

*Bender - Briggs*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Nos. 77-6124, 77-\_\_\_\_

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JOEL HARNETT, et al.,

Plaintiffs-Appellees,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant-Appellant,

and

EXECUTIVE OFFICE OF THE PRESIDENT  
OF THE UNITED STATES,

Defendant.

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REPLY OF THE DEFENDANT-APPELLANT SECURITIES AND EXCHANGE  
COMMISSION TO THE PLAINTIFFS-APPELLEES' MOTIONS TO VACATE  
THE DISTRICT COURT'S STAY ORDER AND TO DISMISS THIS APPEAL

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HARVEY L. PITT  
General Counsel

PAUL GONSON  
Associate General Counsel

Securities and Exchange Commission  
Washington, D. C. 20549

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PRELIMINARY STATEMENT

On August 2, 1977, the Commission noticed an appeal (A. 391) 1/  
from two orders entered by the Honorable Vincent L. Broderick, United  
States District Judge for the Southern District of New York, on August  
1, and August 2, 1977 (A. 329, 389). Those orders

— declared that the district court had jurisdiction over this alleged  
Freedom of Information Act ("FOIA") action, despite the court's  
findings that the plaintiffs "have not followed the [Commission's  
FOIA] channels at all" (A. 105), that "There has been no decision

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1/ References to the Appendix filed with this Court on August 5, 1977,  
will be cited as "A.    ;" references to the Supplemental Appendix  
filed with the Court concurrently with this memorandum will be  
cited as "Supp. A.       ."

made within the SEC itself as to what to do about Mr. Marshall's demand" (A. 278-279), and that the document allegedly sought by the plaintiffs did not exist (A. 305); and

- directed the Commission to produce, for in camera inspection, in order for the court to determine whether to require public disclosure of, certain draft portions of a report of investigation, in various stages of preparation, being compiled by the Commission's New York Regional Office staff, notwithstanding the court's finding that although the plaintiffs' purported request to the Commission encompassed only "the SEC Report on the results of its investigation" (A. 12), "there is no complete report, \* \* \* there is at most a draft report which is not finished, plus underlying documents" (A. 305), and notwithstanding Commission counsel's un rebutted showing that the materials were exempt under the FOIA, and the court's express finding that such an order "does interfere with the ability of the SEC to perform its law enforcement functions with dispatch" (A. 347).

On August 2, 1977, the Commission moved for a stay of the district court's orders, "pending [the Commission's] attempt to expeditiously seek appellate review \* \* \*" (A. 386). The district court initially granted a stay of its orders until 5:00 p.m., Friday, August 5, 1977, "upon the condition that the \* \* \* Commission promptly: (1) file such pleadings as are necessary to perfect appellate jurisdiction of [the district] Court's Orders no later than August 3, 1977, and (2) seek from [this Court] a stay of [the district] Court's Order to produce materials no later than August 5, 1977" (A. 388, 390).

Accordingly, the Commission served and filed its notice of appeal on August 3, 1977, and served on August 4, 1977, and filed with this Court, on August 5, 1977, its motion for a stay pending appeal and a determination of its application for extraordinary relief. In its stay papers, the Commission notified this Court, as it had advised the court below (A. 386), that, out of an abundance of caution, the Commission also would petition this Court for writ of mandamus and prohibition.

On August 3, 1977, the Commission was informed by the Office of the Clerk of this Court that, the Court not being in regular session, no panel would be available to hear the Commission's stay motion until August 16, 1977. The Clerk's Office suggested that, under the circumstances, the Commission should reapply to the district court for a further stay before applying to a single judge of this Court for emergency consideration (Supp. A. 399-400). On August 4, 1977, the parties appeared before the district court on the Commission's application for a further stay (Supp. A. 398-450).

The district court granted a stay until 5:00 p.m., August 16, 1977, because the court recognized that (1) its order "does have ramifications which undoubtedly may go far beyond this case" (Supp. A. 444); (2) the Commission "will do everything it can to expedite consideration of the Court of Appeals" (Supp. A. 448); and (3) "the Commission is working as diligently as possible in bringing its report to a stage where, to the extent that it can be made public, it will be made public" (Supp. A. 444).

