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AUG 3 - 1978
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. RUTH HANDLER, et al., Defendants.	)	No. CR 78-148-RMT ORDER

This Matter came before the court on June 27, 1978, upon defendants Ruth Handler and Seymour Rosenberg's joint motions to dismiss all or some of the Counts alleged in the Indictment. All submissions of the parties having been read and considered, as well as oral arguments having been heard, this court denies the following motions to dismiss:

1. Counts One through Ten for violations of due process, focusing particularly on government misconduct, to wit:
   a. the improper delay in seeking an Indictment and the resultant prejudice to them,
   b. the unconstitutional procedure in the appointment and use of Special Counsel, and
   c. the improper use of a civil investigation solely to obtain evidence for a criminal proceeding.

1 2. Counts One through Ten on the basis that the statute of
2 limitations bars prosecution for any offenses committed
3 more than five years prior to the Indictment. 18 U.S.C.
4 §3282.
5 3. Counts One through Ten on the grounds of an improper
6 extension of the grand jury without good cause. Rule 6,
7 Fed.R.Crim.P.; Rule 16, Local Rules of C.D.Cal.
8 4. Counts Six through Nine as (a) inapplicable to Section 24
9 of the Securities Act of 1933 in that the registration
10 statements filed were not effected and the alleged
11 misstatements were withdrawn prior to the return of
12 the Indictment, (b) Counts Six and Eight as Multiplicitous
13 of Counts Seven and Nine, and (c) Counts Seven and Nine
14 as Duplicitous.
15 5. Counts Six through Nine for improper venue under
16 Section 24 of the 1933 Securities Act. 18 U.S.C. §3232.
17 6. Counts Two and Three as Multiplicitous of Count One.
18 7. Counts Four, Five and Ten as failing to charge an offense
19 in that the major element of knowledge is not alleged.
20 The words "post-effective" are ordered to be stricken
21 from the Indictment, pursuant to Rule 7(d), Fed.R.Crim.P.
22
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24 Dated:
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27 ROBERT M. TAKASUGI
United States District Court Judge
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CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. RUTH HANDLER, et al., Defendants.	No. CR 78-148-RMT ORDER

This Matter came before the court on June 27, 1978, upon defendant Seymour Rosenberg's motion to dismiss all counts alleged in the Indictment charging defendant of conspiracy to violate certain security laws and of aiding and abetting substantive crimes allegedly committed pursuant to said conspiracy.

All submissions of the parties having been heard, it is hereby ORDERED, ADJUDGED, and DECREED in accordance with the opinion filed this date that said motion to dismiss all counts of the Indictment against defendant Seymour Rosenberg is denied.

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1 Dated:

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5 ROBERT M. TAKASUGI
United States District Court Judge

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AUG 3 - 1978

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. RUTH HANDLER, et al., Defendants.	No. CR 78-148-RMT OPINION

BACKGROUND

On February 16, 1978, the United States Grand Jury returned an Indictment charging defendants Ruth Handler (Handler), Seymour Rosenberg (Rosenberg), Yasuo Yoshida (Yoshida), Gloria Billings (Billings), and Paul Ashcraft (Ashcraft) with conspiracy to violate certain security laws and/or for substantive crimes allegedly committed pursuant to said conspiracy. All defendants were, during the specified times, employees and/or officers and/or directors of Mattel, Inc. (Mattel).

Defendants Handler and Rosenberg have been indicted on all of the following ten Counts;[1/] the other three defendants, while named as unindicted co-conspirators on Count One, were only indicted on Count Four:

I. CONSPIRACY: to commit certain offenses in violation of the laws of the United States. 18 U.S.C. §371.

1 II. MAIL FRAUD: for material misstatements in the
2 Annual Report of fiscal year 1973. 18 U.S.C. §1341(2).
3 III. MAIL FRAUD: for material misstatements in the Annual
4 Report of fiscal year 1974. 18 U.S.C. §1341(2).
5 IV. MATERIALLY FALSE AND MISLEADING STATEMENTS: knowingly
6 made and caused to be made, on <u>May 2, 1973</u>. 15 U.S.C.
7 §§78m(a)(2), 78ff 17; C.R.F. §240.13(a)-1; 18 U.S.C. §2.
8 V. MATERIALLY FALSE AND MISLEADING STATEMENTS: knowingly
9 made and caused to be made, on <u>May 3, 1978</u>. 15 U.S.C.
10 §§78m(a)(2), 78ff 17; C.R.F. §240.13(a)-1; 18 U.S.C. §2.
11 VI. MATERIAL MISSTATEMENT IN REGISTRATION STATEMENT:
12 knowingly filed with the SEC on <u>May 16, 1973</u>. 15 U.S.C.
13 §77x; 18 U.S.C. §2.
14 VII. MATERIAL MISSTATEMENT IN REGISTRATION STATEMENT:
15 knowingly filed with the SEC on <u>May 16, 1973</u>.
16 15 U.S.C. §77x; 18 U.S.C. §2.
17 VIII. MATERIAL MISSTATEMENT IN AMENDMENT TO REGISTRATION
18 STATEMENT: filed on October 29, 1973. 15 U.S.C.
19 §77x; 18 U.S.C. §2.
20 IX. MATERIAL MISSTATEMENT TO AMENDMENT TO REGISTRATION
21 STATEMENT: filed on October 29, 1973. 15 U.S.C.
22 §17X; 18 U.S.C. §2.
23 X. TRANSMISSION OF FALSE INFORMATION TO A FEDERALLY
24 INSURED BANK. 18 U.S.C. §1014.
25
26 Defendants Yoshida, Billings and Ashcraft have entered pleas
27 of guilty to certain portions of Count Four and are awaiting
28 sentencing.

1 Defendants Handler and Rosenberg have filed seven joint
2 motions to dismiss all or some of the Counts alleged in the
3 Indictment. Said motions are to dismiss:

4 1. Counts One through Ten for violation of due process,
5 focusing particularly on government misconduct, to wit:
6 a. the improper delay in seeking an indictment and
7 the resultant prejudice to them;
8 b. the unconstitutional procedure in the appointment
9 and use of Special Counsel; and
10 c. the improper use of a civil investigation solely
11 to obtain evidence for a criminal proceeding.
12 2. Counts One through Ten on the basis that the Statute
13 of Limitations bars prosecution for any offenses
14 committed more than five years prior to the Indictment.
15 3. Counts One through Ten on the grounds of an improper
16 extension of the grand jury without good cause.
17 4. Counts Six through Nine as inapplicable to Section 24
18 of the Securities Act of 1933 in that the registration
19 statements filed were not effected and the alleged
20 misstatements were withdrawn prior to the return of
21 the Indictment.
22 5. Counts Six through Nine as improperly before this court
23 under Section 24 of the 1933 Securities Act in that the
24 proper venue is found in the District of Columbia.
25 6. Counts Two and Three as multiplicitous of Count One.
26 7. Counts Four, Five and Ten as failing to charge an
27 offense in that knowledge is not alleged.
28 . . . . . .

Defendant Rosenberg singularly files a motion to dismiss all counts on the grounds that he effectively withdrew from any conspiracy alleged in Count One and that he lacked the requisite knowledge and intent to aid and abet the commission of the crimes alleged in Counts Two through Ten.

Five major factual settings need mention to establish a proper background for these pretrial motions. Additional facts will be introduced where appropriate under the specific motion as discussed.

1. <u>SEC investigation and subsequent Judgment and Order of Permanent Injunction and Ancillary Relief</u>.

On February 5 and 23, 1973, Mattel released to the Securities and Exchange Commission (SEC) two inconsistent statements regarding its financial affairs for the fiscal years of 1970-1972. On June 13, 1973, the SEC met with Mattel representatives to discuss the inconsistencies. A preliminary SEC investigation followed which resulted in an order issued on January 24, 1974, authorizing a formal investigation of the affairs of Mattel. Potential securities violations committed by Mattel were discovered during the investigation.

