Burden - Briefs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD HIRSCHFELD, Plaintiff, v. SECURITIES AND EXCHANGE COMMISSION JOHN S. R. SHAD, Chairman JAMES C. TREADWAY, JR. Commissioner CHARLES C. COX Commissioner CHARLES L. MARINACCIO Commissioner AULANA L. PETERS Commissioner, In their official capacities as Commissioners of the Securities and Exchange Commission Defendants.	Civil No. 84-3453

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

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INTRODUCTION

Plaintiff -- who has twice been enjoined from violating antifraud provisions of the federal securities laws -- is an attorney who represents various companies in connection with corporate and securities matters. The Securities and Exchange Commission is currently investigating plaintiff's role in connection with the securities transactions of two companies with which he either is affiliated or represents -- Hirsch-Chemie, Limited

and Robotronix. Recently, the Commission obtained a permanent injunction against plaintiff in connection with a third company with which he was affiliated -- Champion Sports Management, Inc. Plaintiff has filed this action to enjoin the Commission's two ongoing investigations.

The thrust of plaintiff's complaint is that the Commission violated the attorney-client privilege when a former associate with his law firm, Annamerle Zwitman Bellah, voluntarily contacted the Commission, after consulting with a state bar ethics committee and a United States Attorney's Office, to report what she believed to be possible violations of the law. Specifically, she told the Commission that plaintiff may have been responsible for the filing of a false registration statement with the Commission in connection with a public offering of securities by one company, and for misappropriating the funds of another. Plaintiff contends that the Commission's receipt of information from Ms. Bellah violated his attorney-client privilege, and therefore, the Commission's investigations violated his rights under the First, Fourth and Fifth Amendments to the Constitution.

As we demonstrate, plaintiff's complaint is without merit and should be dismissed for lack of subject matter jurisdiction or, alternatively, for failure to state a claim. Rules 12(b)(1), (6), Fed. R. Civ. P. First, the court lacks jurisdiction to enter-

tain this action. Plaintiff asserts jurisdiction under 28 U.S.C. 1346, 1491, 2201, 2202, 5 U.S.C. 701 et seq., the Constitution, and the Court's inherent equity power. Comp. ¶1. 1/ However, not one of these provisions waives sovereign immunity to permit a suit in district court for injunctive relief against the Commission or its Commissioners.

Second, plaintiff has failed to state a claim upon which relief can be granted, as he has not even alleged the requisite elements of the attorney-client privilege. For example, plaintiff has not alleged, nor could he, that he is the client who possesses the privilege, should one even exist. Nor does he allege that he is asserting the privilege on behalf of his corporate clients. On the contrary, plaintiff concedes that he is asserting the privilege to further his own interests, that is, to enjoin the Commission from investigating him. Comp. at 8-11. But, even if plaintiff's claim that the Commission had violated the attorney-client privilege were true, it is not actionable under the First, Fourth or Fifth Amendments. The privilege is a common-law evidentiary privilege; it does not provide a constitutional right. Finally, plaintiff cannot state a claim for injunctive relief because he has adequate legal remedies and cannot demonstrate irreparable harm in the absence of an injunction.

1/ References to the Complaint are cited as "Comp. ¶ __."

BACKGROUND

A. The Commission authorizes investigations of plaintiff's activities in connection with the sales of securities by Hirsch-Chemie, Robotronix, and Champion Sports Management.

The Commission, pursuant to statutory authority, 2/ has commenced investigations of three companies which plaintiff represents or serves as an officer or director. 3/ On November 2,

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2/ Section 20(a) of the Securities Act of 1933 (Securities Act), Section 21(a) of the Securities Exchange Act of 1934 (Exchange Act), and Section 209(a) of the Investment Advisers Act of 1940 (Advisers Act). Section 20(a) of the Securities Act, 15 U.S.C. 77t(a), provides, in pertinent part:

> Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

Section 21(a) of the Exchange Act, 15 U.S.C. 78u(a), and Section 209(a) of the Investment Advisers Act, 15 U.S.C. 80b-9(a), provide analogous authority.

3/ On November 23, 1984, the Commission filed a motion to transfer this action to the United States District Court for the Southern District of New York. In support of the motion, the Commission filed the Affidavit of Venrice R. Palmer, one of the attorneys representing the Commission in SEC v. Champion Sports Management, Inc., and Richard Hirschfeld, 84 Civ. 5778 (RJW) (S.D.N.Y. 1984). References to that affidavit are cited as "Palmer Aff. ¶ ___." Additionally, the Commission submits herewith the Supplemental

(footnote continued)

1983, the Commission directed its staff to conduct an investigation into possible violations of registration and antifraud provisions of the Securities Act, 4/ antifraud and recordkeeping provisions of the Exchange Act, 5/ and the registration requirements of the Advisers Act, 6/ in connection with transactions in the securities of Hirsch-Chemie, Limited ("Hirsch-Chemie"). Palmer Aff. ¶3. The Commission sought to determine, among other things, whether certain persons were making untrue statements of material fact to purchasers and prospective purchasers of the securities (id.). Plaintiff is secretary-treasurer, director, and a major shareholder (26.5 percent) of Hirsch-Chemie. Palmer Aff. Ex. 3, at 2. Hirsch-Chemie owned all of Hirsch Capital Corporation ("Hirsch Capital") until March 24, 1984. Hirsch Capital is a also a major shareholder of Champion Sports Manage-

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3/ (footnote continued)

Affidavit of Venrice R. Palmer, which contains as an exhibit excerpts from the transcript of the hearing in that case concerning plaintiff's motion to strike the Commission's exhibits based on his allegation that the attorney-client privilege had been violated. References to the supplemental affidavit and transcript are cited as "Palmer Supp. Aff. TR __."

