituting the most important asset of the company without consulting its stockholders who really own the assets of the company and that it was even more ridiculous when Mr. MacLane stated that after the subordination the claim of $52,925,000 against the United Gas Corporation would still be the subject matter of some kind of a determination by the Securities and Exchange Commission under the proposed plan as to the validity and to what extent and in what form the Electric Bond and Share Company would receive securities, if any, from the United Gas Corporation.

Deponent thereupon stated that those facts made the proposed subordination even more outrageous, because without subordination the question of the legality of the $52,925,000 could be determined in the proper tribunal and if declared valid, the same would be a collective item because of the tremendous assets of the United Gas Corporation and that the worst that could ever happen would be the very thing which the Company was agreeing to around the table except that under the subordination plan, the best that the company could hope for would be a determination that the claim was valid but in any event it would be subject to the $70,000,000 in bonds, and that under those circumstances it was obvious that the most sensible thing to do, since there seemed to be the feeling that

there might be litigation, would be not to subordinate but if necessary to litigate in the proper tribunal the indebtedness due Electric Bond and Share Company of $52,925,000 from the United Gas Corporation, and if successful at least there would be no prior claims.

No matter how deponent argued with the said representatives of the Electric Bond and Share Company at this meeting, they absolutely refused to rescind the proposed subordination and the result was that deponent told them that he was leaving for Washington, D. C. and intended to appear at the hearing before the Trial Examiner of the plaintiff Commission and fight the proposed subordination and resort to whatever other tribunal might be necessary to prevent the burial of this $52,920,000 claim.

Deponent arrived in Washington, D.C. on Tuesday, January 27th, 1942, and immediately went into conference with Mr. Cohen of the Public Utility Staff of the Securities and Exchange Commission and expressed his opposition to the proposed subordination and when told by Mr. Cohen that there was the feeling that the claim of the Electric Bond and Share Company after subordination would have just as good security as before subordination, deponent told Mr. Cohen that any such contention was absurd and that any person would be mentally unbalanced to think that a subordinated claim would be in the same class as the claim without subordination.

That day deponent arranged to examine approximately 5000 pages of testimony in the United Gas Corporation and Electric Bond and Share Company proceedings before the Securities and Exchange Commission, in Washington. On the same day, January 27th, deponent first conferred with Commissioner O'Brien and certain members of the Public Utility Staff of the Securities and Exchange Commission, and thereafter with Chairman Purcell, and in both meetings deponent explained at great length the injustice of the proposed subordination and the fact that there was no reason whatsoever for the said subordination.

The next day, after remaining in Washington, D.C., deponent appeared before Trial Examiner Johnson of the Securities and Exchange Commission and noted his appearance and having been told that morning by Mr. MacLane that after deponent left the office of the Electric Bond and Share Company in New York on Monday, January 26th, that it had been decided to follow deponent's suggestion and not subordinate until after a meeting of the stockholders of the Electric Bond and Share Company called for that purpose.

That afternoon deponent requested that Chairman Purcell arrange if possible for deponent's informal appearance before the Securities and Exchange Commission so that deponent could explain the details of the transactions resulting in the indebtedness due Electric Bond and Share Company from United Gas Corporation of $52,925,000. Pursuant to this request deponent was permitted and did appear informally before the Securities and Exchange Commission and in detail explained to the Commission how the $52,925,000 was due Electric Bond and Share Company and how unfair it was to consider any subordination and that United Gas Corporation should be permitted to

refinance at a lesser rate of interest and should be permitted to pay its indebtedness to Electric Bond and Share Company.

Pursuant to the request of the members of the said Securities and Exchange Commission deponent prepared and sent to the plaintiff Commission a lengthy memorandum in which deponent analyzed in the most careful manner the indebtedness of $52,925,000 due Electric Bond and Share Company and in doing so deponent reexamined the 5000 pages approximately of the hearings in the consolidated proceedings of United Gas Corporation and Electric Bond and Share Company.

Two days later, January 30th, 1942, deponent was informed by Mr. MacLane, counsel for the Electric Bond and Share Company, that after further consideration the Electric Bond and Share Company had decided not to go through with any subordination of its claim for $52,925,000 against the United Gas Corporation, and had so informed the Commission.

On January 31st, 1942, the Securities and Exchange Commission issued a long Release referring in great length to the refinancing as proposed by United Gas Corporation and how arrangements had been made for the subordination by the Electric Bond and Share Company and how after all agreement had been made, Electric Bond and Share Company had advised the Securities and Exchange Commission that as a result of conferences with a stockholder of the Company, it was apparent that litigation would arise if subordination was attempted and that under the circumstances the proposed subordination had been abandoned.

Deponent has merely touched the high spots in trying to outline the foregoing and it would take innumerable pages to tell in actual complate [sic] the voluminous amount of work which deponent was compelled to engage in in order to finally succeed in preventing this subordination. It was only due to the strenuous opposition of deponent that this subordination was prevented.

The statements made by deponent in the second, third and fourth paragraphs of the letter of deponent's dated the 18th day of September, 1942, are absolutely true as is apparent from the reading of the foregoing. There isn't a single statement or word in the said paragraphs which is in the slightest degree misleading or in any manner false and there isn't a single statement anywhere in the papers of the plaintiff which can be referred to which in any way contends that the second, third and fourth paragraphs of the said letter are in any manner untrue or false or misleading.

In the 8th paragraph of the complaint the plaintiff merely claims that the "defendant omitted to state that at the time of the proposed financing, proceedings were pending had been instituted by the plaintiff against Electric Bond and Share Company and United Gas Corporation, in which the status of the latter's indebtedness and the propriety of payment thereon to Electric Bond and Share Company were issues raised by the plaintiff for determination, and that therefore whether or not abandonment of the proposed subordination prevented any losses to Electric Bond and Share Company is necessarily

dependent upon the ultimate decision by the plaintiff and by the courts as to the status of such claim."

This contention of the plaintiff is not only wholly ridiculous but it is impossible to understand on what theory any one can contend that statements made by deponent in his letter which are unquestionably true must have linked with them contentions of the plaintiff and its counsel which find no support either in fact or law, and that if deponent refuses to make the absurd statements suggested by the said 8th paragraph of the complaint then the plaintiff Commission has the courage to advance a mere argument that deponent's statement becomes false and misleading.

Instead of deponent's statements being in any way false or misleading, which is obvious, deponent will now show that there is no basis in fact or law for these contentions of the plaintiff and as a matter of fact if these contentions of the plaintiff had been incorporated in deponent's letter, the same would truly then be actually false and misleading.

On June 3, 1941, the Securities and Exchange Commission issued Release No. 2790 in the proceedings with respect to the application of the United Gas Corporation and Electric Bond and Share Company, hereinbefore referred to, wherein at page 9 appears the following:

"It further appearing to the Commission that it is appropriate and in the public interest and the interests of investors and consumers to institute an investigation pursuant to Sections 18 (a) and 18 (b) of the Act concerning (1) the organization and financing of the United and its former subsidiary company, United Gas Public Public [sic] Service Company, (2) all intercompany investments, transactions, dealings, and relationships between or among United and its past and present subsidiaries [sic] companies and between or among any of such companies or their predecessors and Bond and Share, Electric, or any associate or affiliate of either, including the origin and history of all indebtedness stated to be owing by United to Bond and Share, (3) all valuations or revaluations of tangible and intangible property of United and its subsidiary companies made at or about the time of or in connection with the organization of United, (4) certain restatements of property and investment accounts of United and certain of its subsidiary companies made during the year 1932, and (5) certain reorganizations and transfers of property among United and its subsidiary companies during the year 1937:"

and further at page 10:

"4. The history of all intercompany investments, transactions, dealings, and relationships between or among United and its past and present subsidiary companies and between or among any of such companies or their predecessors and Bond and Share, Electric or any associate or affiliate of either, including the origin and history of all indebtedness stated to be owing by United to Bond and Share and the history of the management and control of United, as bearing upon the propriety of the proposed application of part of the proceeds to be realized by United from the sale of bonds to the public to retire securities of United now held by Bond and Share and to pay open account indebtedness stated to be

owing to Bond and Share, and the propriety of the application of part of such proceeds to pay dividends in arrears on preferred stock of United.