At the request of the district court, in an effort to expedite consideration of this matter, the Commission inquired of the Clerk of this Court regarding the availability of a panel of this Court to hear the Commission's stay motion before August 16, 1977 (Supp. A. 455-456). Upon being informed by the Office of the Clerk that a panel could not be convened prior to August 16, 1977, the Commission so informed the district court and opposing counsel (Supp. A. 458).

In its motion before this Court for a stay pending the disposition of appellate review of the lower court's assertion of jurisdiction over this case, the Commission set forth in detail why it met each of the applicable standards for a stay. Of paramount significance in this regard is the fact that the lower court asserted jurisdiction it did not have, to

issue an order the court itself recognized would necessarily disrupt an ongoing law enforcement investigatory proceeding (A. 347). The Commission feels constrained to seek immediate appellate review to preserve the integrity of its law enforcement processes, and to preclude the FOIA from being used to divert the Commission from effectively completing its pending and future law enforcement investigations.

In the absence of a stay, it will be impossible to invoke this Court's power to correct the serious errors of the court below. In that circumstance, only a Commission determination to refuse to comply with the lower court's order, bringing on a contempt order, would preserve this Court's jurisdiction. That is a step the Commission neither wants to take, nor believes it should be compelled to take. Only by granting a continued stay of limited duration, pending a disposition of the substantial merits of the Commission's claims, can an unseemly, and unnecessary, confrontation between an independent law enforcement agency and the federal judiciary be avoided.

The plaintiffs have not chosen to, and, indeed could not, dispute the Commission's demonstration that the lower court significantly erred in asserting jurisdiction where none exists. Rather, on August 9, 1977, the plaintiffs-appellees filed with this Court motions to vacate the district court's stay order and to dismiss the Commission's appeal. Those moving papers generally challenge this Court's jurisdiction to review the orders in question by an appeal as of right. Significantly, however, memoranda of law filed by the plaintiffs-appellees in support of their motions do not question the appropriateness of appellate review by way of application for extraordinary relief; nor do they challenge the appealability of these orders, except to assert the general proposition that a denial of a motion

to dismiss is not normally appealable and that an order for in camera inspection is interlocutory in nature. (See, e.g., Plaintiffs' Memorandum of Law in Support of Motion to Dismiss the Appeal, pages 7-9.) But, as we show below, there are five significant issues presented for review here, and the case law amply supports both the mandatory and discretionary assertion of appellate jurisdiction by this Court to review such significant issues.

In addition, the plaintiffs-appellees have asserted that the Commission's efforts to secure appellate review at this time are a "sham." The district court, however, expressly recognized "that the SEC in good faith has challenged my power to issue the order I have issued." (Supp. A. 439). 2/

QUESTIONS PRESENTED BY THE ORDERS AS TO  
WHICH THE COMMISSION SEEKS APPELLATE REVIEW

1. May a district court assert jurisdiction over an action brought solely pursuant to the FOIA, where no request for documents was ever made to, or disposed of by, the agency from which the documents allegedly were sought?

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2/ The unsupported allegation of the plaintiffs-appellees -- that the Commission obtained an extension of the lower court's stay order from that court on August 4, 1977, by "hinting darkly and ominously to JUDGE BRODERICK that the COMMISSION might have to bring on a writ of mandamus" (see Affidavit of Joel Harnett, dated August 9, 1977, at p. 6) -- is unwarranted, scandalous and demeans the district court as well as the Commission. The Commission respectfully informed the district court on August 2, 1977, that "in order to avoid any questions about the jurisdiction of the Second Circuit, we believe we are constrained to seek also writs of prohibition and mandamus with respect to this matter" (A. 386). The Commission will, in fact, file its petition for writs of mandamus and prohibition, and brief in support of the petition, as well as its opening brief in this appeal, prior to the oral argument on the pending motion for a stay, scheduled for August 16, 1977.