4/ Sections 5(a), 5(c), and 17(a), 15 U.S.C. 77e(a), 77e(c), 77q(a).

5/ Sections 10(b), 15(c), 17(a), 15 U.S.C. 78j(b), 78o(c), 78q(a).

6/ Section 203, 15 U.S.C. 80b-3.

ment, Inc. ("Champion"), owning 9.5 percent of Champion's outstanding shares. Mr. Hirschfeld, by virtue of his 26.5 percent interest in Hirsch-Chemie, is a major shareholder of Champion. Id. The Commission's investigation is ongoing. At the conclusion of the investigation, the Commission may determine that no enforcement action is warranted. Alternatively, it may determine that some enforcement action should be taken with respect to certain persons.

On June 27, 1984, the Commission directed its staff to conduct an investigation concerning possible violations of antifraud provisions of the securities laws in connection with transactions in the securities of Robotronix Corporation ("Robotronix"). Plaintiff's law firm is counsel to Robotronix. The Commission is investigating whether Robotronix, plaintiff, and certain other persons may have made untrue statements of material facts and failed to disclose other facts concerning Robotronix' financial dealings in a registration statement filed with the Commission by Robotronix to sell securities to the public. This investigation also has not been concluded. 7/

As we discuss below, the Commission also investigated plaintiff's activities in connection with the public sales of securities

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7/ The Robotronix investigation is being conducted by the Commission's Washington Regional Office. The Hirsch-Chemie and Champion investigations have been conducted by the Commission's New York Regional Office.

by Champion, a corporation controlled by plaintiff. Champion was organized to recruit, train, and promote professional boxers. In addition to being a major shareholder in Champion, plaintiff conducted Champion's loan transactions which included using Hirsch-Chemie and Hirsch-Capital as guarantors of loans to Champion from the Bank of Virginia Beach. Palmer Aff. Ex. 3 at 2, 7-10. That investigation resulted in a Commission enforcement action in which the district court held that plaintiff violated antifraud provisions of the federal securities laws and enjoined him from further violations (see pages 8-11, infra).

B. Ms. Bellah contacts the Commission's staff regarding plaintiff's activities.

On or about July 12 or 13, 1984, while these investigations were proceeding, an attorney in the Commission's New York Regional Office received a telephone call from Annamerle Zwitman Bellah. Palmer Aff. ¶2. Ms. Bellah had worked as an associate in plaintiff's law firm from April 1983 to June 1984. Comp. ¶6. During that time, Ms. Bellah worked on various matters involving Hirsch-Chemie, Robotronix, and Champion. Palmer Supp. Aff. TR 168-171. Prior to telephoning the Commission, Ms. Bellah had contacted a state bar ethics committee and a United States Attorney's Office because she was concerned that plaintiff was improperly using funds which Hirsch-Chemie received in a public offering of

stock. Palmer Aff. ¶2. Prior to the call, the Commission's only contact with Ms. Bellah was at a meeting between Commission staff and representatives of Hirsch-Chemie concerning a public stock offering by that firm. Ms. Bellah attended that meeting in her capacity as one of the counsel for Hirsch-Chemie. Palmer Supp. Aff. TR 168-171.

On July 23 and 24, 1984, Ms. Bellah spoke with two employees of the Commission's New York Regional Office in New Orleans, Louisiana. She was advised by the Commission staff of her rights under the Fifth Amendment and Freedom of Information and Privacy Acts. Palmer Supp. Aff. TR 84. Ms. Bellah's interview with the Commission staff was voluntary on her part. Id. at 127. The staff took notes of the interview with Ms. Bellah. Id. at 92-94.

C. The Commission files an injunctive action against plaintiff and Champion to enjoin violations of antifraud provisions of the federal securities laws. Hirschfeld unsuccessfully moves to suppress the Commission's evidence, arguing that it was obtained in violation of the attorney-client privilege.

