UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
FLORIDA, MIAMI DIVISION

HIGHER EDUCATION LOANS PROGRAM, INC., a Florida corporation, and MURRAY BAST,
Plaintiffs,

v. — 69-127-Civ.-CA

ROBERT R. GILBERT,
WALSTON & COMPANY, a corporation, and
THE SECURITIES AND EXCHANGE COMMISSION, a United States agency,
Defendants.

MEMORANDUM OF LAW OF DEFENDANT SECURITIES AND EXCHANGE COMMISSION IN SUPPORT OF ITS MOTION TO BE DROPPED AS A PARTY AND TO DISMISS THE ACTION AS TO IT

STATEMENT

Pursuant to the permission of the Court as granted at the hearing of February 10, 1969, defendant Securities and Exchange Commission ("Commission") submits this memorandum of law in support of its motion to drop it as a party and to dismiss as to it the action of plaintiffs Higher Education Loans Program, Inc. ("H.E.L.P.") and Murray Bast.

The allegations of the complaint are as follows:

At some unspecified time in the past plaintiff H.E.L.P. acquired 7000 shares of the common stock of Bartep Industries, Inc. ("Bartep") as part of a fee for negotiating a merger that resulted in the formation of Bartep. The 7000 shares of Bartep were not and are not now registered

with the Commission as provided in Section 6 of the Securities Act of 1933, 15 U.S.C. 77f. The stock purportedly "can be transferred only by private sale for investment and not for resale."

On or about July 1, 1968, H.E.L.P., through its officer Mr. Bast, borrowed $25,000 from defendant Robert R. Gilbert, who was acting as trustee for certain undisclosed principals. H.E.L.P. delivered the 7000 shares of Bartep stock to Mr. Gilbert as security for the loan. H.E.L.P. subsequently suffered business reverses, became insolvent and has no assets to repay the loan other than the stock. Sometime after January 24, 1969, Mr. Gilbert delivered the 7000 shares of Bartep stock to defendant Walston & Company with instructions to sell it by private or public sales, the proceeds being intended to be applied against the loan. H.E.L.P. and Mr. Bast "are in doubt" as to the right of Mr. Gilbert and Walston & Company to sell these shares "on the open market" and as to their own right to sell certain additional shares of Bartep stock under the rules and regulations promulgated by the Commission (presumably under the Securities Act of 1933) and under the decision in Securities and Exchange Commission v. Guild Films Co., 279 F. 2d 485 (C.A. 2), certiorari denied, 364 U.S. 819 (1960).

The jurisdiction of the Court is purportedly based on the Declaratory Judgment Act, 28 U.S.C. 2201-2202. Plaintiffs request the Court temporarily to enjoin Mr. Gilbert and Walston & Company from selling any of the Bartep stock until the Court has finally decided the case and seek a determination of the rights of H.E.L.P.,

Mr. Bast, Mr. Gilbert and Walston & Company to sell the stock under the Commission's rules and regulations and "such other relief as this Court may deem just and proper." Although the Commission is named as a defendant, no specific relief is sought as to it.

ARGUMENT

THE COMMISSION HAS BEEN IMPROPERLY JOINED IN THIS ACTION; AS TO IT THE COMPLAINT STATES NEITHER A CLAIM UPON WHICH RELIEF CAN BE GRANTED NOR ONE WITHIN THE SUBJECT MATTER JURISDICTION OF THIS COURT.

It is hornbook law that "one who is not connected with the controversy at all is not even a proper party and should not be joined in the suit." 2 W. Barron & A. Holtzoff, Federal Practice and Procedure § 511, at 90 (rev. ed. C. Wright 1961) (footnote omitted). If there is any controversy here at all, it is among the individual and corporate plaintiffs and the individual and corporate defendants only. The Commission is not a person needed for just adjudication of the action, as specified in Rule 19 of the Federal Rules of Civil Procedure, merely because it administers the act that purportedly gives rise to plaintiffs' "doubt."[1/] In such a situation, the proper procedure is to drop the Commission

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1/ The fact that the suit involves the Securities Act of 1933, a statute that this Commission is charged with administering, does not mean that the Commission is a proper party to the suit. So to hold would mandate that every government agency is a proper party to every private lawsuit involving a statute under its jurisdiction. Such a rule would place an impossible burden on the administrative system.

as a party to the action pursuant to Rule 21 of those rules. See, e.g., Ziegler v. Akin, 261 F. 2d 88, 91 (C.A. 10, 1958); 3A J. Moore, Federal Practice, ¶ 21.03, at 2904-2905 (2d ed. 1968).