2. Where a document allegedly requested of an agency under the FOIA indisputably did not exist, may a district court nevertheless exercise continuing jurisdiction of an action under the FOIA to determine whether the plaintiffs should be given access to some other documents that might be in the agency's possession?

3. Where an agency has never had the opportunity to consider whether it would produce a document allegedly requested of it under the FOIA and, if it would not produce the document, what statutory exemptions it relies upon to justify nondisclosure, may a district judge nevertheless order in camera inspection of agency records for the purpose of determining the validity of the exemptions the court supposes the agency might have claimed had the agency been given the opportunity to do so?

4. Is a district court compelled, as a matter of law, to require the in camera inspection of Commission records where it is undisputed, and the lower court so finds, that no FOIA request was ever made to the Commission, that the document the plaintiffs could have been deemed to have requested from the Commission did not exist, and that the only conceivably relevant records possessed by the agency were predecisional draft staff memoranda and investigatory records compiled for law enforcement purposes, the compilation and production of which for in camera inspection, the court found, would itself "interfere with the ability of the SEC to perform its law enforcement functions with dispatch"?

5. May a district court, in a lawsuit purportedly brought under the FOIA, assert supervisory control over the Commission's law enforcement investigation, and divest the Commission of its "absolute discretion" <sup>3/</sup> to determine whether, and when, to prepare and issue a report of its staff's law enforcement investigation?

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<sup>3/</sup> See, e.g., Dyer v. Securities and Exchange Commission, 291 F. 2d 774, 781 (C.A. 8, 1961); Section 21(a) of the Securities Exchange Act.

ARGUMENT

I. THIS COURT HAS APPELLATE JURISDICTION TO REVIEW THE ORDERS ISSUED BY THE DISTRICT COURT ON AUGUST 1 AND AUGUST 2, 1977.

A. This Court Has Jurisdiction Under 28 U.S.C. 1291 To Review The Orders From Which The Commission Has Noticed An Appeal.

The United States courts of appeals are granted jurisdiction, under 28 U.S.C. 1291, to hear appeals "from all final decisions of the district courts." And, in interpreting the requirement of "finality," the courts have consistently "given this provision of the statute [a] practical rather than a technical construction." Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949). 4/

Thus, "a decision 'final' within the meaning of §1291 does not necessarily mean the last order possible to be made in a case," Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964), nor "those final judgements which terminate an action \* \* \*." Cohen v. Beneficial Loan Corp., supra, 337 U.S. at 545. In fact, "whether a ruling is 'final' within the meaning of §1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality." Id.; accord, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974).

The courts must therefore determine the finality of an order by balancing the "competing considerations" pertinent to a finding of appealability, the most important of which are "the inconvenience and costs

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4/ Accord, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Cobbledick v. United States, 309 U.S. 323 (1940).



of piecemeal review on the one hand and the danger of denying justice by delay on the other." Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950). This the courts have done where, as here, the appellate review sought involves "claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Loan Corp., supra, 337 U.S. at 546.

This Court, in Petition of Trustees of Joint Welfare Fund, 549 F.2d 871, 873 (C.A. 2, 1977) (citations omitted), recently articulated the factors controlling a determination of appealability under 28 U.S.C. 1291 as follows:

"Under the Cohen rule, to be appealable the order must decide issues which are 'separable from, and collateral to,' the rights asserted in the underlying action and issues must be of such a nature that they cannot be effectively reviewed at the time of final judgment. \* \* \* In addition, either the appeal must present a 'serious and unsettled question,' \* \* \* or the order appealed from must have the practical effect of terminating the action \* \* \*."

The Commission respectfully submits that these factors are met here. The issues relating to the lower court's finding of jurisdiction and its entry of the in camera production order are, of course, collateral to the rights asserted by the plaintiffs; these issues cannot be effectively reviewed after the entry of a final judgment because, as we have noted, the substantive damage to the Commission will by then already have occurred; and, finally, this appeal plainly presents "serious and unsettled question[s]" with respect to whether the FOIA may be utilized to divest an agency of its statutorily-defined law enforcement functions, and reconstitute those powers in a federal district court.