The SEC and Mattel disposed of this matter through a Complaint and Consent Decree filed on August 4, 1974, in the District Court for the District of Columbia. <u>SEC v. Mattel, Inc.</u>, Civ. Action No. 74-2958. A Judgment and Order of Permanent Injunction and Ancillary Relief was entered on August 5, 1974. Mattel, its officers and employees were enjoined under penalty of contempt, from further violation of the securities laws. Mattel

was additionally required to establish an "Audit Committee" and a "Litigation and Claims Committee" with a majority membership of new directors approved by the SEC.

2. Mattel's internal investigation and final Second Amended Judgment and Ancillary Relief.

Subsequent to the Judgment, Mattel conducted an internal investigation of its affairs, and discovered additional potential securities violations. Mattel voluntarily reported these findings to the SEC. The SEC and Mattel agreed to reopen the civil litigation and to amend the initial Judgment to account for these additional findings. On October 2, 1974, the District Court for the District of Columbia provided further relief in an Amended Consent Judgment and Order of Permanent Injunction and Ancillary Relief. The relevant portion of the Judgment included the appointment of Special Counsel by Mattel with the approval of the court and the SEC (Para.VIII(2)). Special Counsel was ordered to investigate securities violations alleged in the SEC complaint (Para.VIII(1)) and to initiate civil action against any individual violator either personally or on behalf of Mattel. Special Counsel was also ordered to investigate additional matters which, in his or her discretion, were necessary. A Report was to be compiled by Special Counsel based upon his or her completed findings. This was to be subsequently submitted to the court and to the SEC (Para.VIII(2)). Special Counsel was authorized to approach the court for any orders he or she may require to compel testimony of employees of the company. Orders were not to be issued in violation of constitutional rights (Para.XIV). On November 26, 1974,

1 this case was transferred to the Central District of California,
2 where the District Court upheld the provisions in a Second
3 Amended Judgment. The court additionally reserved the power to
4 grant orders to comply with Special Counsel's investigation.

5 On March 14, 1977, in Handler v. Securities & Exchange
6 Commission, 430 F.Supp. 71 (C.D. Cal. 1977), the court
7 upheld the Special Counsel procedure in the Second Amended
8 Judgment.

9 3. Special Counsel investigation
10 and subsequent SEC procedure.

11 On January 9, 1975, Seth M. Hufstedler, Esq., was
12 appointed by Mattel as Special Counsel, approved by the SEC
13 and by the court. On November 3, 1975, after a nine-month
14 investigation, Special Counsel compiled and submitted a Report
15 based upon his findings. He submitted the Report to the
16 SEC and to the court as ordered. Prior to the commencement
17 of his investigation, Special Counsel met with the SEC
18 several times to discuss the investigation. The SEC released
19 to Special Counsel all files regarding its previous Mattel
20 encounters to aid in Special Counsel's court-ordered
21 investigation.

22 Informal methods of investigation were employed by Special
23 Counsel during his interviews with employees of the company.
24 Special Counsel purposely created a nonthreatening atmosphere
25 conducive to full, voluntary and reliable disclosures. Special
26 Counsel recorded interviewee statements in a conclusory form
27 based upon his good faith impressions of the interviews. These
28 summaries formed the basis of Special Counsel's final conclusions

1 contained in the Report.

2 After the investigation, Special Counsel submitted these
3 notes and other findings, in addition to his Report, to the SEC.

4 In late November of 1975, two weeks after the SEC received
5 the Report from Special Counsel, the SEC submitted a copy of the
6 Report to the United States Attorney's office for criminal
7 prosecution.

8 From January, 1975, until June, 1976, the United States
9 Attorney did not attend to this case. For nine months,
10 governmental energy was focused upon two unrelated criminal
11 trials.

12 On July 14, 1976, the United States Attorney received the
13 prosecutorial memorandum. This was six months after it had been
14 requested. On July 21, 1976, the United States Attorney and the
15 SEC met regarding staffing for the investigation of this matter.

16 4. Criminal investigation based
17 on Special Counsel Report.

18 For seven months, from August, 1976, until February, 1977,
19 the Assistant United States Attorney interviewed grand jury
20 witnesses. On February 4, 1977, the grand jury was impaneled with
21 a maximum tenure, absent an extension, until August 4, 1977. Four
22 months later, the grand jury convened for five days to hear
23 testimony on this case. On August 14, 1977, the Assistant United
24 States Attorney filed an affidavit requesting an extension of the
25 grand jury for "good cause."

26 On August 31, 1977, an extension was granted until March,
27 1978. From January through February, 1978, the grand jury heard
28 from a series of witnesses. The grand jury was in session a

1 total of ten days. On February 16, 1978, thirteen months after th
2 grand jury was impaneled, a true bill was returned.

3 5. Filing of alleged materially
4 misstated registration statements.

5 On May 16, 1973, the SEC received two registration
6 statements filed by Mattel. One statement registered stocks for
7 an employee stock option plan (Statement No. 47). The other
8 statement registered stocks for a company stock option plan
9 (Statement No. 48). Both documents contained language on the
10 cover page expressly conditioning the effectiveness of
11 registration upon the filing of future amendments to the SEC.

12 On June 10, 1973, the SEC sent Mattel a "comment letter"
13 which identified material deficiencies in the initial
14 registration statements pursuant to Section 24 of the Securities
15 Act of 1933. On October 29, 1973, Mattel advisors filed amendment
16 to Statements No. 47 and No. 48, declaring the unavailability of
17 financial figures.

18 On October 6, 1976, after the private SEC investigation and
19 the submission of Special Counsel's Report, Mattel filed an
20 additional amendment withdrawing the alleged misstated figures
21 included in Statement No. 48 and the Amendment to Statement No.
22 48.

23 On July 13, 1976, upon the SEC's request, Mattel withdrew
24 Statement No. 47 in its entirety.

25 On August 4, 1977, the registration of Statement No. 48
26 was "effected" and a public sale was authorized.

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DUE PROCESS

A. Prosecutorial Delay

The test for pre-indictment delay as a violation of an accused's due process rights is set forth in United States v. Marion, 404 U.S. 307 (1971). Defendant must show not only improper delay but also specific instances of prejudice to his or her defense as a result of the delay.

1. Investigative delay is legally justified.

The ten-month delay during which time the Assistant United States Attorney interviewed potential grand jury witnesses, and the subsequent eight-month delay during which time the grand jury convened, were not improper upon the evidence presented to this court. Delays, for bonafide investigative purposes, do not deprive defendant of due process "even if his defense might have been somewhat prejudiced by the lapse of time." United States v. Lovesco, 431 U.S. 783,796 (1977); United States v. Pallan, 571 F.2d 497 (9th Cir. 1978); United States v. Mays, 549 F.2d 670 (9th Cir. 1977). A justifiable delay, consistent with the very fabric of due process, was ably articulated in Lovesco:

> "Rather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of

'orderly expedition' to that of 'mere speed.' Smith v. United States, 360, U.S. 1,10 (1959). This the Due Process Clause does not require. 431 U.S. at 795-796. (emp. added)

The United States Attorney claims that Special Counsel's Report did not set forth sufficient evidence to prosecute. The return of an Indictment under these circumstances would have been improper:

> "Law enforcement officers are under no duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall short of the amount necessary to support a conviction." Hoffa v. United States, 385 U.S. 293, 310 (1966); United States v. Marion, 404 U.S. at 325 n. 18.

2. Administrative delay/inaction is improper coupled with a specific showing of prejudice.

The nine-month delay, during which time the Government remained inactive before the institution of any criminal investigation, was clearly improper and without justification. An additional showing of specific prejudice to defendants, however, is required to establish a due process claim under Marion.

