No. 1158

In the Supreme Court of the United States

OCTOBER TERM, 1970

ABBETT, SOMMER AND COMPANY, INC., ET AL.,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The court of appeals did not render an opinion. The opinion of the Securities and Exchange Commission (Pet. App. 1a-15a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a-17a) was entered on September 25, 1970. The petition for a writ of certiorari was filed on Decem-

ber 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' conduct was willful within the meaning of 5 U.S.C. 558(c).

2. Whether the issuance by the Commission's staff of a letter stating that the offer and sale of certain mortgage notes would be exempt from registration under the Securities Act estopped the Commission from imposing sanctions upon petitioners for offering and selling the unregistered notes when it developed that the submitted facts upon which the staff's opinion was expressly based were, as petitioners knew or should have known, materially at variance with the actual circumstances surrounding the offer and sale of the notes.

STATUTE INVOLVED

The pertinent provisions of 5 U.S.C. (Supp. V) 558 are set forth in the petition at pages 2-3.

STATEMENT

Petitioners seek review of the affirmance of an order of the Commission revoking the broker-dealer registration of petitioner Abbett, Sommer and Company ("registrant"), expelling registrant from membership in the National Association of Securities Dealers, Inc., unconditionally barring registrant's president and sole stockholder, petitioner Charles W. Sommer, III ("Sommer"), from association with any broker or dealer, and finding petitioner Abbett, Som-

mer & Co. Mortgage Corporation ("Mortgage Corporation") to be a cause of the revocation of registrant's broker-dealer registration.

The Commission found that petitioners had willfully violated, or willfully aided and abetted violations of, the registration and antifraud provisions of the Securities Act of 1933 and the antifraud provisions of the Securities Exchange Act of 1934 in the offer and sale of mortgage notes and investment contracts to public investors, and had willfully violated the recordkeeping provisions of the Securities Exchange Act (Pet. App. 1a-15a). The Commission held that petitioners willfully made false and misleading representations to customers in connection with the offer and sale of the mortgage notes,[1] including misrepresentations as to the safety of the investment, and the value of the mortgaged property securing the notes (Pet. App. 4a). The Commission also held that the offer and sale of these notes involved "investment con-

[1] Petitioners purchased the notes in question from, and sold them as agents for, Century Trust Company. The notes were typically executed by home owners, as payments for home improvements, and were secured by mortgages on the properties improved. Century was in the business of buying these notes at a discount from building contractors and others and reselling the notes "with recourse" (against Century) in the event of default by the note maker. The Commission found that petitioners sold more than 600 such notes to approximately 150 customers, at prices totalling more than $1.3 million. Prior to July 1963, sales were made by registrant and thereafter by Mortgage Corporation, which the Commission described as being "organized for that purpose by Sommer" and which " 'lacked a palpable identity distinct from' registrant since it had the same officers and employees and used registrant's stationery." (Pet. App. 3a-4a).

tracts" which petitioners knew or should have known were subject to the registration requirements of the Securities Act (Pet. App. 6a, 11a). The Commission rejected petitioners' claim of good faith reliance on the advice of counsel for Century Trust Company ("Century"), and reliance on a 1964 letter from the Commission's staff (Pet. App. 11a), finding that petitioners knew or should have known that the facts on which both the staff interpretation and the opinion of Century's counsel were based were incorrect (Pet. App. 9a).[2] Accordingly, the Commission found that petitioners' violations of the registration requirements were willful since they knew that no registra-

[2] By letter dated October 1964, the Commission's staff advised Century and Sommer that the Rule 234 exemption from registration under the Securities Act appeared to be available to the Century mortgage notes, provided that the notes were offered and sold within the terms and conditions specified in that rule. As the Commission found, "the record shows that the representations of Century's counsel, made in a July 1964 letter which Sommer saw and on which our staff's interpretation was essentially based, were as Sommer knew or should have known, not in conformance with the facts or misleading in material respects" (Pet. App. 9a). Century's counsel had represented to the Commission's staff, for example, that the notes in question were secured by properties located in Texas only, that purchasers made their own selection of notes, and that the only guarantee offered by Century with respect to the notes was the "with recourse" endorsement (Pet. App. 9a-10a). Contrary to these representations, the Commission found that some of the notes were secured by properties in Louisiana and Arkansas, that petitioners selected notes for many of their customers, that in the event of a default on the notes, Century occasionally made the payments itself, and that the petitioners had advised customers that Century would repurchase the notes at any time (Pet. App. 9a-10a).

tion statement had been filed and knew or should have known that no exemption was available (Pet. App. 11a).