On August 13, 1984, the Commission brought suit against Hirschfeld and Champion in the United States District Court for the Southern District of New York. SEC v. Champion Sports Management, Inc., and Richard Hirschfeld, 84 Civ. 5778(RJW) (S.D.N.Y 1984). In that action, the Commission alleged that Hirschfeld and Champion had violated antifraud provisions of the federal securities laws in connection with a public offering of

securities by Champion. 8/

At trial, Hirschfeld moved to suppress evidence obtained or derived from the Commission's interview with Ms. Bellah, asserting that it was obtained in violation of the attorney-client privilege and thus inadmissible. Palmer Supp. Aff. TR 22-25. Mr. Hirschfeld asserted that the Commission's case, which consisted primarily of documentary evidence and depositions, was derived from the information given by Ms. Bellah. Id. at 180-184. In response to the motion, the court determined to receive all the Commission's evidence, "subject to [defendant's] motion to strike upon a showing that the evidence was improperly obtained" in violation of the attorney-client privilege. Palmer Supp. Aff. TR 24.

To support his motion, Hirschfeld called three witnesses and examined them extensively in an effort to prove that the Commission had obtained information from Ms. Bellah in violation of the attorney-client privilege. Id. at 68-208. 9/ Hirschfeld, himself,

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8/ Specifically, the Commission alleged that Hirschfeld, as secretary-treasurer of Champion, was responsible for filing a registration statement, five supplements thereto, several amendments, and a prospectus, on behalf of Champion which misrepresented, or omitted to state, among other things: plaintiff's ownership of Champion stock and/or the relationship of Hirsch-Chemie to Champion; material financial liabilities of Champion; the terms of a surety agreement between Champion and Hirsch-Capital pursuant to which Hirsch-Capital obtained a controlling interest of Champion; and certain transactions among affiliated companies. Palmer Aff. Ex. 1 at 2-5.

9/ The examinations are recorded on 140 pages of the transcript. Palmer Supp. Aff. TR 68-208.

testified, averring that he had previously disclosed the Commission's notes from the Bellah interview to a reporter for Ring magazine, a boxing publication. Palmer Supp. Aff. TR 200. He admitted disclosing this information to gain favorable publicity for himself. Id. at 233. Mr. Hirschfeld concluded his presentation by stating that he had put on all the evidence he wanted to on the motion to suppress. Id. at 208. The court did not suppress or strike any evidence offered by the Commission which Mr. Hirschfeld challenged as tainted; on the contrary, the court specifically used in its opinion certain of the information Mr. Hirschfeld contended was obtained in violation of the attorney-client privilege.

At the conclusion of the trial, the court held that Hirschfeld had knowingly and recklessly filed with the Commission and disseminated to investors a Champion prospectus that contained "materially false and misleading statements, material misrepresentations and omissions of material fact." Palmer Aff. Ex. 3, p. 12. 10/ As a result, the court found that the Commission had established that Mr. Hirschfeld should be permanently enjoined

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10/ Specifically, the court found that the prospectus failed to disclose or misrepresented, among other things: the extent of Champion's indebtedness and that it was unable to make payment on $1.4 million in notes Hirschfeld had caused it to issue (id. pp. 7-9); that Hirsch-Capital was a guarantor of Champion loans and pursuant to an agreement between them Hirsch-Capital owned 51 percent of the outstanding Champion stock (id. pp. 9-10); and the terms of transactions between Champion and certain affiliated companies. Id. pp. 5-6.

from violating antifraud provisions of the Securities Act and the Exchange Act. Id. pp. 11-13. 11/

On November 14, 1984, the court entered its judgment of permanent injunction against plaintiff. 12/ On December 10, 1984, plaintiff filed a notice of appeal from that judgment.

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

Plaintiff asserts (Comp. ¶1) that this Court has jurisdiction under 28 U.S.C. 1346, 1491, 2201, 2202, 5 U.S.C. 701 et seq., the Constitution, and the Court's "inherent and supervisory powers." None of the alleged jurisdictional bases waives sovereign immunity to permit an injunctive action against the Commission 13/ or its

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11/ The court determined not to enjoin Champion based on its finding that Champion was to be dissolved before December 31, 1984. Palmer Aff. Ex. 3, p.13.

12/ This was not the first time plaintiff was enjoined from violating antifraud provisions of the federal securities laws. Plaintiff previously was enjoined in SEC v. Hirschfeld, No. 76 Civ. 3887 (E.D. Pa. Dec. 21, 1976). And, in SEC v. Hirschfeld Bank of Commerce, No. 74 Civ. 533 (E.D. Va. Feb. 18, 1975), a company of which plaintiff was chairman of the board, was permanently enjoined. Palmer Aff. Ex. 2, p. 10.

13/ To assert a claim against an agency of the United States, the plaintiff must set out, in the complaint, the "statute relied upon as conferring jurisdiction or giving consent on the part of the United States to be sued". Vorachek v. U.S., 337 F.2d 797, 799 (8th Cir. 1964). The statute relied upon must expressly waive sovereign immunity. Absent such an express waiver, a court lacks jurisdiction to entertain an action against the United States and the action must be

(footnote continued)

Commissioners 14/ in this Court. Thus, the complaint should be dismissed for want of jurisdiction. Rule 12(b)(1), Fed. R. Civ. P.

A. Neither 28 U.S.C. 1346 nor 28 U.S.C. 1491 provides jurisdiction for actions against the Commission for equitable relief.