Although the true period under inquiry is but nine months, the Due Process claims should not be viewed so simplistically as

1 mandating a mere superficial quantitative count of the calendar
2 to the exclusion of factors of substance. However, defendants
3 have failed to sustain their burden of showing how the alleged
4 loss of testimony, occasioned by dimmed memories, had actually
5 impaired their ability to meaningfully defend themselves. They
6 have therefore not established a due process claim under Marion.
7 United States v. Pallan, 549 F.2d at 501.[2/]
8
9 B. Special Counsel Procedure
10 1. Legally recognized as proper
11 form of Ancillary Relief.
12 The court, within its broad equity powers, may provide
13 widespread forms of ancillary relief and thereafter, maintain
14 "continuing jurisdiction" to assure compliance with its orders.
15 Porter v. Warner Holding Co., 328 U.S. 395, 398 (1945); Hecht Co.
16 v. Bowles, 321 U.S. 321, 329 (1944). The appointment of Special
17 Counsel is a legally recognized form of ancillary relief.
18 SEC v. Heritage Trust Co., 402 F.Supp. 744, 745 (D.Ariz. 1975).
19 Special Counsel has been approved for purposes similar to
20 those set forth in the Second Amended Judgment. S.E.C. v.
21 Seaboard Corp., (C.D. Cal.), Lit. Rel. No. 6507 (September 9, 1974)
22 5 SEC DOCKET 147 (to investigate and pursue causes of actions
23 alleged in the SEC's complaint); International Controls Corp. v.
24 Vesco, 490 F.2d 1334 (2d Cir. 1974) cert. denied, 417 U.S. 932
25 (1974) (to initiate prosecutions for security violations against
26 individual employees of the corporation, to consult with the SEC
27 in resolving all claims, to obtain approval of the SEC and court
28 before settling any claims, and to pursue all possible claims

against any individual).

The case of United States v. Bloom, CCH Fed. Sec P96,340 (E.D.Pa. January 26, 1978) is analogous to the case at bar. In Bloom, the National Association of Securities Dealers (NASD) conducted a private investigation of the defendants in a certain company. Copies of the products of a private investigation by the NASD were submitted to the SEC pursuant to the SEC's request. The SEC informally submitted the information to the United States Attorney. Defendants presented a number of motions to suppress and to dismiss the criminal indictment of stock manipulation and mail fraud on grounds similar to the ones before this court. The Bloom court denied all motions to suppress evidence and to dismiss the case.

This court recognizes the distinction between the NASD in Bloom and Special Counsel in this case. The NASD is a national organization, formed by the major brokerage firms in the country, for the very purpose of policing companies. It conducts independent investigations and monitors many actions by the firms, such as personnel terminations of which the SEC is unaware. When its investigation reveals something egregious, this information is passed on to the SEC. General rules and procedures are made by its members, but it is basically controlled by the securities industry. Special Counsel is not controlled by the securities industry. Rather, Special Counsel is privately hired by a company. No general procedural safeguards for investigation are mandated by law.

Despite this distinction, the self-initiated safeguards taken by Special Counsel in this case paralleled those procedures

recognized by the NASD. The rationale of the Bloom court is thus applicable to show that the treatment of defendants herein did no amount to a violation of their constitutional rights.

2. Socially desirable procedure.

Special Counsel was hired by Mattel, approved by the SEC, and ordered by the court:

> "to conduct an investigation of securities practices of the corporation, prepare and file the report of a Special Auditor, take action upon his or her findings [with the approval of the board of directors], and take further action upon the approval of the board. In the event of any disagreement between the board of directors and the Special Counsel, the Special Counsel was to apply to the Court for resolution of the dispute."
> Handler v. Securities and Exchange Commission, 430 F.Supp. at 72.

Specifically, Special Counsel was to: (1) investigate charges in the Original and Amended Complaint; (2) investigate matters of conflict of officers, agents, and directors of the corporation, if any; and (3) determine what action, if any, should be brought on behalf of the corporation as a result of these matters. Generally, Special Counsel was to investigate "such other matters as [Special Counsel] shall deem appropriate."

The specific objectives set forth in the Second Amended Judgment were not improper in light of the specific facts of

this case. The appointment of a receiver would have threatened the viability of Mattel. Mattel's creditors, suppliers, and even employees, may have looked upon the appointment of a receiver as tantamount to a petition in bankruptcy, since the SEC had already obtained a Consent Decree and Injunction from the company. Mattel had voluntarily disclosed to the SEC the potential security violations pursuant to a self-initiated internal corporate investigation. Self-policing of internal corporate affairs is a desirable and economical practice for companies to undertake under these or similar circumstances.

A private investigation does not necessarily raise an inference of improper governmental activity. The value of private investigative action for specific purposes, not otherwise delegated to a governmental agency, allows the company to keep its own house clean and avoid unnecessary governmental supervision.

A viable company, such as Mattel, should be encouraged to make appropriate corrections of its past disclosures to insure that the company complies with its agreements (Consent Decree) and to prevent future violations of securities laws. Thus, the appointment of Special Counsel in this case was appropriate.

3. <u>Potentially abusive technique</u>.

However, the unlimited and open-ended nature of the Special Counsel procedure set forth in the Second Amended Judgment could have resulted in a potentially unfair and abusive technique of investigation. The court Order set forth no specific procedural safeguards for Special Counsel to follow in conducting his broad investigation. The court provided only that none of the provisions in the Second Amended Judgment "shall prevent the

assertion of any applicable constitutional or legally recognizable privilege." Thus, Special Counsel retained the authority to investigate SEC matters, without the SEC procedural safeguards.

Special Counsel's Report, containing the fruits of this investigation, was submitted to the SEC in compliance with the Order. A few weeks later, the SEC submitted the Report to the United States Attorney for possible criminal prosecution.

4. No violation of due process.

Although the procedures set forth in the Second Amended Judgment is a potentially abusive mechanism, Special Counsel "cured" the weakness of the Order. Special Counsel exercised care and devotion to fairness. Defendants' due process rights were not violated.

The SEC should have conducted an independent investigation of the additional securities violations disclosed by Mattel. However, Special Counsel, independent from the court Order, provided defendants with the safeguards that mirrored the procedural safeguards provided in an SEC investigation. There is no evidence of overreaching or coercive tactics employed by Special Counsel to force disclosures. Special Counsel testified that his summaries of the interviews were based upon his good faith efforts to report his conclusions objectively, taking into consideration the uncertainties reflected in the interviewees' statements. The Government's subsequent criminal investigation, based upon the findings in the Special Counsel Report, served as a final "check" upon any possible inaccuracies.

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Constitutional warnings:

The fact that defendants were fully informed of their constitutional rights and represented by counsel negates any claim of violation of due process on the grounds of misrepresentation by the Special Counsel procedure.

Special Counsel informed defendants of their right to counsel at the interviews. Defendants did in fact retain counsel. Defendants were cautioned of their right to refuse to testify or to incriminate themselves pursuant to their First and Fifth Amendment rights. Special Counsel explained the purpose of the investigation and his intention to compile the interviews into a report to be disclosed to the public. He warned them that the statements given might be used to reach a conclusion in the Report and might be used against them. The safeguards, which defendants claim were not provided for by Special Counsel, are not required in a private SEC investigation, to wit: the right of cross-examination of witnesses and the right to cross-examine the evidence collected.

These curative safeguards that Special Counsel independently initiated negates defendants' contentions that this potentially abusive procedure violated their due process rights.

Threat of termination of employment:

Defendants also suggest that the "implied" threat of termination of employment if employees refused to cooperate forced employees to testify. Defendants argue that these "coerced" statements could not fairly or reliably form the basis of Special Counsel's conclusions. This argument cannot stand, as the court Decree specifically mandated the protection of constitutional and

other legal rights. Additionally, the SEC, in a private investigation, could have obtained a court order for any individua to cooperate just as Special Counsel had the authority to do here.

Although Mattel encouraged its employees to cooperate with Special Counsel, there was no express threat to cooperate. Mattel's president testified that termination would be determined upon the particular circumstances of each interviewee. Additionally, employees were provided their constitutional privilege to refuse to incriminate themselves. Defendants have failed to show sufficient "coercion" by a threat of employment termination to support their claim.

