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UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

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JOEL HARNETT, <u>et al.</u> ,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	77 Civ. 3110 (VLB)
	:	
SECURITIES AND EXCHANGE COMMISSION,	:	
<u>et al.</u> ,	:	
	:	
Defendants.	:	
_____	:	

SUPPLEMENTAL MEMORANDUM OF THE DEFENDANT SECURITIES AND EXCHANGE COMMISSION IN SUPPORT OF ITS APPLICATION FOR COSTS AND ATTORNEY'S FEES

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UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, et al.,
Plaintiffs,
v.
SECURITIES AND EXCHANGE COMMISSION,
et al.,
Defendants.

77 Civ. 3110 (VLB)

SUPPLEMENTAL MEMORANDUM OF THE DEFENDANT SECURITIES AND EXCHANGE COMMISSION IN SUPPORT OF ITS APPLICATION FOR COSTS AND ATTORNEY'S FEES

In its motion to dismiss this action for failure of the plaintiffs to pursue or exhaust their administrative remedies under the Freedom of Information Act, 5 U.S.C. 552, the Securities and Exchange Commission (the "Commission") requested this Court to award it the costs and reasonable attorney's fees incurred in defending the action, on the ground that the action had been brought "in bad faith, vexatiously, wantonly or for oppressive reasons." Hall v. Cole, 412 U.S. 1, 5 (1973); Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-259 (1975). Since the Commission made its initial motion for attorney's fees, subsequent events relating to the conduct of this litigation by the plaintiffs have further strengthened the basis for the award of attorney's fees to the Commission under the applicable "bad faith" standard. This supplemental memorandum is submitted in order to apprise the Court of these subsequent developments.

1. The plaintiffs have proceeded inappropriately in bringing this matter on for hearing by way of an application for an order to show cause in the absence of any justification for this extraordinary procedure. 1/

1/ It should also be noted that the plaintiffs' counsel gave no indication of his intention to proceed by way of an application for an Order to Show Cause on July 15, 1977, when the Commission agreed to counsel's request that it consider service to have been effected

(footnote continued)

In so doing, they have necessitated the expenditure of considerable time and effort, on the part of both the Court and the Commission. As set forth in our response to the Court's order to show cause, by choosing to proceed in this manner, the plaintiffs have acted in derogation of the right of the defendants to respond to the complaint in due course and to assist the Court in arriving at an informed determination on the merits. An order to show cause is not a satisfactory substitute for a trial on the merits, and should not be used in an attempt to defeat the right of the defendants to "answer or otherwise plead" within 30 days after service of the complaint. 5 U.S.C. 552(a)(4)(C). Pursuant to this statutory provision, the Commission has filed a motion to dismiss the complaint herein and, as we have indicated in our response to the order to show cause, orderly procedure requires that the pending motion to dismiss be considered first.

2. The plaintiffs' application to this Court for an order to show cause was supported by a sworn statement made in the affidavit of Joel Harnett, one of the plaintiffs herein, which not only improperly recounted the unfounded and unsupported speculation of other individuals, but added the unsupported speculation of the plaintiff himself, and was moreover replete with impertinent and unwarranted aspersions on the integrity of officials of the Securities and Exchange Commission. 2/ These inappro-

1/ (continued)

on the Commission on June 30, 1977. Nor did counsel indicate that this was his intention on July 18, 1977, when this arrangement was confirmed in writing in a letter to the Commission's General Counsel, in which the plaintiffs' counsel stated: "I look forward to receiving the answer of the Securities and Exchange Commission on or before July 30, 1977." See Exhibit A to the affidavit of Joel Harnett, filed in support of plaintiffs' application for an order to show cause. The plaintiffs have not explained what change in circumstances occurring after July 18, 1977, warranted their application to this Court for an order to show cause.

2/ For example, paragraphs 9-24 of Mr. Harnett's affidavit are largely devoted to recounting speculation that appeared in two articles that were published in the New York Times on July 16, and July 19, 1977, and adding thereto his own speculation concerning these articles. These unwarranted assertions concerning the integrity

(footnote continued)

priate statements made in the Harnett affidavit provide further evidence that this litigation was instituted and has been conducted vexatiously and in bad faith.

3. This suit was instituted for obvious political reasons, and the plaintiffs are attempting to use this Court, as they have used the Commission, in order to obtain publicity that they hoped would benefit their ongoing political campaign. In these attempts, the plaintiffs have demonstrated their willingness to issue press releases that misstate and distort the facts, when it suits their purposes to do so. Attached hereto as Exhibit B is such a press release, issued by the plaintiffs on May 5, 1977, in which the substance of a telephone conversation between plaintiff Gordon Marshall and Harvey L. Pitt, General Counsel of the Commission, was materially misrepresented by the plaintiffs. The plaintiffs' attempt to bring this matter on for a court hearing by way of an inappropriate request for an order to show cause can only be viewed as another attempt to obtain publicity for their political campaign—an attempt which has, as we have noted, resulted in the expenditure of a significant amount of time and effort, on the part of both the Court and the Commission. These actions are further evidence that the plaintiffs have acted vexatiously and in bad faith.

2/ (continued)

of the Commission and its officials are completely unsupported and unsupportable. As stated in a letter from Harold M. Williams, Chairman of the Commission, to the editor of the New York Times, a copy of which is attached hereto as Exhibit A:

"the truth is that the Commission has not made any * * * decision [to delay the issuance of the report] and will release the New York City report as soon as it is completed * * *. Our staff is continuing to work on what has been an extremely difficult and complicated investigation. The findings of the Commission will be released to Congress and to the public at the earliest possible time consistent with our responsibilities under the federal securities laws."