Because plaintiff seeks equitable relief only, and not money damages, neither 28 U.S.C. 1346 nor 28 U.S.C. 1491 provides jurisdiction. 28 U.S.C. 1346(a), 15/ authorizes actions for money

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13/ (footnote continued)

dismissed. U.S. v. Testan, 424 U.S. 392, 399 (1976); U.S. v. Sherwood, 312 U.S. 584, 586-87 (1941).

The doctrine of sovereign immunity extends to the Commission. Holmes v. Eddy, 341 F.2d 477, 480 (4th Cir.), cert. denied, 382 U.S. 892 (1965) ([A]s an agency of the United States . . . the Commission may be sued only in such manner as Congress authorizes . . . As distinguished from having its orders reviewed by the courts, Congress has not consented that the Commission be sued . . ."); Smallwood v. U.S., 358 F. Supp. 398 (E.D. Mo.), aff'd, 486 F.2d 1407 (8th Cir. 1973).

14/ Sovereign immunity also requires the dismissal of the claims against the Chairman and the Commissioners, as it bars suits against officials when, as here, they are in effect, actions against the government. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687 (1949). Plaintiff's claims against the individual Commissioners are clearly claims against the agency itself: the Commissioners are named solely in their official capacities and plaintiff seeks to enjoin them from carrying out one of their statutory functions, that is deciding whether to direct their staff to conduct investigations and enforcement actions. See Comp. at 8-11. Additionally, since the Commissioners are performing quasi-judicial responsibilities, they are absolutely immune from suit. See, e.g., Stump v. Sparkman, 435 U.S. 349 (1978); Doe v. McMillan, 412 U.S. 306, 320 (1973).

15/ 28 U.S.C. 1346(a) vests the district courts and the United States Claims Court with concurrent jurisdiction over actions

(footnote continued)

judgments only, not for equitable relief. Richardson v. Morris, Morris, 409 U.S. 464, 465 (1973) ("The Act has long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States"). See also Larionoff v. U.S., 533 F.2d 1167, 1181 (D.C. Cir. 1976), aff'd, 431 U.S. 864 (1977) ("the Act authorizes jurisdiction only over actions for money judgments"). Equally unavailing is 28 U.S.C. 1346(b), 16/ which also authorizes actions only to recover money damages for injuries to persons or property. 17/

Similarly inapposite is 28 U.S.C. 1491. 18/ The statute also

15/ (footnote continued)

against the United States for: (1) the recovery of internal-revenue tax alleged to have been improperly assessed, and (2) money damages in amounts not exceeding $10,000, "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon an express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort[.]"

16/ 28 U.S.C. 1346(b) vests the district courts with exclusive jurisdiction over "claims against the United States, for money damages" for losses "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

17/ Moreover, in suits brought pursuant to either 1346(a) or (b), only the United States is a proper defendant. 28 U.S.C. 1346.

18/ 28 U.S.C. 1491 provides, in relevant part: "The United States Claims Court shall have jurisdiction to render judgment

(footnote continued)

waives sovereign immunity for certain actions against the United States, but not its agencies or officials, for money damages. Moreover, it provides a grant of jurisdiction only to the United States Claims Court, not to the United States district courts. See, e.g., International Engineering Co., Div. of A-T-O, Inc. v. Richardson, 512 F.2d 573, 577 (D.C. Cir. 1975), cert. denied, 423 U.S. 1048 (1976) ("The Court of Claims has jurisdiction only to award damages"). Thus, the statute provides no basis for a suit in district court against the Commission for injunctive relief.

B. Neither the Declaratory Judgment Act nor the Administrative Procedure Act contains an independent grant of jurisdiction; thus they do not provide this Court with subject matter jurisdiction.

The Declaratory Judgment Act, 28 U.S.C. 2201 and 2202, 19/ does not contain a grant of federal subject matter jurisdiction; it may be invoked only when some other statute provides an independent basis for jurisdiction. As the Supreme Court has explained, when Congress enacted the Declaratory Judgment Act it "enlarged

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18/ (footnote continued)

upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

19/ The Declaratory Judgment Act authorizes a court, under appropriate circumstances, to "declare the rights and other legal relations of any interested party" in "a case of actual controversy within its jurisdiction[.]" 28 U.S.C. 2201.

the range of remedies available in the federal courts but did not extend their jurisdiction." Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950). See also Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240 (1937); Boraks v. Wilson, 383 F. Supp. 195, 196 (D.D.C. 1974). Thus, in an action for declaratory relief, "an independent basis for subject matter jurisdiction must be identified." Riker Laboratories, Inc. v. Gist-Brocades N.V., 636 F.2d 772, 779-80 (D.C. Cir. 1980). Here, plaintiff has not set forth any other statute which provides an independent basis of subject matter jurisdiction for this action (see Comp. ¶1).

Similarly, the Administrative Procedure Act, 5 U.S.C. 701 et seq., does not contain a grant of federal subject matter jurisdiction. In Califano v. Sanders, 430 U.S. 99, 105 (1977) the Supreme Court held that ". . . the APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions." 20/ Although the Court stated in Califano that a federal district court's jurisdiction to entertain an action

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20/ Although it does not contain a grant of jurisdiction, the APA does contain a limited waiver of sovereign immunity permitting review as follows:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 5 U.S.C. 702.