Settlement of civil suits:

The claim that the need for settlement with the Handlers and Rosenberg influenced Special Counsel's investigation also lacks sufficient support. Mattel clearly needed to settle with defendants Handler and Rosenberg. However, there was no evidence of any misconduct by Special Counsel in obtaining evidence which resulted in a settlement. Settlement is a benefit, not a sanction. Even if settlement had worked as a sanction, it was not of the degree to work a constitutional deprivation. Bloom v. United States, supra.

Summary

The appointment of Special Counsel in this case was appropriate. Special Counsel operated in an essentially private capacity. However, due to the breadth of the authority granted to Special Counsel in the Second Amended Judgment, due process violations could have occurred. Because of the role of the SEC and the court in relation to the Second Amended Judgment, and

specifically the SEC's failure to carry out an independent investigation during this period, if violations had occurred, this court would have to consider whether to impute any such violations to the prosecution. Fortunately, the self-initiated standards of fairness and the highly proper course of conduct exhibited by Special Counsel, as well as his independence, during the entire course of the investigation, certainly were not violative of defendants' constitutional rights.

C. Co-terminous civil and criminal investigation

Defendants contend that Special Counsel's investigation was an unfair means to obtain criminal evidence. The Report was submitted to the United States Attorney. The findings contained in the Report served as the basis for the criminal Indictment. There is no inherent unfairness in a system which upholds the pursuit of both civil and criminal remedies.

> "A rational decision whether to proceed criminally may have to await consideration of a fuller record.... It would stultify enforcement of federal law to require a government agency... invariably to choose either to forego recommendation of a criminal prosecution once it seeks civil relief or to defer civil proceedings pending the ultimate outcome of the criminal trial." United States v. Kordell, 397 U.S. 1, 11 (1970).

The Supreme Court in United States v. LaSalle National Bank, 23CrL 3129, No. 77-365 (June 19, 1978) recognized the improper

procedure of gathering evidence solely for a criminal investigation. In this case, the court held that the Internal Revenue Service may not pursue a summons to gather evidence solely for a criminal investigation. However, the Court notes the interrelated nature of a civil/criminal tax fraud inquiry:

> "For a fraud investigation to be solely criminal in nature would require an extraordinary departure from the normally inseparable goals of examining whether the basis exists for criminal charges and for the assessment of civil penalties." Id. at 3133.

Civil and criminal securities inquiries are also interrelated.

The burden of showing an improper investigation is upon the defendant. United States v. Fisher, 500 F.2d 683 (5th Cir. 1974). In the case at bar, the prior civil litigation was initially commenced in August, 1974, after an SEC investigation that had uncovered serious violations of the securities laws. The disclosures by Mattel of potential civil violations which led to the Second Amended Judgment similarly focused on civil litigation. Special Counsel denied any discussion of a criminal case with the SEC or with the witnesses that he interviewed. The evidence he obtained uncovered civil violations and was used as a basis for settlement negotiations. The LaSalle court emphasized that the burden of showing bad faith is a heavy one.

> "Because criminal and civil fraud liabilities are co-terminous, the Service

> rarely will be found to have acted in bad faith by pursuing the former." 23 CrL at 3134.

Defendants have failed to meet their burden of showing that the civil investigation was conducted in "bad faith" and solely for the purpose of obtaining criminal evidence.

Conclusion

Defendants' motion to dismiss for violation of their due process rights is denied. Defendants have not met their burden of showing specific prejudice caused by prosecutorial delay. Special Counsel cured the potentially unfair scope and technique of the investigation set forth in the Second Amended Judgment. The civil investigation was not conducted solely to obtain evidence for criminal prosecution.

STATUTE OF LIMITATIONS

The alleged misstatements which form the basis of Counts Two through Nine of the Indictment reiterate allegedly misstated figures for fiscal 1970, 1971, and 1972, or overstate Mattel's loss in the fiscal year 1973 which is the product of allegedly improper deferrals of expenses in fiscal 1970, 1971, and 1972.

Defendants' claim that the Government is barred by the five-year statute of limitations period pursuant to 18 U.S.C. §3282, since the actual crimes alleged in the Indictment occurred in the years 1970 through 1972.

Defendants' contentions are without merit. The five-year statute of limitations period begins to run from the dates that reports are filed and mailings occur. Each filing or mailing is a separate, distinct offense. United States v. Watkins, 16 F.R.D. 229 (D. Minn. 1954). The affirmative restatement of 1970-1972 figures in 1973 is the type of voluntary, deliberate and deceptive conduct that securities laws are designed to prevent. The purpose of securities law is to prevent any misstatement of a material fact that an innocent investor may rely upon.

The Indictment herein sets forth a conspiracy lasting through September of 1974. The conspiracy involved the ongoing acts of creating and disseminating false financial reports concerning Mattel. Defendants contend that the overt acts alleged in Counts One through Ten occurred more than five years from the date the Indictment was returned. However, the statements filed in 1973-1974 were affirmative and overt acts sufficient to further any alleged conspiracy. Grunewald v. United States, 353 U.S.

391, 396-7 (1957).

The substantive offenses charged in Counts Two through Nine and the conspiracy charged in Count One, are not barred by the five-year statute of limitations period.

GRAND JURY EXTENSION

On August 15, 1977, the Assistant United States Attorney filed an affidavit requesting an extension of the grand jury for "good cause" pursuant to Rule 6 of the Federal Rules of Criminal Procedure[4/] and Rule 16 of the Local Rules of the Central District of California.[5/]

The major ground for requesting an extension of the grand jury was to prevent further delay. The statute of limitations was running. The impanelment of a new grand jury, the re-presentation of technical data, and the presentation of additional witnesses would have resulted in unnecessary delay.

Defendants move to dismiss the Indictment on the ground that the affidavit was based on misrepresentations and misstatements which resulted in an improper extension of the grand jury.

This court disagrees. The Assistant United States Attorney was quite aware of the time pressures involved in the case. Several counts had already been lost by the bar of the statute of limitations. To have required that "expert testimony" of technical data be resubmitted to another grand jury would have resulted in unnecessary delay. The running of the statute of limitations period, which would bar prosecution of additional substantive counts, constituted "good cause" for an extension.

The motion to dismiss the Indictment as void is denied.[6/]

REGISTRATION STATEMENTS

(Counts Six through Nine)

The sequence of events surrounding Mattel's submission of statements to the SEC which form the basis of Counts Six through Nine are as follows:

On May 16, 1973, the SEC received "registration statements" from Mattel, in accordance with the filing requirements of the securities laws. Defendants are charged in Counts Six through Nine with violations of §24 of the 1933 Act, 15 U.S.C. §77x, which provides:

> "Any person who wilfully...in a registration statement filed under this subchapter, makes any untrue statement of a material fact...shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both." (emp. added)

These statements of Mattel's Employee Stock Purchase Plan (SEC File No. 2-48047) (No. 47) and Mattel's Stock Option Plans (SEC File No. 2-48048) (No. 48), containing alleged material misstatements, form the basis of Counts Six and Seven, respectively.

Both submissions include on the facing page "delaying amendment language" pursuant to SEC's Rule 473 (17 C.F.R. §230.473):

> "The Registrant hereby amends this Registration Statement on such date or dates as may be necessary to delay its

effective date until the Registrant shall file a further amendment which specifically states that this Registration Statement shall thereafter become effective on such date as the Commission, acting pursuant to said Section 8(a), may determine."

On June 13, 1973, Mattel representatives met with SEC officials to discuss inconsistent press releases dealing with the financial status of the company for the fiscal year ending February 3, 1973. Subsequent to this meeting, on July 10, 1973, the SEC sent Mattel a letter of comment indicating that material deficiencies existed in the initial "registration statements" filed. Accordingly, Mattel filed amendments to these statements on October 29, 1973.

These amendments to Statements No. 47 and 48, which allegedly contain materially misstated financial figures, form the basis of Counts Seven and Nine, respectively.