4. As we indicated in our memorandum in support of our motion to dismiss for failure to exhaust administrative remedies, the plaintiffs have completely failed to advance any substantial, colorable claim of access to any Commission documents under the Freedom of Information Act, 5 U.S.C. 552. As set forth in that memorandum, the documents brought before the Court by the plaintiffs themselves clearly evidence: (1) their complete failure to identify adequately any specific documents to which access is desired; (2) their complete failure to comply with published procedures of the Commission for submitting requests for records under the Freedom of Information Act; and (3) their complete failure to comply with the published procedures of the Commission for pursuing an appeal from an initial adverse determination. The plaintiffs' failure to comply with the most rudimentary of administrative procedures cannot be excused. The "bad faith" test is satisfied where a party knowingly asserts a frivolous claim; by any reasonable standard, the plaintiffs' action is frivolous and was instituted vexatiously and in bad faith.

CONCLUSION

For the foregoing reasons, and those set forth in the memorandum in support of the Commission's motion to dismiss, the defendant Securities and Exchange Commission should be awarded reasonable attorney's fees and other costs expended in the defense of this meritless litigation.

Respectfully submitted,

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Dated: July 25, 1977



OFFICE OF
THE CHAIRMAN

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

July 21, 1977

Letters to the Editor
The New York Times
c/o Mr. Hedrick L. Smith
N. Y. Times Bureau
1920 L Street, N.W.
Washington, D. C. 20036

To the Editor:

Three months is not a great deal of time to come to know an agency of some 2,000 people. Nevertheless, in the three months that I have been Chairman of the Securities and Exchange Commission I have developed a great respect for the integrity, ability, and dedication of my fellow Commissioners, and of the members of the Commission's staff. It is not hard to see why the Commission has consistently been identified as the best of the independent regulatory agencies.

It is therefore with real sadness that I have read two recent articles which, without any foundation in fact, impugn the integrity of this Commission and its staff.

In articles published on Saturday, July 16, and Tuesday, July 19, reporter Martin Tolchin asserts that the Commission has made a decision not to issue any report on its investigation of circumstances surrounding the sale of City of New York securities until after the September mayoral primary election. Furthermore, through innuendo and artful juxtaposition, these articles imply that the reason for this alleged decision was a desire by the Carter Administration to assist a political ally. These extremely serious and damaging assertions are absolutely unsupported and unsupportable.

The truth is that the Commission has not made any such decision and will release the New York City report as soon as it is completed. There has been no attempt whatsoever by anyone from the Carter Administration to exert any influence with respect to any aspect of the report, nor in fact have they even made any inquiry about it. I told all of this to Mr. Tolchin quite clearly prior to the publication of his first article. Our staff is continuing to work on what has been an extremely difficult and complicated investigation.

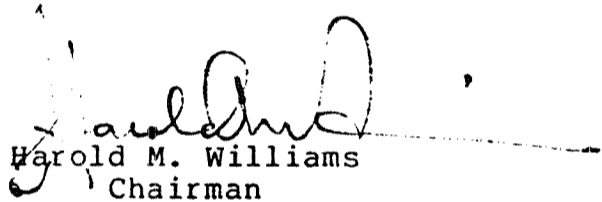
EXHIBIT A

2.

The findings of the Commission will be released to Congress and the public at the earliest possible time consistent with our responsibilities under the federal securities laws.

During the 43 years of its existence, the Commission has built and maintained, sometimes in the face of very great pressure, a reputation for integrity, effectiveness, and independence of political considerations. It is only by virtue of the authority which such an unblemished reputation affords that an agency as small as the Commission has been able to do such an effective job of assuring the integrity of our capital markets, which are recognized as the finest in the world. I am saddened, and more than a little angered, that the integrity of this agency should be put into question without factual basis. And, I am at a loss to understand how one of the leading newspapers in the world could allow itself to be compromised in this fashion.

Sincerely,



Harold M. Williams
Chairman

Save
our
City

with **JOEL HARNETT as Mayor**

SAVE OUR CITY, INC., SUITE 2703, 575 LEXINGTON AVE., NEW YORK, NY 10022

May 5, 1977

Contact: Rennie C. Weber (212) 688-4546

file New York City

HARNETT CALLS ON PRESIDENT CARTER
TO DIRECT IMMEDIATE RELEASE
OF SEC REPORT ON NYC BOND SALES

Joel Harnett, a Mayoral candidate in the Democratic primary today asked President Carter to order the Chairman of the Securities and Exchange Commission to release its report on New York City municipal bond sales.

"Delay", said Harnett, "has the same effect as a cover-up. If the report is not released by June 1st, the primary election could be a futile exercise in democratic rights".

"Petitions", Harnett pointed out, "start circulating on June 7. To act responsibly, signers have a right to know what involvement, if any, potential candidates had in the sale of the bonds and if there was fraud".

The SEC report was due to be released in the Spring of 1977. It deals with the sale of New York City municipal bonds and, specifically, whether fraud was committed by the withholding of vital information to the public.

Letters dealing with the release date of the report to the Chairman of the Securities and Exchange Commission by Joel Harnett's counsel, Gordon Marshall, have not been answered.

In a telephone call to Harvey Pitt, Chief Counsel to the SEC, Marshall was told that the stock phrase "The matter is still under investigation" could include a situation where the fact-finding has been completed but the Commissioners have not made up their minds to release the report.

EXHIBIT B

Page 2

Mr. Pitt also said that the Chairman of the SEC could order that the report be released by a specific date, but he has not so ordered.

Harnett, therefore, wrote the President of the United States, asking him to direct the Chairman to complete and release the report by June 1st.

In the election situation in New York City, a delay would serve the same purpose as a cover-up if the report is not released until after the primary election. The people, in order to exercise their vote responsibly, must know the facts about their candidates.

May 5, 1977

Letter to President Carter attached.