To be reviewable under the APA, agency action must be "final." 5 U.S.C. 704; see pages 16-17 and notes 23 and 24, infra.

under the APA could be based upon 28 U.S.C. 1331 (id. at 105), 21/ plaintiff has not alleged that statute as a jurisdictional basis (see Comp. ¶1), nor could he. 22/ Even had plaintiff relied upon 28 U.S.C. 1331 to invoke the APA, the APA's limited waiver of sovereign immunity is inapplicable to the claims he has asserted here.

First, the APA only permits judicial review of final agency action in certain circumstances. See 5 U.S.C. 704; 23/ Federal Communications Commission v. ITT World Communications, Inc., 104 S. Ct. 1936 (1984) (only final agency decisions may be reviewed

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21/ 28 U.S.C. 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

22/ Even if plaintiff amended the complaint to add 28 U.S.C. 1331, this action would be subject to dismissal for failure to state a claim. As we demonstrate, infra pp. 24-26, the attorney-client privilege is not of constitutional dimension; rather, it is a common-law evidentiary privilege. Thus, plaintiff's allegation that the Commission violated the attorney-client privilege, even if true, is insufficient to state a claim under the First, Fourth or Fifth Amendments. As plaintiff's claim does not arise under the Constitution, and he makes no claims under a federal statute, he cannot invoke 28 U.S.C. 1331.

23/ 5 U.S.C. 704 provides, in relevant part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

under the APA). Plaintiff does not -- and could not -- allege that there has been final agency action. The law enforcement investigations plaintiff seeks to enjoin are preliminary non-adjudicatory proceedings that do not determine plaintiff's or any other person's rights. SEC v. Jerry T. O'Brien, Inc., 104 S. Ct. 2720, 2725 (1984); Hannah v. Larche, 363 U.S. 420, 441 (1960); Federal Trade Commission v. Standard Oil of California, 449 U.S. 232, 238 (1980) (the issuance of an administrative complaint does not constitute final agency action and, thus, is not reviewable under the APA). Here, the Commission has merely commenced investigations of certain securities transactions in which plaintiff was involved. 24/ The initiation of these investigations is not reviewable under the APA. Stardust, Inc. v. SEC, 225 F.2d 255, 257 (9th Cir. 1955). First Jersey Securities, Inc. v. SEC, 553 F. Supp. 205 (D.N.J. 1982).

24/ With respect to the Champion Sports Management case, the Commission did determine to bring an enforcement action and that action has been concluded in the district court. APA review is unavailable, however, because plaintiff has a statutory right to seek review of the final judgment in the court of appeals, and has done so. See 28 U.S.C. 1291. APA review is precluded -- and unnecessary -- when there is a statutory review procedure such as that provided by 28 U.S.C. 1291. See 5 U.S.C. 702; Sprecher v. Graber, 716 F.2d 968, 974-75 (2d Cir. 1983) ("[t]he legislative history of Section 702 amply demonstrates that Congress did not intend to waive sovereign immunity where . . . 'another statute provides a form of relief which is expressly or impliedly exclusive.' H.R. No. 94-1656, p.3, 94th Cong. 2d Sess." "Section 702 . . . was designed to waive sovereign immunity only in situations when specific provisions establishing judicial review do not exist and to leave untouched areas in which . . . judicial review was the subject of specific legislation").

Second, even when there has been final agency action, the APA excludes from its coverage agency action "committed to agency discretion by law." 5 U.S.C. 701. Under Sections 20(a) of the Securities Act, 15 U.S.C. 77t(a), and 21 of the Exchange Act, 15 U.S.C. 78u -- the provisions pursuant to which the Commission is conducting the Hirsch-Chemie and Robotronix investigations -- the Commission's decision to investigate is committed to its discretion. See Kixmiller v. SEC, 492 F.2d 641, 644-46 (D.C. Cir. 1974); Leighton v. SEC, 221 F.2d 91 (D.C. Cir.), cert. denied, 350 U.S. 825 (1955). Thus, Commission investigations are not subject to judicial review under the APA. Sprecher v. Graber, 716 F.2d at 974.

The Second Circuit's decision in Sprecher is instructive. In Sprecher, plaintiff sought declaratory and injunctive relief against the Commission alleging, among other things, that the Commission had violated his rights in determining to conduct an investigation and to issue subpoenas in that investigation. The court rejected plaintiff's claim that the APA's limited waiver of sovereign immunity permitted him to obtain judicial review of the Commission's investigative actions. The court explained that the Commission's investigative decisions are unreviewable under the APA because the APA excepts agency actions that are committed to the agency's discretion. Id. at 974. Additionally, the court held that the APA's waiver of sovereign immunity is applicable "only in situations when specific provisions establishing judicial review do not exist . . . " Id. Thus, the waiver is unavailable here because, before

the Commission may take any action affecting plaintiff's rights, the Commission would have to bring an enforcement action against plaintiff pursuant to statute. Plaintiff could raise, by way of defense in that action, alleged defects in the Commission's evidence. 25/ The adequacy of that judicial remedy was demonstrated in the Champion Sports Management case when plaintiff had an opportunity to defend that action by making the very arguments he raises here. That judicial remedy precludes reliance on the APA. 26/

25/ In Sprecher, the court held that plaintiff's sole judicial remedy for the allegedly improper issuance of a subpoena was to assert that argument, by way of defense, in the subpoena enforcement action brought by the Commission pursuant to 15 U.S.C. 78u(a). Id. at 974-75.