A private SEC investigation in January, 1974, followed Mattel's initial meeting with the SEC. On October 6, 1976, the SEC received a second amendment to Statement No. 48 which expressly withdrew the financial statements for the fiscal years ending on or before February 3, 1973. On July 13, 1976, pursuant to the SEC's request, Mattel filed to withdraw Statement No. 47 in its entirety.

Defendants move to dismiss Counts Six through Nine on the following grounds:

(1) the initial filings for the stock plans were not "filed" for purposes of 15 U.S.C. §77x;

(2) any alleged material misstatement included in the filings challenged in Counts Six through Nine was nullified or cured by the final amendments to withdraw Statement No. 47 and to cure Statement No. 48;

(3) Counts Eight and Nine, based upon amendments to the registration statements, are multiplicitous of Counts Six and Seven;

(4) the Counts based upon amendments to the registration statements are duplicitous because they improperly allege what are "pre-effective" amendments to be "post-effective" amendments; and,

(5) the grand jury did not have evidence of a material element of the offense since the registration statements had not become effective.

1. <u>"Filing" for criminal liability purposes are on date received and not date effectuated</u>.

Criminal liability for materially misstated registration statements attaches when the statements are "received" by the SEC and not when "effectuated."

Section 24 of the Securities Act of 1933 upon which liability of defendants in Counts Six through Nine is premised states:

> ". . . any person who willfully, in a registration statement <u>filed</u> under this subchapter, makes any untrue statement of a material fact [shall be guilty].

1 . . . The filing with the Commission of a
2 registration statement, <u>shall be deemed to</u>
3 <u>have taken place upon the receipt thereof</u>."
4 (emp. added)

5 Defendants define "filing," under this statute for purposes
6 of criminal liability, as the actual "effectuation" of
7 registration which authorizes the stocks to be sold. Since
8 "delaying amendment language" postpones effectuation, defendants
9 cannot be liable under this statute.

10 The Government defines "filing" under this statute as the
11 physical and deliberate filing by the registrant manifested by
12 the receipt by the SEC.

13 This court agrees with the Government that liability attaches
14 upon receipt by the SEC for a materially false registration
15 statement. It would be illogical to presume that Congress
16 intended to allow a company to intentionally submit a materially
17 false registration statement without any risk of prosecution.
18 <u>Wolf Corporation v. S.E.C.</u>, 317 F.2d 139 (D.C. Cir. 1963);
19 <u>Columbia General Int'l. Corp</u>. v. S.E.C., 265 F.2d 559 (5th Cir.
20 1959).

21 The purpose of permitting "delaying amendment language" is
22 to promote efficiency. A registrant could request a letter of
23 comment from the SEC before effectuation to avoid <u>civil</u> liability
24 from misstatements mistakenly filed. However, the purpose of
25 this practice does not apply to "willful" and "intentional"
26 misstatements.

27 The delaying amendment language does not immunize defendants
28 for criminal liability under 15 U.S.C. §77x.

"To preclude the Commission from enforcing a rule such as this would be to say that even a false statement is beyond the reach of the law if the registrant recalls his statement before inquiry can evaluate its truth, falsity or significance." Wolf Corporation v. S.E.C., supra, 317 F.2d at 142.

2. Subsequent withdrawal of misstated figures: does not absolve liability for initial false filing.

Amendments filed to correct alleged misstatements in the initial registration statements by withdrawing the statement or by curing its defect do not eliminate criminal liability for the initial filings.

The subsequent amendments filed on October 6, 1976, and July 13, 1976, which withdrew allegedly misstated financial statements for fiscal year 1973 in No. 48 and which withdrew No. 47 in its entirety, respectively, do not bar the Government from prosecution for the initial alleged misstatements.

Defendants contend that by the return of the Indictment on February 16, 1978, there was no registration statement defective in any sense in either Statement.

The purpose of the Securities Act of 1933 is to "insure fair dealing and good conduct--at the source--on the part of those who seek and obtain the use of the mails and the other instrumentalities of commerce in the sale of securities to the public." Resources Corp. International v. S.E.C., 103 F.2d 929,

1 932 (D.C. Cir. 1939).

2 To promote this objective, a registrant should not be
3 permitted to willfully file a false statement and, when charged
4 with a fraud, withdraw the statement to escape liability.

5 Even if the statement has not yet become effective, and no
6 shareholder is alleged to have suffered by the sale of these
7 specific shares, the public suffers from the misconduct. In
8 Resources Corp. Int'l., where the registration statement had in
9 fact been effected, the court rejected the rationale that since
10 no investor was affected, no liability attached.

11 "In short, we think that Congress in
12 the enactment of the statute was legislating
13 in the public interest and not solely for
14 the protection of a potential investor in
15 shares of stock. . ." 103 F.2d at 932.

16 The court further set forth a test of withdrawal.

17 ". . . the test of the right of withdrawal
18 is the absence of prejudice to the public
19 or to investors and not the absence of
20 prejudice to investors alone. The finding
21 of the Commission that the withdrawal
22 would not be consistent with public
23 interest, coupled as it was with specific
24 notice to plaintiff of the respects in
25 which the application appeared to contain
26 untrue statements, was enough to bring into
27 operation the investigatory functions of
28 the Commission; and in such circumstances

those functions may not be rendered impotent by voluntary abandonment on the theory that it is a matter in the sole concern of the registrant." Id.

In Columbia General Investment Corp. v. S.E.C., 265 F.2d 559 (5th Cir. 1959), the court dealt with the right to withdraw a registration statement not yet effected because of a delaying amendment.

The court recognized the real danger to the public in permitting the right to withdraw a statement that has not yet become effective:

> "[A] registrant may file a statement and then postpone its final legal effectiveness. . . . During all of that time the Registration serves as the basis for exploiting the ultimate sale through offers to sell and solicitation of offers to buy. On the basis of the filing the prospectus. . . may be widely circulated. . . . Certainly during that period the public has a great stake. More important, the registrant is using the very facilities of the SEC and the mechanism of registration as a valuable phase in its sales promotion. . . .
>
> "If, as Columbia urges, the registrant has the unfettered right

to withdraw up to the effective date, the machinery of the Commission, established by Congress to provide truth and honesty in securities, may become the very instrument of deception and fraud." *Id.* at 563.

The mere filing of the stock option plans by Mattel gave rise to the possibility of misrepresenting the validity of these plans to the public and to investors. The subsequent amendments to the initial registration statements do not save defendants from criminal prosecution.[7/]

3. Multiplicity: Each filing is a separate offense.

Since each filing of a misstatement is a separate crime, Counts Six and Eight and Counts Seven and Nine are not multiplicitous of each other as defendants allege.

Defendants invoke the doctrine of multiplicity on grounds that the initial statement filed and its subsequent amendments are part of the "registration statement" and not separate and distinct documents. 15 U.S.C. §77b(8) states that a registration statement includes "any report, document, or memorandum filed as part of such statement or incorporated therein by reference."

The policy of Section 24 as discussed *supra*, is to encourage honest conduct by the registrant. Thus, *each* deliberate filing of a misstatement is a violation of the Act regardless of whether any misstatement is filed twice. "Multiplicity is the charging of a single offense in several counts." Wright, Federal Practice and Procedure, Criminal §142 p. 306. Since each filing of the

separate documents to the "registration statement" constituted violations of the Securities Act, there is no multiplicity issue.

4. Duplicative: Mere surplusage will be stricken.

The amendments filed with the SEC which underlie the charges in Counts Seven and Nine are not "post-effective" amendments as specified in the heading of the right-hand column for Counts Six through Nine which reads: "Description of Registration Statements or Post-Effective Amendment." Indictment, p. 23, lines 14-15.

This court has already rejected the distinction between pre- and post-effective amendments for criminal liability pursuant to Section 24 of the Securities Act. The words "post-effective" add nothing to the charges and give defendants no further information. United States v. Pope, 189 F.Supp. 1 (S.D.N.Y. 1960).