5. Whether the facts and circumstances concerning any of the investments, transactions, dealings, and relationships referred to in item 4 above, or the facts and circumstances concerning any intercompany investments, transactions, dealings and relationships between Bond and Share and Electric, or the facts and circumstances concerning the corporate structure and capitalization of United (particularly, the nature and amount of its outstanding preferred and second preferred stocks and the dividend arrearages thereon) require adverse findings with respect to the proposed issue and sale of bonds by United under the standards of Section 7 (d) (1), (2), (3), or (6) of the Act, or make it necessary or appropriate to issue any order or impose any term or condition under the standards of Section 12 (c) or 12 (f) of the Act with respect to the proposed retirement of securities held by Bond and Share or the payment of indebtedness stated to be owing to Bond and Share."

and further at page 12:

"19. Whether pending final liquidation of the indebtedness stated to be owing by United to Bond and Share (whether evidenced by securities or on open book account) it is necessary or appropriate, in view of any of the matters referred to above, to enter any order or impose any term or condition under the provisions of Section 12 (b), 12(c) or 12 (f) of the Act prohibiting or restricting the payment of interest or principal on any of such indebtedness."

Section 18 (a) of the Public Utility Holding Company Act of 1985 provides:

"The Commission, in its discretion, may investigate any facts, conditions, practices, or matters which it may deem necessary or appropriate to determine whether any person has violated or is about to violate any provision of this title or any rule or regulation thereunder, or to aid in the enforcement of the provisions of this title, in the prescribing of rules and regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this title relates . . ."

and Section 18(b) provides:

"The Commission upon its own motion or at the request of a State commission may investigate or obtain any information regarding the business, financial condition, or practices of any registered holding company or subsidiary company thereof or facts, conditions, practices, or matters affecting the relations between any such company and any other company or companies in the same holding-company system."

It is obvious from the foregoing that while Section 18 (a) and (b) give the Securities and Exchange Commission the power to investigate certain matters, it is equally obvious that after the investigation, the Commission has absolutely no power to make any

determination as to any matter which was the subject matter of the investigation under Section 18 of the Act.

The statement appearing therefore in paragraph 8 (a) of the plaintiff's complaint that "whether or not abandonment of the proposed subordination prevented any losses to Electric Bond and Share Company is necessarily dependent upon the ultimate decision by the plaintiff and by the courts as to the status of the claim" is wholly without merit.

The plaintiff in deponent's opinion has absolutely no power to render any decision as to the claim of $52,925,000 due Electric Bond and Share Company by United Gas Corporation and there is no proceeding pending anywhere in deponent's opinion which can in any way affect the said claim and no Court will be called upon to pass upon the status of such claim because in deponent's opinion there is no proceeding pending anywhere wherein any tribunal has the legal authority to question the indebtedness due the Electric Bond and Share Company. The debtor, United Gas Corporation, does not question the indebtedness but as a matter of fact wants to pay it. The Securities and Exchange Commission as hereinbefore stated commenced an investigation under Section 18 of the Act but in deponent's opinion in the said proceeding with respect to said investigation the Securities and Exchange Commission has absolutely no power to render any decision.

In view of the foregoing, and since everything said by deponent in the second, third and fourth paragraphs as to the indebtedness is true and is not false or misleading, the plaintiff certainly has no right to claim that there must be included therein statements which are contrary to law and fact. Any person with the slightest degree of business judgment knows that the estimate of $20,000,000 in losses under the circumstances would have arisen if the subordination had taken place, is indeed very conservative. The statements appearing in paragraph 8 (b) of the plaintiff's complaint:

"when the fact is and the defendant omits to state that he was unsuccessful in all of such litigation and that the litigation was not of a nature that would protect or conserve the assets of the said company even if successful, but would merely relate to the amount of the claims of the various classes of security holders to the existing assets."

are wholly without basis in fact and it is inconceivable that such a statement is advanced by the plaintiff.

In the first place the action commenced by the defendant against the Electric Bond and Share Company and its officers and directors in the Supreme Court of the State of New York is still pending and has not been tried. A motion was made by the defendant herein as plaintiff in the said Supreme Court action for certain injunctive relief pendente lite which was denied and an appeal is pending from the order denying such relief. The action however is still pending and the trial has not as yet taken place but the action is merely at issue. The further claim of the plaintiff that "the litigation was not of a nature that would protect or conserve the assets of the said company even if successful, but would merely

relate to the amount of the claims of various classes of security holders to the existing assets" is equally without merit.

In the said Supreme Court action commenced by the defendant as aforesaid, the defendant as plaintiff therein sought to compel the Company to refrain from considering any plan which would restrict its business to that of a public utility company thereby, causing very substantial damage, the plaintiff therein sought to compel the company to utilize its large cash resources and obtain revenue, to compel the company to purchase its preferred stock and thereby reduce its preferred stock dividend requirements, to relinquish its control over certain companies which control compel [sic] the company to remain a holding company, subject to the jurisdiction of the Securities and Exchange Commission, preventing it from acting and causing millions of dollars in losses.

It is obvious that the said complaint sought the conservation of the assets of the company and the statements of the plaintiff as hereinbefore stated in paragraph 8 (b) of the complaint herein are wholly without merit.

The defendant commenced a mandamus proceeding against the Electric Bond and Share Company to compel it to file a plan to relinquish the control over the American Power and Light Company and Electric Power & Light Corp., and to make an application for exemption under the Public Utility Holding Company Act of 1935. The Supreme Court denied the application and dismissed the proceeding on the theory that the Securities and Exchange Commission had sole jurisdiction and an appeal is pending from the said order. If the application had been granted the Electric Bond and Share Company in deponent's opinion would have saved a few million dollars, because recently the Securities and Exchange Commission directed the dissolution of the said Electric Power & Light Company and American Power & Light Company and under those circumstances if the orders of dissolution remain effective the Electric Bond and Share Company will [sic] in deponent's opinion will receive probably nothing for its common stock holdings in these companies whereas if deponent's plan had been followed these equities would have been saved.

The plaintiff's contention that the statement about the deficit is not true is not the fact. The company had a deficit as stated in the letter after the payment of the preferred stock dividend. The word "deficit" means shortness and the statement is correct. It is submitted that there is no impropriety in deponent not stating what he paid for his stock because the sole purpose of the plaintiff is to make it appear that deponent may have paid less than some other stockholder, and while that may be true if one takes into consideration the enormous amount of time and money which deponent has devoted to this matter since January, 1942, which must be added to the cost of his stock, the conclusion is not as claimed by the plaintiff that the stock cost plaintiff $9,000 but probably closer to $25,000 in money and time and energy.

The further allegations in the plaintiff's complaint (8) (b) as to possible future intent has no place in the letter.

Deponent has shown at length that there isn't a single statement in the letter which can in any way be construed as false or misleading and the attempts of the plaintiff to contend that the omission of certain statements by the defendant has been shown to be not only fallacious in fact but also in law.

It is respectfully submitted, however, that while the defendant herein has explained at length that the letter is true in every respect, in addition thereto it is the contention of the defendant that this letter does not come within the provisions of Section 12 (e) of the Public Utility Holding Company Act of 1935.