26/ Plaintiff's reliance on the Constitution and the court's inherent and supervisory powers (Comp. ¶1) is also misplaced. Jurisdiction in the federal district courts derives only from acts of Congress. As the Supreme Court stated in Kline v. Burke Construction Co., 260 U.S. 226, 233-34 (1922), referring to Article 3, §2 of the Constitution:

> The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress.

See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328-30 (1816).

II. THE COMPLAINT FAILS TO STATE A CLAIM AS PLAINTIFF HAS NOT ASSERTED THE ATTORNEY-CLIENT PRIVILEGE AND, IN ANY EVENT, HIS CLAIM OF BREACH OF THE PRIVILEGE DOES NOT CONSTITUTE A VIOLATION OF THE CONSTITUTION.

A. The complaint must be dismissed because plaintiff has not invoked the attorney-client privilege.

The courts in this Circuit have adopted the test articulated in U.S. v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950), to determine whether the attorney-client privilege may be invoked. 27/ There, Judge Wyzanski stated that the asserted holder of the privilege must demonstrate, among other things, that: (1) he is the client; (2) the privilege has been claimed by the client; (3) the communication was for the purpose of securing legal services and not for committing a crime or fraud; and (4) the privilege has not been waived. 28/ Plaintiff does

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27/ See, e.g., Brinton v. Department of State, 636 F.2d 600, 604 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981); Mead Data Central, Inc. v. United States Department of Air Force, 566 F.2d 242, 253-254 (D.C. Cir. 1977); SEC v. Gulf & Western Industries, Inc., 518 F. Supp. 675, 681 (D.D.C. 1981).

28/ This Court has recognized that the test set out in the United Shoe Machinery Corp. decision is the most commonly used one to determine whether the attorney-client privilege is properly asserted. See SEC v. Gulf & Western, 518 F. Supp. at 681. The full test has four parts, with sub-elements:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal

(footnote continued)

not allege in his complaint that those requirements have been met, nor could he.

Plaintiff does not allege either that Ms. Bellah was acting as his attorney or that he was her client (see generally Comp.). To the contrary, he admits that Ms. Bellah obtained the "confidential privileged information" she is alleged to have divulged in connection with her "representation" of the corporate clients of plaintiff's law firm (Comp. ¶¶ 6, 7, 10). Indeed, the firm's corporate clients -- and not plaintiff -- are the clients who possess any privilege, should one even exist, covering the information plaintiff asserts has been disclosed (id.). Furthermore, plaintiff does not allege that he is asserting the privilege on behalf of his corporate clients; rather, he asserts that he is advancing "rights, privileges and immunities secured to him[self]" (Comp. p. 8). 29/ Thus, plaintiff has failed to meet two of the

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28/ (footnote continued)

> proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

89 F. Supp. at 358-59.

29/ It is clear that plaintiff brings this action in his individual capacity to protect his own interests, not those of his firm's present or former corporate clients. Indeed, plaintiff asks this Court to enjoin the Commission from proceeding against him on the basis of the allegedly tainted information; he does not seek that relief for his corporate clients (Comp. pp. 8-11).

(footnote continued)

test's prerequisites for invocation of the privilege: (1) that he is the client; and (2) that the privilege has been claimed by the client.

Plaintiff also has not alleged, as he must, that the communications he wishes to protect were to secure legal services, and not in furtherance of a crime or fraud (see generally Comp.). Communications in furtherance of a crime or fraud may not be protected, even by the holder of the privilege. See, e.g., Clark v. U.S., 289 U.S. 1, 15 (1933) ("A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."). See also U.S. v. Mardian, 546 F.2d 973, 982 (D.C. Cir. 1976); SEC v. Gulf & Western Industries, Inc., 502 F. Supp. 343, 346 n.5 (D.D.C. 1980); U.S. v. AT&T, 86 F.R.D. 603, 624 (D.D.C. 1979). See also Larkin, Federal Testimonial Privileges §2.07 pp. 2-67, 2-68 (1984). 30/

29/ (footnote continued)

Moreover, plaintiff's disclosure of the notes of the Bellah interview to a national magazine (Palmer Supp. Aff. TR 200, 203) suggests that his interests and those of the firm's clients are not the same. Although plaintiff divulged the information for his own purposes, he takes the position in this action that the information he disclosed was considered confidential by his clients. Id.