These words are mere surplusage and are stricken from the Indictment pursuant to Rule 7(d), Fed.R.Crim.P.

5. Grand jury had sufficient evidence.

The registration statements became ripe for criminal prosecution upon the receipt by the SEC. The grand jury had sufficient evidence upon which to base Counts Six through Nine of the Indictment.

PROPER VENUE FOR REGISTRATION VIOLATIONS

(Counts Six through Nine)

Defendants are charged in Counts Six through Nine for violations of Section 24 of the 1933 Act, §77x. There is no special venue provisions for violations of this Section in the 1933 Act. Therefore, the general venue provisions of the 18 U.S.C. §3237 is consistently applied to criminal violations of the 1933 Act:

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another . . . may be inquired of and prosecuted in any district in which such offense was begun. . . or completed."

Defendants claim that the only proper venue pursuant to this statute is in Washington, D.C., where the statements are "filed." The act of "filing," for purposes of this statute provision, is manifested by the receipt by the SEC.

Defendants argue that there is no "crime" until the statements are filed. Registration statements must be filed in Washington, D.C. Thus, the place where the crime began and ended was in Washington, D.C.

Defendants' argument is not supported by case law. The court in United States v. Pope, 189 F.Supp. 12, 23, (S.D.N.Y. 1960) held that §3237 was applicable to 1933 Act charges, and that proper venue could be found where registration statements were filed or prepared. The defendants in Pope were also charged

under 15 U.S.C. §77x with the making of false statements prepared in the Southern District of New York and filed with the SEC in Washington, D.C. Defendants' argument that proper venue could only be found in Washington, D.C., where the actual "filing" took place was rejected:

> "The essential elements of the crime charged consist not only of the filing of the statement, but, equally important, the ingredient of falsity. Proof upon the trial may establish, as the Government contends, that the defendants performed, with respect to the latter element, sufficient acts within the district to bring the matter within the ambit of 18 U.S.C., Section 3237. . . ." 189 F.Supp at 12.

Accord: United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976).

The Ninth Circuit has consistently analyzed venue questions by looking at the "locus" of the crime based on the facts and the language of the statute involved. United States v. Clinton, ______ F.2d ______ (No. 77.02447, 9th Cir., April 6, 1978) (failure to file a tax form where a false statement was made); Haddad v. United States, 349 F.2d 511 (9th Cir. 1965) (false letter to the American Consul).

Practical factors also dictate that proper venue be found in this district. Congress clearly did not intend that every registration statement case be brought in the District of

Columbia.

Since the registration statements challenged in Counts Six through Nine were prepared in the Central District of California, this court has jurisdiction.[8/]

Defendants' motion to dismiss Counts Six, Seven, Eight, and Nine for lack of proper venue is denied.

1 MULTIPLICITY: Counts Two and Three as multiplicitous of Count One

2 Count One charges defendants Handler and Rosenberg with a
3 conspiracy to commit offenses in violation of the laws of the
4 United States.[9/] Counts Two and Three charge defendants
5 Handler and Rosenberg with the substantive offenses of mail
6 fraud.[10/]

7 Under the mail fraud statute, 18 U.S.C. §1341, "whoever having
8 devised or intending to devise any scheme or artifice to defraud
9 . . . shall be fined." Under the conspiracy statute, 18 U.S.C.
10 §371, "If two or more persons conspire either to commit any
11 offense against the United States, or to defraud the United
12 States. . . each shall be fined."

13 Multiplicity results when a single offense is charged in
14 more than one count. Wright, Federal Practice and Procedure,
15 Criminal, supra. Defendants contend that Counts One, Two, and
16 Three all charge a conspiracy. The Government pleads in Count
17 One, "a conspiracy to use the mails to defraud" and in Counts Two
18 and Three, "a scheme to defraud executed by the use of the mails."
19 (emp. added) Defendants are clearly wrong.

20 The distinction between a conspiracy to commit mail fraud
21 and the commission of mail fraud is that the former requires
22 two persons acting in agreement, whereas, the latter can be
23 committed individually. Pinkerton v. United States, 328 U.S.
24 640 (1940); Pererira v. United States, 347 U.S. 1 (1954).

25 The conspiracy alleged in Count One focuses on the agreement
26 by two or more people to commit mail fraud, which is a scheme to
27 defraud through the mails.

28 The substantive crime of mail fraud alleged in Counts Two

and Three focus on the commission of the substantive crime itself.

The Government has not charged three conspiracies. The motion to dismiss Counts Two and Three as multiplicitous of Count One is denied.

FAILURE TO CHARGE AN OFFENSE

(Counts Four, Five and Ten)

The charging language in Counts Four, Five and Ten states that "defendants knowingly made or caused to be made false statements."[11/] Defendants claim that these Counts can be interpreted as charging that defendants "knowingly" caused others to file statements that they later learned to be false. The "knowledge" element of the substantive offense is thus lacking.

This court rejects this argument. The language in each of these Counts precisely follows the statutory language upon which the charges in the Counts are predicated.[12/]

> "All that is required under Fed.R.Crim.P. 7(c) is that the indictment be a plain, concise and definite written statement of the essential facts constituting the offense charged. An indictment is deemed good when it informs the accused of the offense with which he is charged with sufficient specificity to enable him to prepare his defense and to avoid the danger of the accused being again prosecuted for the same offense." Rood v. United States, 340 F.2d 506, 510 (8th Cir. 1965).

The Federal Rules of Criminal Procedure are designed to eliminate technicalities in criminal pleading and to simplify procedure. Rua v. United States, 321 F.2d 140, 141 (5th Cir. 1963). (Indictment charging defendant with intent to defraud and possession of counterfeit bills was sufficient even though

1 it failed to allege "knowledge" of the counterfeit nature of the
2 bills.)
3 The motion to dismiss Counts Four, Five and Ten for failure
4 to charge an offense is denied. The Indictment language is
5 sufficient to inform defendants of the offenses charged.
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MOTION TO DISMISS INDICTMENT AS TO ROSENBERG

A. Withdrawal

As mentioned *supra*, Rosenberg is charged in Count One of the Indictment with complicity in a criminal conspiracy to fraudulently manipulate and inflate the price of Mattel stock, including the filing of improper financial statements with the SEC. He is further charged in Counts Two through Ten with aiding and abetting the commission of substantive offenses emanating from the alleged conspiracy.

By pretrial motion, he seeks an order to dismiss the Indictment against him pursuant to Rule 12(b), Federal Rules of Criminal Procedure, and the limitations period provided in 18 U.S.C. §3282. *Supra* note 3 at i.

Rosenberg argues:

1. He legally withdrew from the alleged conspiracy prior to February 16, 1973--more than five years preceding the return and filing of the Indictment on February 16, 1978.
2. He lacked the requisite concurrence of act and intent for the substantive offenses alleged in Counts Two through Ten, inclusive.

It is well established that the statute of limitations begins to run against an alleged participant in a conspiracy at the moment he withdraws from the conspiracy. *Hyde v. United States*, 225 U.S. 347, 367 (1912). The issue is to initially establish whether in fact there has been a legally effective withdrawal, and if so, when such withdrawal occurred. Once decided, a mathematical computation of the limitations period

will resolve this motion before the court. The burden of persuasion on the issue of withdrawal rests with the defendant. United States v. Dubrin, 93 F.2d 499 (2d Cir. 1957) cert. denied, 303 U.S. 646 (1938).

A motion to dismiss the Indictment may appropriately raise the bar of the statute of limitations. United States v. Kerney, 436 F.Supp. 1108 (S.D.N.Y. 1977); Jaben v. United States, 333 F.2d 535, 538 (8th Cir. 1964) aff'd. 381 U.S. 214, reh. denied, 382 U.S. 873 (1965).