An analogous situation was presented in United States v. Nixon, 418 U.S. 683 (1974). There, the Supreme Court reviewed, by way of writ of certiorari before judgment to the Court of Appeals for the District of Columbia Circuit, a district court order directing in camera inspection of certain materials which were the subject of a subpoena duces tecum issued to the President of the United States. The President had moved to quash the subpoena, on the ground that the materials sought were privileged. The Supreme Court affirmed the court of appeal's decision that the district court's in camera inspection order was appealable as of right. 5/

Here, as in Nixon, supra, the only alternative to appellate review by this Court is Commission contempt of the lower court's order. While the Supreme Court has held that contempt is an appropriate route for private litigants to follow, 6/ in the Nixon case the Court held that there was an important "exception" to the "requirement of submitting to contempt \* \* \*" where separate branches of the government are involved and requiring contemptuous conduct "would be unseemly, \* \* \*" and would present an unnecessary occasion for confrontation between two branches of the government. Id. at 691-692. The Court also predicated appealability on the fact that the issue of contempt "could itself engender protracted litigation, and would further delay \* \* \* review on the

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5/ The Court's ruling was made despite its recognition that the finality requirement of 28 U.S.C. 1291 "embodies a strong congressional policy against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals \* \* \* [and that] [t]his requirement ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation." Id. at 690 (citations omitted, emphasis supplied).

6/ The Court observed that, as a general rule, "'one who seeks to resist the production of desired information [must choose] between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.'" Id. at 691, quoting, United States v. Ryan, 402 U.S. 530, 533 (1971).

merits of [the] claim of privilege \* \* \*." Id. at 692.

Here, the Commission has sought appellate review of the orders in question in an effort, inter alia, to protect its primary jurisdiction under the FOIA to determine, in the first instance, whether some (or complete) public disclosure of Commission records should be made, as well as its "absolute discretion" under Section 21(a) of the Securities Exchange Act, 7/ to determine whether and when to release a report of its law enforcement investigation. The orders of the district court, as that court itself conceded (A. 347), will have a substantial adverse effect upon an ongoing law enforcement investigation.

In addition, Commission compliance with those orders, in the hope of avoiding the need for ultimate appellate review, would establish a deleterious precedent by which any person, including the subjects of pending and future law enforcement investigations, could apply to a district court, under the guise of the FOIA, for similar and, perhaps, even more intrusive, orders, and thus effectively stymie the Commission's investigative and law enforcement functions.

Under the circumstances, a compelling predicate has been established for the proper application of a jurisdictional statute the Supreme Court has consistently and unequivocally interpreted flexibly in order to achieve substantial justice. As the district court below noted (Supp. A. 439), the Commission is proceeding, in good faith, expeditiously to secure appellate review of issues it believes to be of critical importance to its ability effectively to protect public investors. To require the Commission to resort

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7/ Dyer v. Securities and Exchange Commission, 291 F.2d 774, 781 (C.A. 8, 1961). See also Kukatush Mining Corp. v. Securities and Exchange Commission, 309 F.2d 647 (C.A. D.C., 1962); Schmidt v. United States, 198 F.2d 32 (C.A. 7), certiorari denied, 344 U.S. 896 (1952).

to defiance of the district court's order and seek appellate review of these issues by way of appeal from a contempt order would demean both the court and the Commission, resulting in an unnecessary confrontation between the judiciary and an independent regulatory agency. The Commission desires to seek reversal of the orders "by orderly and proper proceedings," see United States v. United Mine Workers, 330 U.S. 258, 293 (1947), not to bring on review by disobedience to the order of the lower court. Cf. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911).