This letter does not in deponent's opinion solicit any proxy, power of attorney, consent or authorization regarding any security of a registered holding company or a subsidiary company thereof and therefore does not come within the provisions of Section 12 (e) of said Act. The annexed letter shows very clearly that the sole purpose of the letter is to warn the stockholders not to sign proxies and to revoke where the same is necessary in order to prevent the management of the Electric Bond and Share Company from obtaining a quorum and thereby compel the adjournment of the stockholders' meeting so that the stockholders can get together and protect their valuable interests. No where in the letter does deponent ask or seek any authorization, consent, proxy or power of attorney and the purpose of the letter is purely to put the stockholders on notice of trouble in the company.

Deponent respectfully states that it is most vital that the restraining order dated October 2nd, 1942, be vacated forthwith. The meeting is scheduled for October 14, 1942, and the Electric Bond and Share Company is using every means at its disposal including personal solicitation of stockholders in order to get proxies, and it is most urgent that the stockholders receive the letter of deponent's so that they can be apprised of the true facts. While deponent is restrained, the company is proceeding to place every conceivable obstacle in the path of deponent in trying to reach the other stockholders of the company in order to warn them, so much so that the company even succeeded in temporarily inducing a large brokerage house which has more than 100,000 shares of common stock on its books in the names of 375 customers to refrain from sending out deponent's letter although the company wants the same house to send out their proxy material. Deponent is in the midst of conferring with the attorney for the said brokerage house in order to make them realize what a gross injustice it will be to their customers if they send the company's proxy material and do not send the copy of deponent's letter. Because of the restraining order deponent is prevented from continuing these conferences and from causing various banks and other brokerage houses to receive copies of the letter for transmission to the stockholders. The stockholders of the Electric Bond and Share Company are scattered all over the United States, Canada, Mexico, Central and South America. Every day is of great importance and it is respectfully submitted that this letter has proven of great benefit to the stockholders of the company as is evident from the many letters of appreciation received by deponent and the telephone calls, all prior to the service of the restraining order herein.

Deponent respectfully states that he has fought in almost a super human fashion to protect the interest of the stockholders and has merely related a very small part of the actual work done by him. Deponent is in the midst of an appeal in the Circuit Court of Appeals in an action commenced by deponent as plaintiff against the Securities and Exchange Commission for injunctive relief which was dismissed on jurisdictional questions and is now set for argument for October 8th, 1942, in this Circuit.

In my struggle before the Commission with respect to the affairs of the Electric Bond and Share Company, I have been compelled to fight every inch of the way in order to protect rights, and have been denied intervention in proceedings when the same was necessary and have been prevented from adequately protecting my rights and those of stockholders because of restrictions placed upon me by the Commission.

In the midst of a gigantic struggle against the management of the Electric Bond and Share Company, when it becomes apparent that every stockholder upon receiving my letter either refuses to sign a proxy for the company management or revokes the same if signed, suddenly with only 12 days left before the meeting, the Securities and Exchange Commission undertakes to invoke the jurisdiction of this Court to tie my hands and prevent me from reaching the other stockholders of the company to adequately warn them against acting against their interests, and the plaintiff invokes the purported provisions of the Public Utility Holding Company Act of 1935 which was never intended to hurt the investor but was intended to strip the management of control, and now this same Act is attempted to be invoked by the plaintiff Commission to apparently aid the management in its fight for proxies.

This same plaintiff Commission has been advocating amendments in proxy provisions in order to aid minority stockholders to fight the management.

Nevertheless when it comes to the Electric Bond and Share Company affairs, the attitude of the same plaintiff Commission changes and it seeks to restrain a stockholder from acting knowing full well that by doing so it is helping the management.

What harm can possibly come if the stockholders of the company are permitted to receive deponent's letter which seeks no proxy of any kind, but merely desires a postponement of the stockholders' meeting so that the stockholders will have more time to consider the matters. If the management have nothing to fear and can substantiate their conduct, then I am sure the stockholders will do what they believe is proper at the adjourned meeting, if and when that takes place.

Deponent cannot understand why the Securities and Exchange Commission is so anxious to prevent any adjournment. An adjournment of the meeting continues the same officers and directors in office until the election takes place. Obviously no one is hurt by an adjournment whereas the stockholders will suffer severely if the adjournment does not take place.

In the interests of justice, I respectfully appeal to this Court to forthwith vacate the restraining order so that I can continue with the distribution of my letter which can cause no harm to any one if they have acted properly but will enable the stockholder to have sufficient time to make the proper decisions.

The reason why the annexed order to show cause is requested is because as hereinbefore stated it is most urgent that this motion be heard as soon as possible.

WHEREFORE deponent respectfully asks for the annexed order to show cause why an order should not be made dismissing the complaint herein on the ground that the complaint fails to state facts sufficient to constitute a cause of action against the defendant, and on the ground that the letter of Samuel Okin dated September 18th, 1942, in no way, shape or manner violates Section 12 (e) of the Public Utility Holding Company Act of 1935, 15 U. S. C. 79k (g) or Rule U-61 of the Rules and Regulations thereunder or Regulation X-14 promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934 and upon the further ground that the letter of September 18, 1942, is not and does not constitute a solicitation of any proxy, power of attorney, consent or authorization regarding any security of a registered holding company or a subsidiary company thereof as provided in said Section 12 (e) of the Public Utility Holding Company Act of 1935, and upon the further ground that the said letter of Samuel Okin dated September 18, 1942, is true in every respect and that not a single statement therein is in any way, shape or manner, false or misleading, and why an order should not be made vacating the temporary restraining order dated the 2nd day of October, 1942, and for such other and further relief in the premises as to the Court may seem just and proper, for all of which no previous application has been made to this Court.

SAMUEL OKIN

Sworn to before me this 3rd day of October, 1942.

SAMUEL REID
Notary Public
Kings County

Certificate filed, of court

IMPORTANT
DO NOT SIGN ANY PROXIES
REVOKE SAME IF YOU HAVE SIGNED THEM

SAMUEL OKIN
32 Broadway
New York
Whitehall 4-5800

September 18, 1942.

TO THE COMMON STOCKHOLDERS OF ELECTRIC BOND AND SHARE COMPANY

I own Nine thousand (9,000) shares of the common stock of Electric Bond and Share Company.

In January, 1942, the present management of the Electric Bond and Share Company, without the consent of stockholders, agreed to subordinate the claims of $52,925,000 which the Electric Bond and Share Company has against the United Gas Corp. These claims represent the sum of $52,925,000 paid by Electric Bond and Share Company to United Gas Corp. for bonds aggregating $25,000,000 and advances amounting to $27,925,000. The present management of Electric Bond and Share Company agreed to make this subordination in order to enable the United Gas Corp. to sell $75,000,000 in bonds to insurance companies and instead of the United Gas Corp. using these moneys to pay to the Electric Bond and Share Company the $52,925,000, as aforesaid, the present management of Electric Bond and Share Company intended to permit the United Gas Corp. to use these moneys to redeem the first preferred stock of the United Gas Corp., pay a premium for redemption and arrearages thereon, all of which would have amounted to approximately $55,000,000.

When I learned of the foregoing, I made strenuous protest and succeeded in stopping this intended subordination and attempted, outrageous dissipation of assets.

If the subordination had taken place, it would have caused losses to Electric Bond and Share Company which might have amounted to as much as $20,000,000 and would undoubtedly have buried for all future time this $52,925,000 claim, which is the most important asset which the Electric Bond and Share Company owns.

Since January, 1942, I have used every means afforded by law to protect and conserve the assets of Electric Bond and Share Company which have a value of approximately $174,000,000, and in doing it, I have been compelled to cause an action and proceeding to be commenced in Supreme Court of the State of New York against the present management of Electric Bond and Share Company; and against the Securities and Exchange Commission for an injunction, which action is now the subject matter of an appeal in the United States Circuit Court of Appeals, Second Circuit, which is to be argued in the early part of October, 1942.