Since the Indictment was returned on February 16, 1978, Rosenberg claims he can only be prosecuted on Count One for an offense committed on or subsequent to February 16, 1973. Rosenberg denies his involvement in the charged conspiracy. In the alternative, he argues that if he had been a participant thereof, he effectively withdrew prior to February 16, 1973, and thus, the Government is precluded from pursuing its prosecution for the alleged offense. For the purposes of this motion, and only to adjudicate the issue of withdrawal, it is presumed that a conspiracy did exist, and that Rosenberg was a participant therein.

Rule 12(b)(1) states, in part,

> "Any defense. . . which is capable of determination without the trial on the general issue may be raised before trial by motion.
>
> . . . The following must be raised prior to trial:

. . . . .

1 (1) Defenses and objections based
2 on defects in the institution
3 of the prosecution. . . ."

4 Under this rule, a defense is capable of pretrial
5 determination if the trial of the facts surrounding the
6 commission of the alleged offense would be of no assistance
7 in determining the validity of the defense. United States v.
8 Covington, 395 U.S. 57, 60 (1969). However, the affirmative
9 defense of withdrawal is not one which is capable of determination
10 if questions of fact relating to the motion to dismiss are
11 "intertwined with considerations of issues going to the merits
12 of the case." United States v. Andreas, 4 F.Supp. 402, 403.
13 (D. Minn. 1974). This court is fully aware of its responsibility
14 to dispose of any and all pretrial matters at the earliest
15 possible occasion to avoid the needless burden of subjecting
16 parties to further litigation. The court is also mindful of
17 its responsibility to determine whether the issue before it
18 is appropriate for determination in a pretrial motion. In
19 United States v. Andreas, 374 F.Supp. 402 (D. Minn. 1974), the
20 court refused to address the withdrawal issue by pretrial motion
21 since a specific date which was necessary to determine the date
22 of withdrawal was disputed. This case does not involve a mere
23 determination of any factual dispute that would clearly preclude
24 this court from addressing this pretrial motion. Even absent
25 any factual dispute, this court must still decide if the
26 uncontroverted facts set forth by defendant are qualitatively
27 sufficient to make a pretrial determination of withdrawal.
28 Withdrawal enables a defendant to avoid liability for

subsequent offenses committed by a co-conspirator for which he would otherwise be liable either as an accomplice, or as a result of his membership in the conspiracy. The purpose of this rule is to encourage co-conspirators to abandon the conspiracy prior to the commission of the substantive offense, thereby discouraging or reducing the likelihood of the overt substantive crime. Developments in the Law-Criminal Conspiracy, 72 Harv.L.Rev. 920, 958 (1959).

Interspersed in this discussion of withdrawal in chronological relation to the commission of the related substantive crime, it is also possible that continuing conspiracy may have occurred. A continuing conspiracy is distinguished as one directed toward the accomplishment of a succession of objectives as opposed to one with a single or limited objective. See Reisman v. United States, 409 F.2d 789 (9th Cir. 1969). Distinct factual situations are seen in conspiracy cases which fall within the category of a continuing conspiracy. The case at bar may fall within this category in that the financial statements in question for a given fiscal year may require carryover into the financial statements of the year immediately succeeding it.

The following uncontradicted facts are proferred by Rosenberg:

1. His physical absence from the offices of Mattel by 1972.
2. Mattel's hiring of his replacement (Executive Vice President of Finance and Administration) in January or February, 1972.

3. Sale of 80,000 shares of his total stock holding of 100,000 shares in June, 1972.

4. His formal resignation as an officer of Mattel on August 31, 1972.

5. Press release on July 28, 1972, by Mattel, disclosing his plans to retire from Mattel on August 31, 1972.

6. Performance as consultant for two other companies and a subsequent disclosure to the business world of his availability as consultant by October-December, 1972.

7. Last attended a board of director's meeting on January 14, 1973.

8. His last act as director regarding Mattel matters on February 2, 1973.

9. His formal resignation as a director on February 22, 1973.

The Supreme Court in U.S. v. U. S. Gypsum Company, et al., No. 76-1560, 46 Law Week 4937, 4939 (June 19, 1978) upheld the traditional test of withdrawal that requires defendant to establish (1) affirmative acts inconsistent with the object of the conspiracy, and (2) a communication of withdrawal in a manner reasonably calculated to reach his co-conspirators. Hyde v. United States, 225 U.S. 347, 369 (1912); United States v. Borelli, 336 F.2d 376, 385 (2d Cir. 1964) cert. denied, 379 U.S. 960.

1. Affirmative acts.

It has been held that the mere resignation of offices and cessation of activity with a company may not be sufficient

"affirmative acts" to constitute an effective withdrawal. In Reisman v. United States, supra, defendant-appellant contended that his withdrawal precluded prosecution under 18 U.S.C. §1341 for subsequent mailings. The court expressly held:

> "Although appellant. . . resigned as president and director of Gamble Land Company and ceased to participate in the company's day-to-day business operations, he remained a major stockholder and took no affirmative action to disavow or defeat the promotional activities which he had joined in setting in motion."
> Id. at 796-7.

The court in United States v. Borelli, 336 F.2d at 388 held that a mere cessation of activity is not enough to start the running of the statute. The Borelli court called for some affirmative action of either making a clean breast to the authorities or communicating the fact of abandonment in a manner reasonably calculated to reach co-conspirators.

The necessity that the "affirmative act" be a confession to law enforcement has been expressly rejected in Gypsum, 46 Law Week at 4949, on the reasoning that such a requirement would set forth an impractical approach for withdrawal.

However, the courts do require the defendant to show an affirmative act that is "inconsistent with the object of the conspiracy" or which "disavow(s) or defeat(s) the promotional activities which he had joined in setting in motion." Reisman v. United States, 409 F.2d at 793.

In United States v. Goldberg, 401 F.2d 644 (2d Cir. 1968), cert. denied, 393 U.S. 1099 (1969), in a prosecution for conspiracy to violate the Securities Act of 1933 and the mail fraud statutes, Scheftel, a salesman, was given "lead cards" which included the names of potential customers who were previously sent fraudulent reports and brochures regarding worthless stock. Scheftel would then use the "lead cards" to sell the stock. At the end of each day, the securities broker-employer collected the "lead cards" from Scheftel. Scheftel left the broker's employ more than five years before the filing of the Indictment. The court agreed with Scheftel that the affirmative acts of (1) leaving the employment, (2) notifying the National Association of Securities Dealers with whom Scheftel was registered of such fact of departure, and (3) sending letters to all his customers of his leaving was sufficient and constituted an effective withdrawal from the conspiracy. The Goldberg court did rely on the fact that although Scheftel left the "lead cards" which were used to cause further damage, he himself did not prepare the "lead cards" and such cards were not within his effective control.

In the case at bar, Rosenberg was physically absent from the offices of Mattel by 1972 as Mattel hired his replacement in January or February of 1972. He sold 80 percent of his stock holdings in June, 1972, and resigned as an officer of Mattel on August 31, 1972. He performed consulting services for two other businesses and disclosed to the business world his availability as a consultant by October-December, 1972. He last attended a board meeting on January 14, 1973, and his

last act as a director was on February 2, 1973. He resigned his directorship on February 22, 1973.

Do these acts, considered collectively, lead to the conclusion that Rosenberg acted in a manner "inconsistent with the object of the conspiracy"? The Government's contention that Rosenberg did not officially resign as a director until February 22, 1978, which is within the five-year period, is too mechanical an approach and fraught with the concern of "confining blinders." Gypsum, supra.

In reaching the determination of whether Rosenberg's acts were sufficiently "affirmative" to constitute an effective withdrawal, the court must view the charged conspiracy.

By an examination of all the pretrial evidence, this court has determined that the alleged conspiracy is exceedingly complex. Aside from the complexity of the alleged conspiracy, the court is without sufficient information as to the full extent, nature, duration and details of the alleged conspiracy, as well as the role of Rosenberg in this unlawful agreement. The conspiracy contemplated the commission of a succession of repeated acts. Without this information, this court is unable to provide a qualitative evaluation of Rosenberg's acts in relation to whether there has been an effective withdrawal.