Moreover, to secure review of the orders in question at this time will, in fact, promote the purposes underlying the finality requirement of 28 U.S.C. 1291. The Commission's appeal will determine essential jurisdictional questions --questions underlying the district court's orders and central to the viability of the plaintiffs' cause of action. A determination of these questions at this time will promote judicial economy by obviating either the need for a laborious in camera inspection by the district court of the thousands of pages of draft materials its order comprehends, or, even assuming rulings adverse to the Commission by this Court and, following in camera inspection, on the merits by the district court, protracted appellate procedures involving factual and legal questions far more involved and complex than those presented by the instant appeal. The Commission believes that appellate review at this juncture can only result in hastening the termination of this litigation and, to that end, commits itself to exert all efforts necessary to expedite appellate review of this matter at this time. 8/

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8/ The lower court's orders are likely also reviewable pursuant to 28 U.S.C. 1292(a)(1). That statutory provision grants appellate jurisdiction to the courts of appeals from "[i]nterlocutory orders of the district courts \* \* \* granting, continuing, modifying, refusing or dissolving injunctions \* \* \*." For the purposes of interpreting which interlocutory orders relate to injunctions within the meaning of this Section, the

B. This Court Also Has Appellate Jurisdiction to Review the District Court's Orders under 28 U.S.C. 1651

The All Writs statute, 28 U.S.C. 1651, provides that this Court "may issue all writs necessary or appropriate in aid of [its] jurisdiction and agreeable to the usages and principles of law." The Commission also seeks appellate review by this Court of the district court's orders by way of an application for writs of mandamus and prohibition under 28 U.S.C. 1651, in order to allay any doubts about the proper method of invoking this Court's jurisdiction (A. 386).

By its orders in this case, the district court has asserted two propositions -- (1) that it has jurisdiction over an action seeking access to records under the FOIA without the necessity for the requestor to seek access from the agency itself, and to exhaust the administrative process Congress provided; and (2) that it has the ultimate discretion to decide the timing and content of Commission enforcement activity, including the authority to decide whether, and when, a report of a Commission investigation should be published. The Commission believes that it has the responsibility, as an independent agency charged by the Congress

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8/ (footnote continued)

courts look beyond the form of the order and inquire as to its substantive the order and inquire as to its substantive impact. See, e.g., Taylor v. Board of Education, 288 F.2d 600, 604 (C.A. 2, 1961). And, in determining whether orders relating to injunctions are appealable under this provision, the courts have held reviewable those "orders which affect the substance of the plaintiff's basic claim." See, e.g., Shakur v. Malcomb, 525 F.2d 1144, 1147 (C.A. 2, 1975).

The district court's order compelling submission of certain material for in camera inspection is compulsory on its face, commanding the Commission to perform an act related not to any procedural aspect of the action, but to the substance of the plaintiffs' claim. A mandatory order for in camera inspection was expressly part of the plaintiffs' requested relief in their complaint (A. 20), and was a major portion of the order to show cause, issued by the district court pursuant to the motion of the plaintiff (A. 56-57).

with investigating and prosecuting violations of the federal securities laws, to invoke the assistance of this Court to protect its jurisdiction from this unjustified encroachment by the court below.

The issuance of writs of mandamus and prohibition are particularly appropriate in this case, where the Commission seeks only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction \* \* \*." Roche v. Evaporated Milk Association, 319 U.S. 21, 26 (1943). As we discuss below, the district court had no jurisdiction to proceed with this action under the FOIA because the plaintiffs failed to comply with that Act and the Commission's procedures under it, which require a determination by the Commission in the first instance before the district courts will have jurisdiction of such matters. Accordingly, the Commission asserts that a fundamental error pervades the district court's action here. As this Court has recently noted:

"We recognize that mandamus is not a substitute for an appeal, and that every disputed ruling during a trial should not be made the subject of a mandamus petition. However, the relief sought here is more fundamental. The errors complained of are not errors involving improper exercise of discretion; rather they concern actions which, petitioner has charged, are entirely outside the permissible bounds of the trial court's discretion, and which exceed the trial court's jurisdiction. Such actions are properly reviewable by writ of mandamus." 9/

The Commission does not seek to invoke this Court's mandamus and prohibition jurisdiction lightly or routinely. Insignificant or non-prejudicial errors of law and fact do occur, and litigants (particularly government litigants) have a responsibility to avoid time-consuming appeals or petitions for extraordinary

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9/ International Business Machines Corp. v. Edelstein, 526 F.2d 37, 40 (C.A. 2, 1975)(citation omitted).

writs. Once the court proceeded to issue its order requiring in camera inspection, however, the implications of this lawsuit became clear.