The present management of Electric Bond and Share Company refuses to enforce the legal right of Electric Bond and Share Company to purchase its preferred stock by tenders or in the open market, using therefor the $24,000,000 in cash and short term securities which produce hardly any income, whereas the preferred dividend requirements of the Electric Bond and Share Company have already caused a deficit of approximately $1,250,000, this year, and if the conditions remain the deficit will be approximately

$2,500,000 by the end of this year. The Securities and Exchange Commission, in my opinion without any authority in law, has refused to permit the use of any further cash by the company in the purchase of its preferred stock "pending formulation by the company of an exchange plan or other plan or plans for *distribution of assets to the preferred stockholders*," with the indication that the preferred stockholders should receive substantially more than market value. After many months, instead of in the meantime invoking the aid of a tribunal to enforce the rights of the company and prevent the deficit, now the company files a plan for exchange which does not recite any method and is neither practical nor feasible. At this time it is impossible and time does not permit me to discuss the plan nor to explain at length the many things which have happened since January, 1942, in my efforts to conserve the assets of the company. Reference to some of the foregoing will be found in financial statistical reports.

The important thing at the present moment is that the present management has sent out requests for proxies to stockholders, for the annual meeting of stockholders on October 14th, 1942.

The management of the company must be prevented from obtaining a quorum for this stockholders' meeting in order to compel the adjournment of the meeting so that the stockholders of the company can arrange to protect their valuable interests.

Do not sign any proxies — if you have signed any proxy, immediately revoke the same by writing a letter to the Electric Bond and Share Company revoking the same — if your stock is in the name of your stock broker, immediately notify him not to sign any proxy and if a proxy has been signed, to immediately revoke the same.

It is important to prevent the management from getting the necessary proxies and thereby protect your valuable interests.

Please read this letter very *carefully* and make certain to follow the suggestions.

As soon as possible, I intend to again communicate with you and would appreciate any comments you care to make on the foregoing. **It is important that you inform me if you notified the Electric Bond and Share Company to revoke your proxy so I can make certain your proxy is not used at the stockholders' meeting.**

SAMUEL OKIN

[TITLE OF DISTRICT COURT AND CAUSE]

SUPPLEMENTAL AFFIDAVIT

STATE OF NEW YORK

COUNTY OF NEW YORK

SAMUEL OKIN being duly sworn deposes and says that he is the defendant in the above entitled action and is submitting this supplemental affidavit as referred to in his letter dated October 3, 1942 which was delivered to the attorney for the plaintiff and which letter is as follows:

"October 3, 1942.

Irving J. Galpeer, Esq.,
120 Broadway,
New York City

Re: Securities and Exchange Commission against Samuel Okin

Dear Sir:

At about 6 P. M. last night I was served with an order to show cause and papers in the above entitled matter and we worked until 4:30 A. M. this morning in preparing an affidavit and order to show cause in the above entitled matter and because of the length of the papers it was impossible for me to answer the affidavit of Nathan Sameth sworn to the 2nd day of October, 1942 which was part of the papers served upon me. I intend to prepare an affidavit supplemental to that which is being submitted this morning to the Court in support of the order to show cause, in which said supplemental affidavit I intend to answer the statements contained in the said Sameth affidavit and if the Court grants my order to show cause you will have a copy of this supplemental affidavit early Monday morning, October 5th, 1942.

Very truly yours,
SAMUEL OKIN"

The affidavit of Nathan Sameth submitted in support of the plaintiff's application for an exparte temporary restraining order and in support of the plaintiff's motion for a preliminary injunction, does not state all the conversations between deponent and the said Sameth when the former conferred with the latter in the office of the Securities and Exchange Commission in Philadelphia with respect to deponent's letter dated September 18, 1942, on the 24th and 25th days of September, 1942, for many hours, and in the lengthy conversation over the telephone on September 26th, 1942, and in addition said Sameth in his affidavit incorrectly refers to the certain portions of deponent's statements made to him.

In order to eliminate any possibility of any argument on the part of the Securities and Exchange Commission that deponent at any time in the slightest degree thought that this letter of September 18, 1942, was a solicitation of any proxy or that it came within the provisions of Section 12 (e) of the Public Utility Holding Company Act of 1935 or the regulations thereunder referring to the solicitation of proxies, deponent deems it advisable

for the information of the Court to refer to what transpired prior and subsequent to September 22, 1942, when deponent mailed a copy of said letter of September, 1942, to the Securities and Exchange Commission and requested a waiver of the ten day rule, in order to prove conclusively that at all times both prior and subsequent to the mailing of the said letter, deponent was absolutely of the opinion that the said letter of September 18, 1942 which does not solicit any proxy, power of attorney, consent or authorization regarding any security of a registered holding company or a subsidiary thereof as provided in Section 12 (e) of the Public Utility Holding Company Act of 1935, and which letter merely suggests that the stockholders of Electric Bond and Share Company should not sign any proxy solicited by the management of the said company and to revoke the same if they had signed same, that the said letter did not come within the provisions of Section 12 (e) of said Public Utility Holding Company Act of 1935 and that it was not necessary to file the same with the Securities and Exchange Commission and to wait ten days before distributing the same through the mails and that the said letter did not come within the regulations of the Securities and Exchange Commission with respect to proxy solicitation because no proxies were being solicited.

Although deponent as heretofore stated did not believe the law required any filing, nevertheless by reason of certain statements made to him as hereinafter stated deponent felt that no harm could come from filing the letter with the Securities and Exchange Commission, seek a waiver of the ten day provision and in that way it would be a practical solution to the difference of opinion that arose with respect to whether the letter did or did not come under the proxy section of the Act and the proxy regulations.

On September 22nd, 1942, deponent had a conference with Samuel W. Murphy, President of the Electric Bond and Share Company, and during the course of that conference deponent informed said Murphy that deponent had cause to be printed a letter to common stockholders of the Electric Bond and Share Company in great quantities wherein deponent informed the said stockholders of the tremendous struggle that he had had and was having to conserve the assets of the said company and that in said letter deponent was asking the common stockholders not to sign any proxy for the management and to revoke same if signed and that deponent was about to distribute the same. Said Murphy thereupon asked deponent whether or not such a letter would come within the proxy rules of the Commission because he understood that it did. Deponent informed Murphy that the letter did not come within the proxy rules of the Commission and did not have to be filed.

About 7 P.M. on the evening of September 22, 1942, just when deponent was about to start the mailing of the said letter to common stockholders, deponent decided to telephone Mr. Galpeer at his home and ask him to express an opinion as to whether the said letter came within the proxy rules. Accordingly deponent on September 22, 1942, at about 7 P.M. phoned Mr. Galpeer who was one of the attorneys for the Securities and Exchange Commission, and deponent explained to him that he was sending out the letter of September 18, 1942 and what was contained therein and that while deponent was certain in his own mind that the said letter did not come within the proxy rules of the Commission nor the law pertaining to proxies, nevertheless deponent thought he would

ask Mr. Galpeer. Mr. Galpeer replied that he would rather not express an opinion because he was not in the interpreting divisions of the Securities and Exchange Commission and suggested that deponent telephone Mr. Parlin, head of the interpreting division of the Securities and Exchange Division, at his home in New Jersey, and deponent was given Mr. Parlin's long distance home phone.