In considering the sanctions to be imposed upon petitioners, the Commission stated (Pet. App. 14a):

> The record reflects gross indifference by Sommer and his companies to basic requirements of the securities acts and the standards applicable to those engaged in the securities business, which, taken together with the other factors noted by the examiner, make it in our view inconsistent with the public interest to permit their continuance in the securities business.

The court of appeals affirmed the Commission's order without opinion (Pet. App. 16a-17a).

ARGUMENT

The court below correctly upheld the Commission's findings and order, and the petition presents no question warranting further review.

1. Petitioners contend (Pet. 5-6) that the Commission erred in barring them from the securities business without affording them prior notice and an opportunity to comply with the law, pursuant to Section 9(b) of the Administrative Procedure Act, as amended, 5 U.S.C. (Supp. V) 558(c) (set forth at Pet. 2-3). The Commission expressly found that petitioners' conduct brought this case within the exceptions for cases of "willfulness" or "public interest" contained in Section 9(b) and that prior notice and opportunity to comply were thus not required (Pet. App. 13a). Petitioners argue, however, that the Com-

mission applied an erroneous definition of willfulness and that, under any definition, petitioners' conduct was not willful because they acted in good faith reliance on the advice of counsel for Century Trust Company ("Century") and the 1964 staff letter.

"Willfulness" under Section 9(b) of the Administrative Procedure Act has been defined by the Commission and most courts to mean the intentional doing of an act which is prohibited; a finding of specific intent to violate the law has not been required. See, *e.g.*, *Goodman* v. *Benson*, 286 F.2d 896, 900 (C.A. 7); *Eastern Produce Co.* v. *Benson*, 278 F.2d 606, 609 (C.A. 3); *Great Western Food Distributors* v. *Brannan*, 201 F.2d 476, 484 (C.A. 7), certiorari denied, 345 U.S. 997; *Schwebel* v. *Orrick*, 153 F. Supp. 701, 705 (D. D.C.), affirmed *per curiam*, 251 F.2d 919 (C.A. D.C.), certiorari denied, 356 U.S. 927. While there is language in the Tenth Circuit's opinion in *Capitol Packing Co.* v. *United States*, 350 F.2d 67, 78-79, cited by petitioners (Pet. 5), that a finding of "willfulness" can only be premised upon an "intentional misdeed" or "gross neglect," the holding of that case—which found the requisite intent even under the stricter test—does not conflict with the decision below.

Moreover, the record shows that petitioners' violations were willful even under their definition. Petitioners' false and misleading representations as to the value of the mortgaged properties securing the notes, for example, were either intentional or grossly negligent, since petitioners knew or should have known the true value of the properties. In addition, as the Commission found, petitioners sold securities which

they knew were not registered when they knew or should have known that no exemption was available, and Sommer and registrant failed to keep current or accurate records as required by the Securities Exchange Act, even though they were repeatedly advised of specific recordkeeping deficiencies by the Commission's staff (Pet. App. 11a-12a).

The Commission also properly rejected, on the basis of the record, petitioners' contention that they relied in good faith on the advice of Century's counsel and the interpretation of the Commission's staff and were not aware they were violating the securities laws (Pet. 5; Pet. App. 9a-10a). Contrary to petitioners' contention, the Commission did not assume that they either knew or should have known that the information on which the Commission's staff interpretation in 1964 and the opinion of Century's counsel were based was incorrect (Pet. 7). The Commission found, with substantial evidentiary support, that Sommer saw the representations of Century's counsel, made in a July 1964 letter, on which the 1964 interpretation of the Commission's staff was based and that Sommer knew or should have known that the representations in that letter did not conform with the true facts or were materially misleading (Pet. App. 9a).

2. Petitioners also err in contending that the Commission was estopped from imposing sanctions for their participation in the sale of the unregistered securities because of the staff's 1964 letter (Pet. 7-8). The staff there stated that its opinion as to the registration exemption was limited to the facts that had been disclosed. The Commission found that

petitioners were not justified in relying upon the 1964 letter in that they knew or should have known that the facts represented to the staff were not accurate (Pet. App. 9a-10a). In any event, as the Commission noted in its opinion (Pet. App. 9a), the doctrine of equitable estoppel cannot be invoked to prevent an administrative agency from enforcing the law. *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183; *United States* v. *San Francisco*, 310 U.S. 16, 32. Accord, *Capital Funds, Inc.* v. *Securities and Exchange Commission*, 348 F.2d 582, 588 (C.A. 8); *Securities and Exchange Commission* v. *Culpepper*, 270 F.2d 241, 248 (C.A. 2); *Securities and Exchange Commission* v. *Morgan, Lewis & Bockius*, 209 F.2d 44, 49 (C.A. 3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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