By its action, the district court signalled its intention to usurp vital functions committed to the Commission's discretion by Congress. Notwithstanding the Commission's demonstration that no request for records under the FOIA had been made, and that the materials made the subject of the suit by the court would be exempt under the FOIA, the court nevertheless held that it was required to order in camera inspection, to determine whether it should order the release of draft portions of the report of the staff's investigation, "to assist the public in making a decision with respect to the various candidates for election" (A. 292-293).

But, Section 21(a) of the Securities Exchange Act commits to the Commission's discretion whether to issue a report of its investigation of New York City securities, as one enforcement option available to the agency, and the timing of the release of such a report, just as much as the contents of that report. Under similar circumstances, this Court has held that, where a "determination is for [the government] and not for the courts," mandamus is appropriate in light of the fact that "the court below did not simply abuse its discretion but usurped a power in making a finding which the Congress vested in [the government]." United States v. Carter, 493 F. 2d 704, 708 (1974).

For these reasons, coupled with the facts that the enforcement of the lower court's order will impose a serious burden on the Commission and gravely interfere with its New York City investigation, a result which the legislative drafters of the FOIA carefully sought to avoid, as well as the fact that the orders below will have a detrimental impact on future agency investigations, review at this time by this Court would serve "a vital corrective and didactic function," 10/ and would

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10/ Will v. United States, 389 U.S. 90, 107 (1967).

avoid depriving the Commission of appellate consideration of the novel and significant issues presented until an appeal from a final judgment on the merits could be taken.

II. CONTRARY TO THE PLAINTIFFS-APPELLEES' ASSERTIONS, THE COMMISSION IS ATTEMPTING, IN GOOD FAITH, EXPEDITIOUSLY TO SEEK APPELLATE REVIEW BY THIS COURT OF THE DISTRICT COURT'S ORDERS

As the events outlined above, pages 2-4, make clear, the Commission is seeking appellate review of the district court's orders in good faith, and is making every effort to expedite the review process. Before this Court, the plaintiffs do not dispute that the lower court's orders raise novel and unique issues which require a reconciliation of the policies underlying the FOIA with the need for efficient law enforcement investigations conducted by federal agencies.

The court below expressly recognized that the position that the Commission is taking is a "very responsible position of a law enforcement agency \* \* \* which has certain responsibilities of investigation" (A. 347). The court also noted the Commission's "good faith" in pursuing appellate review at this time (Supp. A. 439). Indeed, there is nothing in the record below, nor the plaintiffs-appellees' moving papers before this Court, which could indicate to the contrary, except the plaintiffs' scandalous and wholly untrue charges regarding an alleged "cover-up" of the Commission's report of investigation (see, e.g., Affidavit of Joel Harnett, dated August 9, 1977, at pages 9, 11).

In moving to secure appellate relief at this juncture, the Commission is expending every effort to expedite these proceedings. The Commission intends to file with this Court, by August 16, 1977, its opening brief in this appeal, as well as its petition for writs of mandamus and prohibition and memorandum in support thereof. And, the Commission stands ready to file any reply papers and will be prepared for oral argument in accordance with any timetable this Court may deem appropriate.



CONCLUSION

For the foregoing reasons, the Commission's motion for a stay of the district court's orders dated August 1 and August 2, 1977, should be granted until the novel and important issues raised by the Commission can be determined by this Court.

Respectfully submitted,

HARVEY L. PITT  
General Counsel

PAUL GONSON  
Associate General Counsel

Securities and Exchange Commission  
Washington, D.C. 20549  
(202) 755-1108

Dated: August 12, 1977