As this Court was informed at the hearing held on February 10, 1969, the Commission is currently conducting an inquiry involving Bartep securities. The shares of Bartep here in issue may be involved in this inquiry. If this lawsuit is intended to bind the Commission as to the proposed transactions involving Bartep stock before the Commission has an opportunity to complete its inquiry and take whatever steps it concludes to be warranted by the facts uncovered, such a prior restraint would be an invalid infringement on the administrative process. It is clear that, if the plaintiffs were actually seeking to enjoin the inquiry on the ground that no violation was involved, the action would be properly dismissed upon a motion by the Commission. See, e.g., Securities and Exchange Commission v. Otis & Co., 338 U.S. 843 (1949) (per curiam); M. G. Davis & Co., Inc. v. Cohen, 369 F. 2d 360 (C.A. 2, 1966); Thomson & McKinnon v. Securities and Exchange Commission, 268 F. Supp. 11 (S.D. N.Y.), aff'd per curiam from the bench (C.A. 2, Docket No. 31297, May 1, 1967); Fontaine v. Securities and Exchange Commission, 259 F. Supp. 880 (D. Puerto Rico, 1966), stay denied, ['67-'68 Decisions] CCH Fed. Sec. L. Rep. ¶ 91,892 (C.A. 1, 1967). Plaintiffs' attempt to seek the equivalent of such an injunction through the back door by the device of a private lawsuit is unwarranted.

Furthermore, it is clear that reliance on the Declaratory Judgment Act as a jurisdictional foundation for this lawsuit is without merit. The Supreme Court has consistently held that statute to be procedural only and not an extension of existing jurisdiction. For example, in Schilling v. Rogers, 363 U.S. 666, 677 (1960), an action brought against a federal agency, the Court refused to accept the Declaratory Judgment Act as a basis for jurisdiction, holding:

> . . . the Declaratory Judgment Act is not an independent source of Federal jurisdiction . . .; the availability of such relief presupposes the existence of a judicially remediable right. No such right exists here.

Indeed, Section 2201 of the Judicial Code allows a court to issue a declaratory judgment only "[i]n a case of actual controversy within . . . [the court's] jurisdiction." The requirement of an actual controversy is, of course, grounded in Article III of the United States Constitution, which limits the judicial power of the United States to "actual controversies arising between adverse litigants. . . ." Muskrat v. United States, 219 U.S. 346, 361 (1911). In this case there is clearly no present controversy between plaintiffs and the Commission as to the legality of any sales of Bartep stock. The Commission has never expressed any view about that question. Indeed, since the complaint does not specify such pertinent facts as the date or dates on which H.E.L.P. acquired its Bartep stock, its total holdings, the circumstances of the acquisitions and the relationship between plaintiffs and Bartep, it could not do so. In the absence of

an actual disagreement between the Commission and the other parties, a declaratory judgment would be no more than an advisory opinion and may not be rendered by a federal court.[2/] Nor is plaintiffs' action against the Commission "within . . . [the] jurisdiction" of this Court. In circumstances such as this it is clear that an action against the Commission seeking an injunction or declaratory relief is not proper, and a motion by the Commission to dismiss the action for want of subject matter jurisdiction must be granted. First Savings & Loan Ass'n of the Bahamas, Ltd. v. Securities and Exchange Commission, 358 F. 2d 358 (C.A. 5, 1966); American College Foundation, Inc. v. Securities and Exchange Commission, S.D. Fla. 68-602-Civ-TC (Sept. 11, 1968) (unreported).

Thus, the complaint fails to state a claim upon which relief can be granted or that is within the jurisdiction of this Court.[3/]

2/ Since plaintiffs do not allege that they and the private defendants disagree about the legality of any sales, it is not clear that the Court even has subject matter jurisdiction as to them.

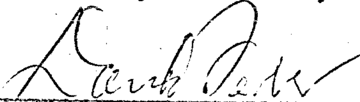
3/ The Commission, as an agency of the United States, may be sued only in such manner as Congress authorizes. The only such authorization with regard to the Securities Act of 1933 is for a petition in a United States Court of Appeals to review an order of the Commission. Section 9 of the Securities Act of 1933, 15 U.S.C. 77i. There is no authorization for an original action in a United States District Court.

Congress has not authorized suit against the Commission as such in a situation like this. Thus, the action could be dismissed as against the Commission on this ground as well. Holmes v. Eddy, 341 F.2d 477, 480 (C.A. 4), certiorari denied, 382 U.S. 822 (1966); cf. Blackmar v. Guerre, 342 U.S. 512 (1952). Since plaintiffs could cure this particular defect by amending their complaint to name the members of the Commission as individuals and by serving them as such, we do not base this motion on the so-called doctrine of eo nomine.

CONCLUSION

For the reasons stated, the motion that the Commission be dropped as a party, and that the action be dismissed as to it should be granted.

Respectfully submitted,



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Dated: February 1969