30/ This element is particularly significant in this case as it is doubtful that plaintiff -- even if he were the client -- could make such a showing. As discussed above, in SEC v. Champion Sports Management, Inc., the court found that plaintiff had violated antifraud provisions of the securities

(footnote continued)

Finally, plaintiff has failed to allege (see generally Comp.) that the privilege has not been waived. The asserted holder of the privilege must make this showing as well:

> The burden is on the [claimant] of the privilege to demonstrate that confidentiality was expected in the handling of these communications and that it was reasonably careful to keep this confidential information protected from general disclosure.

Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980). As the United States Court Appeals for the District of Columbia Circuit has explained:

> [A]ny voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the privilege, not only as to the specific communication disclosed but also as to all other communications relating to the same subject matter.

In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982). See also Permian Corp. v. U.S., 665 F.2d 1214, 1221-22 (D.C. Cir. 1981) (disclosure of documents); U.S. v. AT&T, 642 F.2d 1285, 1299 (D.C. Cir. 1980). Plaintiff's failure to plead this element of the privilege is fatal to his claim. 31/

30/ (footnote continued)

> laws. Palmer Aff. Ex. 3, pp. 11-13. Moreover, testimony in the Champion action revealed that the information Ms. Bellah conveyed to the United States Attorney, the bar ethics committee and the Commission concerned what she believed to be an ongoing fraud. Palmer Supp. Aff. TR 142-143.

31/ Even assuming, arguendo, plaintiff had alleged this element of the privilege, it is doubtful he could establish it at

(footnote continued)

B. Plaintiff's allegations of constitutional violations do not state a claim.

Plaintiff alleges that as a result of Ms. Bellah's voluntary disclosure of information to the Commission, the Commission violated his rights under the First, Fourth and Fifth Amendments. The attorney-client privilege is a common law evidentiary privilege which does not have constitutional dimensions; thus, plaintiff cannot state a constitutional claim based on an alleged breach of that privilege. Moreover, plaintiff lacks standing to assert any claim premised on the breach of the attorney-client privilege because that privilege does not belong to him.

1. The attorney-client privilege does not rise to the level of a constitutional right.

Plaintiff incorrectly asserts that a breach of the attorney-client privilege is of constitutional dimension. The privilege, albeit an important one, does not contain any constitutional ramifications. Rather, it is grounded in the common law. See Upjohn v. U.S., 449 U.S. 383, 389 (1981). And its breach does not constitute a constitutional violation. See Bradt v. Smith, 634 F.2d 796, 800 (5th Cir. 1981), cert. denied, 454 U.S. 830 (1981) (the attorney-client privilege is not of constitutional dimension);

31/ (footnote continued)

trial. On August 24, 1984, prior to the Champion court's ruling on the applicability and effect of the claim of attorney-client privilege, the plaintiff admittedly divulged the very information he now alleges to be confidential to a reporter for Ring magazine, a boxing publication. Palmer Supp. Aff. TR 200. If plaintiff did have authority to assert the privilege, he waived it by voluntarily disclosing the same information. In re Sealed Case, 676 F.2d at 809.

Beckler v. Superior Court, Los Angeles County, 568 F.2d 661, 663 (9th Cir. 1978) (violation of the attorney-client privilege is not constitutional matter).

A claim virtually identical to that asserted in this case was rejected by the court in OKC Corp. v. Williams, 461 F. Supp. 540, 546 (N.D. Tex. 1978). There, OKC claimed that an SEC subpoena seeking a report from its attorneys effectively breached the attorney-client privilege, thereby violating its due process rights. The court held that the alleged violation of its attorney-client privilege was not of constitutional dimension:

> "the attorney-client privilege, the root of OKC's due process claim, is not a principle of constitutional proportions but a rule of evidence. While unquestionably valued and significant, the attorney-client privilege has not been elevated to the stature of a constitutional right. It is a claim over which this [federal] court does not have jurisdiction." Id. at 546.

See also Magida v. Continental Can Company, 12 F.R.D. 74, 76 (S.D.N.Y. 1951) (the privilege is "without Constitutional guarantee"). 32/ Hence, even were plaintiff able to demonstrate that the Commission violated his attorney-client privilege, that breach would not give rise to a constitutional claim. And, as the

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32/ As noted above, supra n. 22, if plaintiff's claim is not of constitutional dimension, it must also be dismissed for lack of subject matter jurisdiction because it would be outside the scope of 28 U.S.C. 1331. Although plaintiff did not assert jurisdiction under 28 U.S.C. 1331, had he done so it would not provide a jurisdictional basis since 1331 only grants jurisdiction for actions arising under either the Constitution or a federal statute.

Supreme Court has held, common law claims cannot be elevated to constitutional claims by artful pleading. Baker v. McCollan, 443 U.S. 137, 146 (1979).

2. Even assuming the attorney-client privilege were of constitutional dimension, plaintiff's allegations must still be dismissed.

a. The complaint does not state a claim under the First Amendment.