On September 22nd, 1942, deponent after speaking to Mr. Galpeer telephoned Mr. Parlin at his home and after explaining to him the purpose of the letter dated September 18, 1942 and that in deponent's opinion the said letter did not constitute a solicitation of any proxy and did not come within the provisions of the law with respect to proxies or the regulations with respect thereto, and that deponent would like to have his opinion with respect to same. Said Parlin informed deponent that the said law and the rules with respect to proxy solicitation had been interpreted by the interpretation division of the Securities and Exchange Commission as including a letter which did not request a proxy but merely asked not to sign a proxy or to revoke the same. When deponent argued at length that the law and the rules and regulations with respect to proxies and their solicitation did not by their provisions refer to a letter which did not seek any proxy, Parlin replied that nevertheless that was the interpretation as he informed deponent.

Although deponent completely disagreed with Mr. Parlin, nevertheless deponent felt that it might be possible to file the letter with the Securities and Exchange Commission, request a waiver of the ten day provision, and if that happened it would eliminate all further question with respect to whether the letter did or did not come within the provisions of the law and regulations and rules with respect to proxy solicitation.

Accordingly deponent sent a letter by registered mail on September 22, 1942, addressed to the Securities and Exchange Commission attention of Chairman Ganson Purcell, enclosing a copy of deponent's letter dated September 18, 1942, explaining the importance of the letter being sent as soon as possible to the common stockholders of the Electric Bond and Share Company and asking that the ten day rule be waived.

On September 24, 1942, not having heard from the Securities and Exchange Commission, deponent went to Philadelphia and found upon inquiry that the letter was in the mailing room and after a great deal of inquiry deponent was requested that he go to one of the members of the staff of the Securities and Exchange Commission to whom deponent explained what has hereinbefore been stated as to the circumstances surrounding the filing of the letter and how deponent did not believe that the letter did not come within the provisions of the law and rules and regulations with respect to proxy solicitation but that as hereinbefore stated deponent had filed the same in order to be practicable and was very anxious to obtain the waiver of the ten day provision. Said member of the staff suggested thereafter that deponent go to see Mr. Nathan Sameth who was in the proxy division of the Securities and Exchange Commission.

At about 4:30 P.M. on Thursday, September 24th, 1942, deponent went to see Mr. Sameth and at the very outset explained to him the circumstances under which the letter had been sent to the Securities and Exchange Commission, and how I did not believe the

letter came within the said law or regulations or rules, but that in view of Mr. Parlin's statements as hereinbefore stated, deponent had filed the letter with the hope that the ten day rule would be waived and in that way in a practical manner all difference of opinion would be eliminated. I told Mr. Sameth that there had been extended controversies with the Commission and its public utility holding company staff, and when after a number of hours of explanation on deponent's part as to all the matters which had heretofore transpired, Mr. Sameth informed deponent that he would have to consult with the members of the public utility staff of the Commission before he could express any opinion. Deponent thereupon informed said Mr. Sameth that deponent had engaged in very heated controversies with certain members of the said public utility staff and was engaged in litigation with the Securities and Exchange Commission wherein deponent was seeking injunctive relief against the said Commission and that the appeal as to that matter was to be heard by the Circuit Court of Appeals, Second Circuit, on October 8th, 1942, and deponent was of the belief that efforts might be made to destroy the effectiveness of his letter by certain changes and that if such was the case deponent intended to send the letter out immediately because deponent was of the opinion that the letter dated September 18, 1942, did not come within the proxy rules, regulations and law. Mr. Sameth [sic] that he thought the letter did come within said law, rules and regulations but that he would immediately go and consult his superior as to same. He returned and said that his superior was not in and that the matter would go over until Friday, September 25, 1942, and that he would consult the public utility staff as to the letter and if deponent did not hear from him by a few minutes before twelve o'clock Friday morning, deponent was to come to Philadelphia on the 12 o'clock train. Deponent again stressed the fact that time was of the essence and that every statement contained in the letter of September 18th, 1942, were true and the said letter did not come within the provisions of the law and rules and regulations pertaining to proxy solicitation and that if deponent found that efforts were made by anyone connected with the Securities and Exchange Commission to destroy the effectiveness of the said letter by any changes or additions thereto or if I was asked to include what I did not believe in, I would ignore the filing and proceed with the distribution of the letter because I was firmly convinced that the letter did not constitute a proxy solicitation within the provisions of the law and the rules and regulations pertaining to proxy solicitations.

Not having heard from Mr. Sameth by 11:50 A. M. on Friday morning, September 25th, 1942, deponent went to Philadelphia and was informed by Mr. Sameth that it had not been possible for the members of the Public Utility Staff of the Securities and Exchange Commission to complete their discussions and that there were to be other conferences that day and the result was that Mr. Sameth returned to his office about 7 P. M. and commenced to tell deponent the changes which had been suggested and while they were few in number, they were so malicious in nature and so unnecessary in so far as deponent's letter was concerned that it was obvious to deponent that there were deliberate efforts being made to destroy the effectiveness of his letter for the purpose of aiding the management of Electric Bond and Share Company and deponent so informed Mr. Sameth in no uncertain terms.

Deponent again reiterated to Mr. Sameth on Friday during these discussions that deponent had merely filed his letter which was truthful in every respect not because deponent thought the same came under the law, rules and regulations respecting to proxies, but merely to avoid any controversy, but that if the public utility staff of the Commission were attempting to destroy the effectiveness of deponent's letter to the stockholders in their determination to help the management who are ready apparently to do many things which the public utility staff want them to do but which they know deponent will strenuously oppose, and that if there was persistence in these changes deponent would go right ahead and distribute the letters to stockholders.

At the very outset Mr. Sameth said that the statement that "I own Nine thousand (9,000) shares of the common stock of Electric Bond and Share Company", was not sufficient but that I would have to state when I purchased the stock. I told Mr. Sameth that there was absolutely no merit in the suggestion but that it was merely an effort on the part of someone to be malicious and I ultimately said that if everything else was satisfactory I would state when I purchased the stock but would also add that I had spent almost $25,000 in time, energy and money in my struggle to conserve the assets of the Company.

The next suggestive change was so repulsive that I informed Mr. Sameth that if this change was insisted upon I wouldn't make any changes in the letter but would distribute the same as is. It is important to note that when Mr. Sameth says at page 1 that deponent asked for changes in the letter that is not true. Deponent never asked for any changes, deponent insisted his letter was proper in every respect and that any change would only be for the purpose of delaying deponent and that it was Mr. Sameth and not deponent who said there would have to be changes. As a matter of fact deponent kept insisting that he didn't want to make any changes and that if the changes in any way prejudiced deponent, that deponent would proceed as though there had never been any filing. Deponent also wants this Court to know that when deponent saw Mr. Sameth on Friday, September 25th, 1942, the first thing he said to deponent was that he had discussed with his superior the question as to whether the letter of deponent's involved the proxy provisions and that his superior had said that it did.

Deponent will now refer to change suggested in the preceding paragraph and which was so objectionable to deponent that deponent stated that it was contrary to his belief, contrary to his knowledge of the law and that he would not under circumstances include same in any letter to stockholders and that any such statements would constitute misleading statements. Mr. Sameth said the public utility staff wanted him to have a statement included in the letter to the effect that the Securities and Exchange Commission had commenced a proceeding against the Electric Bond and Share Company and United Gas Corporation as to the validity and proper ranking of the debt claims of Electric Bond and Share Company in the sum of $52,925,000 against the United Gas Corporation and that in said proceeding the Securities and Exchange Commission would determine the validity and to what extent the said debt should be paid and until this decision is made and the Courts pass upon the same, the question of how much may have been saved by deponent by preventing this subordination would have to be left in abeyance. Deponent

said that he would never put any such statements in his letter because in his opinion they would not be the truth because the Securities and Exchange Commission has no authority to make any adjudication with respect to said debt claims which the debtor wanted to pay and acknowledged as owing. It was finally decided that if the Commission's staff wanted a change and everything else was agreed upon that deponent would say in his letter that the Commission had commenced an investigation into the organization and financing of the United Gas Corp. and certain events and transactions in its subsequent history including the debt claims of $52,925,000 owing Electric Bond and Share Company but that in deponent's opinion based upon undisputed facts brought out in the said investigation the said $52,925,000 is due Electric Bond and Share Company from United Gas Corporation and in deponent's opinion the Securities and Exchange Commission lacks the power to make any determination which can in any way affect the validity of these claims against United Gas Corporation.