Additional difficulties weigh against a decision at this pretrial stage. Rosenberg is charged not only of the conspiracy, but also of aiding and abetting the commission of substantive offenses. Is the evidence supportive of the substantive acts identical to the overt acts alleged in the conspiracy? This court feels that the questions of fact are "intertwined with

considerations of issues going to the merits of the case," as in Andreas, supra, at 409.

Finally, the common thread seen in Rosenberg's affirmative acts appears to be his disengagement from the Mattel employment. If Rosenberg is seeking to equate disengagement with effective withdrawal, Rosenberg commenced his withdrawal prior to the date of the alleged conspiracy! In September, 1967, Rosenberg made special arrangements with Mattel to work only three days a week. In 1971, he commenced negotiations to sever his relationship with Mattel and had signed an agreement to terminate his relationship in the future--all before the formation of the alleged conspiracy.

Based upon the above discussion, this court finds that the viability of Rosenberg's claim of effective withdrawal can only be fairly and adequately assessed in the trial on the merits.

2. Communication of withdrawal.

By reason of the court's finding that this motion is premature and best suited to be fully adjudicated at trial, it does not reach the second prong in Gypsum, supra, to wit: communication of withdrawal to the co-conspirators.

B. Aider and Abettor Charge

Rosenberg's second contention does not raise a statute of limitation question. The limitations period as to Rosenberg did not begin to run until the dates specified in Counts Two

. . . . .

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. . . . .

1 through Ten, because the period of limitation begins to run only
2 "when the crime is complete." Pendergest v. United States,
3 317 U.S. 412, 418. Rosenberg argues that he cannot be held
4 liable as an aider and abettor of these offenses, since he
5 effectively withdrew from the conspiracy at the time the acts
6 occurred in 1973 and 1974.
7 However, the mere physical absence of Rosenberg from the
8 company does not necessarily prove that he lacked the requisite
9 knowledge and intent required for these substantive offenses.
10 Since this court decided the withdrawal motion to be premature,
11 it is likewise unable to determine whether there was a
12 concurrence of act and intent with respect to Counts Two through
13 Ten, inclusive.
14 Rosenberg's direct participation in the commission of the
15 substantive crimes is unnecessary. The Supreme Court clearly
16 set forth this doctrine in Pinkerton v. United States, 328 U.S.
17 640 (1946). Pinkerton was indicted both for conspiring with
18 his brother to evade taxes and for specific tax evasions committed
19 by his brother while Pinkerton was in jail. The Supreme Court
20 affirmed the trial court's instruction to the jury that it
21 could convict upon the substantive counts if it found that the
22 defendant had been engaged in a conspiracy and that the offenses
23 charged were in furtherance thereof.
24 There are insufficient facts for this court to make a
25 pretrial determination of withdrawal from any conspiracy. That
26 issue and that of the statute of limitations must be addressed
27 at trial.
28 Nor, are there sufficient facts for this court to make a

1 pretrial determination of the presence or absence of the
2 requisite knowledge and intent required to aid and abet in the
3 substantive offenses.

4 The motion to dismiss the Indictment as to Rosenberg is
5 denied.

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FOOTNOTES

1. As to Counts II through X, defendant Rosenberg was charged with aiding and abetting under 18 U.S.C. §2.

2. There are two factors that mitigate against any due process claim. First, the statute of limitations period has not run. For pre-indictment delays, the statute of limitations provides the primary guarantee against bringing stale criminal charges. "These statutes provide predictability by specifying a limit beyond which there is an irrebutable presumption that a defendant's right to a fair trial would be prejudiced." United States v. Marion, 404 U.S. at 322. Secondly, this pre-indictment delay does not result in the same abuse and oppressive prejudice to the criminal defendant inherent in a post-indictment delay. United States v. Pallan, 571 F.2d (9th Cir. 1978). (The court upheld a year's delay by the Government due to administrative duties and time demands of other cases, since (1) the statute of limitations had not run; (2) there was no showing of specific prejudice; (3) the delay was pre-accusatory.)

3. 18 U.S.C. §3282 reads:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

. . . . .

1 4. Rule 6, Fed.R.Crim.P. reads, in relevant part:
2 "(g) A grand jury shall serve until discharged
3 by the court but no grand jury may serve
4 more than 18 months. . . ."
5 5. Local Rule 16 reads, in relevant part:
6 ". . .[G]rand jur[ies] shall commence on the
7 first Monday in March and second Monday in
8 September. . .[and] shall be ordered discharged
9 . . . as soon as practicable after a grand jury
10 shall have been empaneled and sworn for the
11 session next following, unless the chief judge
12 or his delegate, upon showing of good cause,
13 orders the term of service extended. . ."
14 (emp. added)
15 6. Since the court finds "good cause" for an extension of
16 the grand jury, it need not reach the question of whether
17 the absence of good cause could have voided the Indictment.
18 7. The Supreme Court case of Jones v. S.E.C., 298 U.S. 1 (1936),
19 which held that withdrawal eliminates the effect of filing,
20 has been distinguished by subsequent cases on legal,
21 factual and policy grounds. See Columbia General Inv.
22 Corp. v. S.E.C., 265 F.2d 559, 565 (5th Cir. 1959).
23 8. The case upon which defendants rely, Travis v. United
24 States, 364 U.S. 631 (1961), is not controlling. The
25 application of this decision has been narrowly applied
26 to the specific statute involved which are inapposite
27 to the case at bar. United States v. Ruehrup, 333 F.2d
28 641 (7th Cir.), cert. denied, 379 U.S. 903 (1964);

1 United States v. Slutsky, 487 F.2d 882 (2d Cir. 1973),
2 cert. denied, 416 U.S. 937 (1974).
3 9. The Counts in question are I, II, and III.
4 Count I reads, in part:
5 ". . . did knowingly and willfully
6 conspire. . . to commit certain offenses. . .
7 [and] caused to be placed in post
8 offices and authorized depositories
9 for mail matter, matters and things
10 to be sent and delivered by the Postal
11 Service. . . in violation of Title 10
12 U.S.C. §1341."
13 Indictment s. 5 pp. 4-5.
14 10. Counts II and III read in part (for fiscal year 1973
15 and 1974, respectively):
16 ". . . devised a scheme and artifice to
17 defraud. . . [and in executing said scheme]
18 caused to be placed in a post office and
19 authorized depository for mail, to be sent
20 and delivered by the Postal Service. . ."
21 11. 15 U.S.C. §78ff (Counts Four and Five) reads, in part:
22 ". . . any person who willfully and knowingly
23 makes, or causes to be made, any statement. . .
24 which statement was false and misleading with
25 respect to any material fact, shall [be
26 guilty of an offense.]" (emp. added)
27 18 U.S.C. §1014 (Count Ten) reads, in part:
28 "Whoever knowingly makes any false statement

or report. . . for the purpose of influencing in any way the action of. . . any [federally insured bank] upon any application. . . commitment, or loan, or any change or extension of any of the same. . . shall be [guilty of an offense.]" (emp. added)

12. Count Four reads, in part:

"On or about May 4, 1973. . . defendants. . . aided, abetted, counseled, commanded, and induced by each other. . . knowingly made and caused to be made a statement and statements which were false and misleading with respect to material facts. . . ." Indictment p. 19/1.3-14. (emp. added)

Count Five reads, in part:

"On or about May 2, 1973, defendant. . . Handler aided, abetted, counseled, commanded and induced by defendant Rosenberg. . . fully and knowingly made and caused to be made a statement and statements which were false and misleading with respect to material facts." Indictment p. 24/1.4-7. (emp. added)

Count Ten reads, in part:

"On or about May 7, 1973, defendant Handler aided, abetted, counseled, commanded and induced by defendant Rosenberg, knowingly caused a false statement and report to be made to the Bank of America. . ." Indictment

1 p. 24/1.4-7. (emp. added)

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4 Dated:

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8 ROBERT M. TAKASUGI
United States District Court Judge

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