Mr. Sameth said that he could not accept this change but that he would discuss the matter with the public utility staff on Saturday morning and would advise deponent over the telephone Saturday morning.

Another objection that Sameth raised was the use of the word deficit. Deponent told Sameth that the word deficit was correctly used in the letter. That Webster's dictionary defined the word 'deficit' as 'deficiency in amount or quality; a falling short, especially of income'. Deponent told Sameth that the statements in the letter 'the preferred dividend requirements of the Electric Bond and Share Company have already caused a deficit of approximately $1,250,000, this year, and if the conditions remain the deficit will be approximately $2,500,000 by the end of this year' are absolutely true and that after the payment of the preferred stock dividends at the end of each quarter this year there was a deficit. Sameth argued that the word 'deficit' hit home and deponent stated that was the very reason why it was used and its use was in accordance with its true meaning and that furthermore the quarterly statements of Electric Bond and Share Company sent to the stockholders of the company for the periods ending March 31, 1942, and June 30, 1942, each showed a red figure after the payment of preferred stock dividends and everyone knows that a red figure means a deficit. Sameth argued that he did not care what the Company sent to its stockholders in its quarter annual reports but that he objected to the use of the word 'deficit' in deponent's letter. Finally when it got close to 11 P.M. and in desperation deponent was trying to find some conclusion to all the arguments which had lasted for many hours, deponent said that if everything else could be agreed upon and deponent could have immediate acceleration and if the public utility staff and Mr. Sameth did not insist upon deponent making any prejudicial statements in his letter which were contrary to deponent's belief and not true, that deponent would insert in the letter a statement that the preferred dividend requirements of Electric Bond and Share Company have so far exceeded current income by approximately $1,250,000 and that if the conditions remained this amount will be increased to approximately $2,590,000. Deponent in no uncertain terms expressed his indignation on being asked to make such a change by eliminating a simple word 'deficit' which every lay person knows has a distinct meaning and inserting words which just lengthen the letter, create some confusion and require the person receiving the same to

have some technical knowledge. Deponent nevertheless was willing as heretofore stated to make this unnecessary change provided some final agreeable conclusion could quickly be arrived at.

Mr. Sameth then said that in the paragraph of the letter referring to the commencement of an action and proceeding against the present management of the Electric Bond and Share Company and against the Securities and Exchange Commission, that deponent should make certain statements with respect thereto. Deponent told Sameth that such suggestions could not be complied with without entering into a long statement in the letter as to the said litigation because of the voluminous matters involved and that to insert merely what Sameth requested was simply an imposition and that deponent would not make any such statements. Deponent called Sameth's attention to the statement in the letter to the effect that "At this time it is impossible and time does not permit me to discuss the plan nor to explain at length the many things which have happened since January, 1942, in my efforts to conserve the assets of the company. Reference to some of the foregoing will be found in financial statistical reports." Deponent informed Sameth that it was very important to deponent that his letter be limited to one page so that the stockholder of the company would realize that the most important thing was to prevent the management from obtaining a quorum for the meeting so that the same would have to be adjourned and then the stockholders could arrange to protect their valuable interests, and that therefore it was most urgent not to sign any proxies and to revoke proxies wherever given.

Deponent at the conclusion of his conference with Mr. Sameth at 11 P.M. on Friday, September 25, 1942, made it perfectly clear that unless he received word by telephone that those matters which deponent stated could not be included in the letter were omitted from the discussions, that deponent would proceed in accordance with his construction of the law that the letter dated September 18th, 1942, did not constitute a proxy solicitation and did not come within the provisions of the law, and the rules and regulations thereunder referring to proxy solicitation. It was then agreed that deponent would telephone Mr. Sameth on Saturday morning, September 26, 1942, when deponent was to receive the answer.

On Saturday morning, September 26th, 1942, deponent telephoned Mr. Sameth at Philadelphia and when Mr. Sameth told deponent that the public utility staff of the Commission had insisted on the inclusion in the letter of statements which were hereinbefore referred to and which deponent stated he would not insert in his letter as not being necessary and being highly prejudicial without at the same time entering into a long discourse as to all the other matters involved which were not justified under the circumstances, that deponent would take such steps as he deemed proper and that if he concluded to do so he would wait ten days from September 24, 1942, before sending out any letters and that if he decided that the letter did not violate any provisions of any law or any rule or regulation, that deponent would send out the letters at any time he saw fit.

On Tuesday, September 29th, 1942, after a most thorough examination of the law on the subject, deponent concluded that the letter of September 18th, 1942, addressed by

deponent to the common stockholders of Electric Bond and Share Company did not in the slightest degree violate any law or rule or regulation referring to the solicitation of proxies and on Tuesday, September 29th, 1942 and up to the time of the service of the temporary restraining order in this matter on October 2nd, 1942, deponent caused to be distributed through the mails and by messenger, and through stock brokerage houses and banks, the letter of September 18th, 1942, and at the present time the letter had been distributed to practically all the stockholders whom deponent intended to send a copy except that there remains a small number of stockholders to whom deponent desires to mail a copy and in addition thereto certain of the large banks in this city and certain stock brokerage houses located in New York City and in other Cities have requested copies of the letter and deponent is very anxious to comply with these requests and complete the mailing of the letter as hereinbefore stated.

Deponent has received tremendous response from his letter and has been the recipient of voluminous thanks from the stockholders for having acquainted them with the facts so that they could adequately protect themselves.

In the interests of justice this outrageous act of the Securities and Exchange Commission which indeed represents a black moment in the history of an administrative body which was created to protect the interests of investors and now engages in a deliberate attempt on the most flimsy pretenses to attempt to smother and prevent stockholders and investors from receiving the true facts so that they can act quickly in protecting their rights, that such attempts by the Securities and Exchange Commission which in deponent's opinion are not its statutory purposes and that the attempts of the plaintiff Commission to aid a management to retain control of a company when the management is acting contrary to the interests of the stockholders, should be condemned by this Court in no uncertain terms and this plaintiff Commission should be instructed by the Court that it was not created to destroy the transmission of true facts to stockholders just because certain persons connected with the Plaintiff Commission deem it apparently advisable to continue the present management in office because of the feeling that the present management is willing to cooperate with the Commission even if such cooperation constitutes action contrary to the interests of the stockholders of the Electric Bond and Share Company.

The efforts of deponent to prevent a quorum at the stockholders meeting on October 14, 1942, which under the by-laws of the Electric Bond and Share Company will require an adjournment can in no possible manner prejudice anyone. It is elementary that the officers and directors of the Electric Bond and Share Company under such circumstances continue in office until an election takes place. How then can the plaintiff Commission possibly justify this extreme effort it is engaged in to prevent deponent from transmitting the facts to the stockholders and thereby hope to aid the management in obtaining a quorum? Is it due to the fact that the plaintiff Commission knows that if deponent's letter reaches the stockholders that at a future date the management will be removed? If such are the reasons for the unusual activity on the part of the plaintiff Commission, and it is obvious in deponent's opinion that there can be no other reasons, then deponent

respectfully states to this Court that the actions of the Commission in this matter are worthy of the most severe censorship.

In conclusion deponent respectfully asks that the complaint be dismissed and that the temporary restraining order be vacated so that deponent can proceed with his long, titanic struggle to make certain that justice shall prevail in the interests of the stockholders of Electric Bond and Share Company.

SAMUEL OKIN

Sworn to before me this 5th day of October, 1942.

BARBARA J. MYERS
Commissioner of Deeds, New York City

N.Y. Co. Clks. No. 66, Reg. No. 18M4
Kings Co. Clks. No. 40, Reg. No. 4010
Commission Expires May 12, 1944

[TITLE OF DISTRICT COURT AND CAUSE]

ADDITIONAL SUPPLEMENTAL AFFIDAVIT

STATE OF NEW YORK

COUNTY OF NEW YORK

SAMUEL OKIN, being duly sworn, deposes and says:

Annexed hereto are printed copies of the report of Electric Bond and Share Company to its stockholders for the periods ended March 31st, 1942 and June 30th, 1942, respectively, with the certificate of its accountants', Haskins & Sells, certified public accounts, annexed thereto, which said reports are hereby made a part of this affidavit as though fully incorporated therein.

The said report for the three months period ended March 31st, 1942, at page 5 thereof, shows a red figure in the sum of $573,395 after payment of dividends on the preferred stock.

The said report for the three months period ended June 30th, 1942, at page 3 thereof, shows a red figure in the sum of $659,668 after payment of dividends on the preferred stock.

The total of the said two red figures in the said reports as hereinbefore referred to for the said six months is the sum of $1,233,063.

SAMUEL OKIN

Sworn to before me this 5th day of October, 1942.

BARBARA J. MYERS
Commissioner of Deeds, New York City

N.Y. Co. Clks. No. 66, Reg. No. 18M4
Kings Co. Clks. No. 40, Reg. No. 4010
Commission Expires May 12, 1944

[TITLE OF DISTRICT COURT AND CAUSE]

NOTICE OF MOTION FOR PRELIMINARY INJUNCTION

The plaintiff, Securities and Exchange Commission, moves the court that the defendant, his agents, servants, employees, attorneys and assigns, be enjoined during the pendency of this action from engaging in the acts and practices specified in the complaint filed herein on the ground that such acts and practices constitute violations of Section 21 (e) of the Public Utility Act of 1935.

/s/ EDWARD H. CASHION
/s/ MAYER U. NEWFIELD
/s/ IRVING J. GALPEER
Of Counsel for the plaintiff,

Securities and Exchange Commission
120 Broadway
New York, New York

NOTICE OF MOTION

To: Samuel Okin
32 Broadway
New York, New York

Please take notice that the undersigned will bring the above motion on for hearing before this court at Room 506 U.S. Courts and Post Office Building, Borough of Manhattan, City of New York, on the 9th day of 1942, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ EDWARD H. CASHION
/s/ MAYER U. NEWFIELD
/s/ IRVING J. GALPEER
Of Counsel for the plaintiff,

Securities and Exchange Commission
120 Broadway
New York, New York

[TITLE OF DISTRICT COURT AND CAUSE]

AFFIDAVIT OF NATHAN SAMETH IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

STATE OF NEW YORK
COUNTY OF NEW YORK

NATHAN SAMETH, being duly sworn, deposes and says:

I am employed by the Securities and Exchange Commission as Associate Analyst in the Commission's Proxy Unit, and submit this affidavit in support of the plaintiff's motion for preliminary injunction.

At the outset I desire to reincorporate and reallege in this affidavit all of my earlier affidavit verified the second day of October, 1942. The original of said affidavit was attached to and filed with the Clerk of this Court as part of plaintiff's motion for a temporary restraining order. The Court's attention is respectfully directed to said affidavit in support of plaintiff's present motion for a preliminary injunction, as the facts stated therein apply equally in support of plaintiff's motion for a preliminary injunction as well as in support of plaintiff's motion for a temporary restraining order.

Furthermore, the facts stated in my earlier affidavit cover all of the allegations of plaintiff's original complaint and the facts stated herein apply merely to paragraph 14, which was added to plaintiff's complaint by amendment.

Said paragraph 14 reads as follows:

"In violation of Rule X-14A-4 (a) of Regulation X-14, the defendant, beginning on September 29, 1942, four (4) days prior to the expiration of the ten-day waiting period prescribed by Rule X-14A-4 (b), mailed to approximately 7500 common stockholders of Electric Bond and Share Company the proxy soliciting material described in paragraph 6."

The facts concerning said amendment are as follows:

As stated in my previous affidavit on September 26, 1942, I received a telephone call from Samuel Okin, who stated that he would not revise the preliminary letter which he had filed with the Commission on September 24, 1942, to correct the deficiencies I pointed out to him in earlier conferences. He stated further that at the end of the ten-day waiting period prescribed by Rule X-14A-4 (b) of Regulation X-14, he would release this letter in its original form to the common stockholders of Electric Bond and Share Company. He also stated that he would compute the ten-day period to have commenced on Wednesday, September 23, 1942.

I was present in the New York City office of Samuel Okin on the afternoon of October 2, 1942, prior to the expiration of the ten-day period above referred to, when representatives of the Commission served on Okin the temporary restraining order signed by Judge Alfred C. Coxe in this matter. On the occasion just referred to Okin stated that, beginning with September 29, 1942, he had mailed approximately 7500 copies of the letter to common stockholders of the Electric Bond and Share Company.

Okin also discussed at considerable length the difficulties he was experiencing with the New York Curb Exchange, the New York Stock Exchange, and with member houses of both exchanges, in having such houses transmit copies of his letter to beneficial owners of common stock registered in the names of such houses. Okin also stated that, he was then negotiating with several of the larger banks in an effort to have them send his letter to persons whose Electric Bond and Share Company common stock is held by such banks in custodian accounts or otherwise.

Okin indicated that there remained several hundred additional letters, some of which I saw in his office, which he had been planning to mail to common stockholders prior to the annual meeting scheduled to be held on October 14, 1942. He also stated that he had just ordered additional copies to be printed for further distribution.

It is, therefore, respectfully submitted that on the basis of all the pleadings and proceedings heretofore had herein and on the basis of my earlier affidavit verified October 2, 1942, and the instant affidavit, a preliminary injunction should issue in favor of the Securities and Exchange Commission, as demanded in the complaint filed in this action.

NATHAN SAMETH.

Sworn to and subscribed before me this 6th day of October, 1942.

Notary Public.

[TITLE OF DISTRICT COURT AND CAUSE]

STIPULATION

IT IS HEREBY STIPULATED AND AGREED that the motion of the defendant to dismiss the complaint and vacate the temporary restraining order be considered as addressed to the amended complaint served October 5th, 1942, and that the order to show cause bringing on said defendant's motion dated October 3rd, 1942, be amended so as to include therein the amended complaint herein.

IT IS FURTHER STIPULATED AND AGREED that the motion of the plaintiff for a preliminary injunction now set for the 9th day of October, 1942, be heard simultaneously with the defendant's motion hereinbefore referred to and that the defendant's and plaintiff's affidavits in support of their respective motions be deemed in opposition to the other's motions.

Dated, New York, October 6th, 1942.

/s/ ED. H. CASHION ET AL.,
Attorneys for Plaintiff.

/s/ SAMUEL OKIN,
Attorney for Defendant.

[TITLE OF DISTRICT COURT AND CAUSE]

OPINION

MANDELBAUM, D. J.

The defendant is the owner and holder of 9,000 shares of Common stock of the Electric Bond & Share Company. He prepared a circular letter, dated September 18th, 1942, which contains certain statements regarding the attempted subordination by the Electric Bond & Share Company of a $52,925,000 claim; that the defendant succeeded in stopping this intended subordination as an outrageous dissipation of assets. Further statements follow and finally, the defendant urges all common stockholders in the company not to sign any proxies sent out by the present management in connection with an annual meeting of stockholders to be held on October 14, 1942, and if such stockholders have signed such proxies, to immediately revoke the same. This letter was submitted to the plaintiff, the Securities and Exchange Commission, before it was mailed to any stockholders and its approval was refused on the ground that it contained materially false and misleading statements. Thereafter, defendant, without the approval of the Commission, mailed a substantial number of these letters.

The Commission obtained a temporary restraining order against the defendant, preliminary to the present motion for a temporary injunction which seeks to enjoin the

defendant from making use of the mails or any means or instrumentality of Interstate Commerce for the solicitation of proxies, consents or authorizations with respect to the common stock of the Electric Bond & Share Company, unless the solicitation complies with the Public Utility Holding Company Act of 1935, and the rules and regulations promulgated by the Securities Exchange Commission, pursuant to Sec. 12 (e) and 20 (a) of the Act.

The defendant, by cross-motion, seeks a dismissal of the complaint for failure to state facts sufficient to constitute a cause of action and to have the temporary restraining order, previously made herein, vacated.

The issue is whether the letter of September 18th, 1942, involves a solicitation of proxies and if so, whether such solicitation is in violation of the proxy rules adopted by the Commission under the authority described in Section 12 (e) of The Public Utility Holding Company Act of 1935.

The defendant takes the position that the letter is not a proxy, consent or authorization or solicitation for the same, but is a mere letter requesting the stockholders not to give proxies to the management and that it is therefore not subject to the rules and regulations governing solicitation of proxies. Further, that even if this letter is a solicitation for a proxy, the allegations are not false or misleading and he should be permitted to send them out in interstate commerce.

In examining the various sections of the Securities Exchange Act of 1934 and The Public Utility Holding Company Act of 1935, and the regulations promulgated thereunder, I am compelled to conclude that the letter in question is not a solicitation for a proxy. The language is clear and unambiguous. Nowhere in the language of the Act itself, the definitions or the regulations, does it appear, either directly or by implication, that a request to withhold a proxy or revoke the same, if already given, is in the same category as the actual solicitation for a proxy. To accept the plaintiff's position would result in an enlargement of the Act, to include something which is not there. I believe that this is a matter for Congress, and not for the courts.

From the complaint, as well as from the affidavits submitted in support of the temporary injunction, it is evident that the Commission has taken the position that Okin, through this letter, is seeking an adjournment of the stockholders meeting, so that a stockholders' committee which he will form can solicit proxies, for the purpose of being elected directors and appointing Okin to office in the Company. In other words, the first step on the part of Okin in the solicitation of new proxies. It might well be that Okin is attempting by this procedure to ultimately do what the Commission alleges in its complaint. The earmarks of such attempts are present. During the argument of this motion, the court queries Okin regarding this charge but was not impressed with the defendant's response. Nevertheless, on the state of the record before me, such allegation being unsubstantiated, amounts to no more than an anticipation or prediction as to what Okin will do in the future. On such basis, the court is not empowered to invoke the drastic remedy which the Commission seeks.

I reiterate that the question of Okin's future actions is not before me. The Commission's application is simply premature, and if a solicitation is attempted at some future time, which in the opinion of the Commission, is in violation of the provisions of the various acts dealing with the solicitation of proxies, it is not precluded from applying to the court for relief at such time. At the moment, the application is untimely.

In view of the fact that I hold that the letter of September 18th, 1942 is not a solicitation of proxies within the meaning and intent of the Act, the other points raised by both sides require no determination.

The plaintiff's motion for a temporary injunction is denied, the temporary restraining order is vacated and the defendant's motion to dismiss the complaint is granted.

Dated October 9, 1942

/s/ SAMUEL MANDELBAUM
U.S.D.J.

[TITLE OF DISTRICT COURT AND CAUSE]

JUDGMENT AND ORDER APPEALED FROM

IT IS HEREBY ORDERED that the Plaintiff's motion for a temporary injunction be and the same hereby is in all respects denied; and it is further

ORDERED that the Defendant's motion to dismiss the plaintiff's complaint and to vacate the temporary restraining order be and the same hereby is in all respects granted; and it is further

ORDERED that the above entitled action be and the same hereby is dismissed.

Dated: New York, October 9th, 1942.

(S) SAMUEL MANDELBAUM,
United States District Judge.

[TITLE OF DISTRICT COURT AND CAUSE]

NOTICE OF APPEAL

NOTICE is hereby given that the Securities and Exchange Commission, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the judgment and order in the above entitled action, made by United States District Judge Samuel Mandelbaum on the 9th day of October, 1942, and filed in the office of the Clerk of this Court on the 9th day of October, 1942, which judgment and order ordered that the plaintiff's motion for a temporary injunction be in all respects denied, and further ordered that the defendant's motion to dismiss the plaintiff's complaint and to vacate the temporary restraining order be in all respects granted, and further ordered that the above entitled action be dismissed, and the plaintiff above named does hereby appeal from each and every part of said judgment and order.

Dated, New York, N. Y. October 10th, 1942.

EDWARD H. CASHION,
Counsel.
MAYER U. NEWFIELD,
Attorney.
IRVING J. GALPEER,
Attorney.

SECURITIES AND EXCHANGE COMMISSION,
120 Broadway,
New York, N. Y.

To
George J. H. Follner,
Clerk, United States District Court for the Southern District of New York.

Samuel Okin,
Attorney for Defendant,
32 Broadway,
New York, N. Y.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellant,

v.

SAMUEL OKIN,
Defendant-Appellee.

STIPULATION AS TO CONTENTS OF RECORD ON APPEAL

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the transcript of record on appeal in the above entitled action shall include the following:

(1) Statement under Rule XIII

(2) Summons

(3) Amended Complaint verified October 6, 1942

(4) Temporary Restraining Order dated October 2, 1942

(5) Affidavit of Nathan Sameth sworn to October 2, 1942

(6) Order to Show Cause dated October 3, 1942, returnable October 5, 1942 to dismiss complaint and to vacate temporary restraining order

(7) Affidavit of Samuel Okin sworn to October 3, 1942

(8) Supplemental affidavit of Samuel Okin sworn to October 5, 1942

(9)Additional supplemental affidavit of Samuel Okin sworn to October 5, 1942 (copies of the exhibits attached thereto are to be inserted in the record and need not be reprinted.)

(10) Notice of Motion for preliminary injunction

(11) Affidavit of Nathan Sameth sworn to October 6, 1942

(12) Stipulation dated October 6, 1942

(13) Opinion of Judge Mandelbaum

(14) Judgment and order appealed from

(15) Notice of appeal

(16) Stipulation as to contents of record on appeal

(17) Stipulation as to record

(18) Clerk's certificate

Dated, New York, N. Y. October 12, 1942

EDWARD H. CASHION,
Counsel

MAYER U. NEWFIELD,
Attorney

IRVING J. GALPEER,
Attorney for Plaintiff-Appellant

SAMUEL OKIN,
Attorney for Defendant-Appellee

[TITLE OF CIRCUIT COURT AND CAUSE]

STIPULATION AS TO RECORD

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the foregoing is a true transcript of the record of the United States District Court for the Southern District of New York in the above entitled matter, as agreed upon by the parties hereto.

DATED: New York, October 12, 1942.

Attorneys for Plaintiff-Appellant
Attorney for Defendant-Appellee

[TITLE OF CIRCUIT COURT AND CAUSE]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the Record of the said District Court in the above entitled matter as agreed upon by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York; in the Southern District of New York, this day of

November, in the year of Our Lord one thousand nine hundred and forty-two and of the Independence of the United States the one hundred sixty-sixth.

GEORGE J. H. FOLLMER
Clerk

(Seal)