"The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances." Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464 (1979). The government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy, NAACP v. Button, 371 U.S. 415, 429 (1963), or by imposing sanctions for the expression of particular views it opposes. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

Plaintiff does not identify which of his rights guaranteed by the First Amendment allegedly has been abridged by the Commission. Plaintiff's allegation that the attorney-client privilege has been breached -- even if true -- does not assert a violation by the Commission of First Amendment rights. Plaintiff does not allege, for example, that the Commission's actions have had a chilling effect on his speech; or that the Commission has abridged his right to advocate ideas, to associate with others, or to petition the government for the redress of grievances. See Smith v.

Arkansas State Highway Employees, 441 U.S. at 464. In sum, plaintiff simply has not alleged any facts, which, if proved, would establish that any rights guaranteed by the First Amendment have been violated. 33/

b. The complaint does not state a claim under the Fourth Amendment.

Plaintiff complains that his Fourth Amendment rights were violated by Ms. Bellah's voluntary disclosure of information to the Commission (Comp. ¶¶ 9-10). Yet, the Supreme Court repeatedly has held that the Fourth Amendment does not give a person a constitutional right to object to a third person's disclosure to law enforcement authorities of information pertaining to him. SEC v. Jerry T. O'Brien, Inc., 104 S. Ct. at 2726; U.S. v. Miller, 425 U.S. 435, 443 (1976); Donaldson v. U.S., 400 U.S. 517, 522 (1971). Moreover, the Fourth Amendment right to be free from unreasonable searches and seizures is a personal right. It may not be asserted vicariously on behalf of others, as plaintiff appears to be doing. U.S. v. Payner, 447 U.S. 727, 731 (1980); Alderman v. U.S., 394 U.S. 165, 174 (1968). Thus, even had the Commission improperly implored Ms. Bellah to provide information

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33/ Although the United States District Court for the Southern District of New York has issued an order permanently enjoining plaintiff from violating provisions of the federal securities laws, it places no restrictions on his lawful activities. Plaintiff cannot seriously contend that such an injunction violates his First Amendment rights. And, even assuming that injunction did infringe his rights, his remedy is to seek review of that order in the court of appeals, as he has done, not to collaterally attack that order in this court.

about plaintiff (which plaintiff does not allege (see Comp. ¶¶ 9-10)), plaintiff would lack standing under the Fourth Amendment to claim he has been harmed by Ms. Bellah's statements. See U.S. v. Miller, 425 U.S. at 445 (no standing under Fourth Amendment to contest subpoenas directed at a third party although records related to complainant).

Furthermore, the Fourth Amendment places no limitation on private persons. Ms. Bellah was free to disclose information to a United States Attorney, a bar ethics committee and the Commission without violating the rights of plaintiff or others under the Fourth Amendment. U.S. v. Miller, 425 U.S. at 445; Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (the Fourth Amendment does not apply when a private individual provides information to the government). See also Hoffa v. U.S., 385 U.S. 293, 301-302 (1966).

c. The complaint does not state a claim under the Fifth Amendment.

Plaintiff has failed to state a claim under either the self-incrimination or due process clauses of the Fifth Amendment. The Fifth Amendment protects against compelled self-incrimination. SEC v. Jerry T. O'Brien, Inc., 104 S. Ct. at 2725-26; Fisher v. U.S., 425 U.S. 391, 397 (1976); Couch v. U.S., 409 U.S. 322, 327 (1973). Plaintiff has not alleged that he has been compelled to be a witness against himself; rather, he is attempting to assert the Fifth Amendment rights of third parties, the corporations with which he is affilated. Indeed, he concedes (Comp. ¶¶ 6, 7, 10)

that the alleged confidential communications were those of his corporate clients -- not his own. In any event, he may not assert the Fifth Amendment on behalf of any other entity, even if he were an agent, which he does not allege (see generally Comp.). Hale v. Henkel, 201 U.S. 43, 69-70 (1905) ("The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness"). See Fisher v. U.S., 425 U.S. at 397; U.S. v. Nobles, 422 U.S. 225 (1975); Couch v. U.S., 409 U.S. at 327.

Plaintiff also does not state (see generally Comp.) in what way his due process rights are being violated in connection with the Commission's ongoing investigations. This is not surprising; it is well established that a Commission investigation does not subject a person to civil or criminal liability, does not change existing or future status, and "does not make determinations depriving anyone of his life, liberty or property." Hannah v. Larche, 363 U.S. at 441. Indeed, the Supreme Court has recently held that the subject of a Commission investigation does not have a due process right to challenge the Commission's receipt of information concerning him in an investigation, even if he believes it was obtained improperly. SEC v. Jerry T. O'Brien, 104 S. Ct. at 2725.

Should the Commission ultimately determine to bring an enforcement proceeding against plaintiff, in which plaintiff's rights would be subject to adjudication, he would enjoy the full

panoply of rights available in that proceeding, including the opportunity to assert all legal and factual arguments concerning alleged violations of his rights. 34/

3. Plaintiff has failed to state a claim for injunctive relief because he has an adequate legal remedy and faces no threat of irreparable harm.

An injunction is an "extraordinary remedy" even between private parties. Wolf Corp. v. SEC, 317 F.2d 139, 142-43 (D.C. Cir. 1963). However, when, as here, the injunction sought would interfere with ongoing law enforcement investigations, the plaintiff's burden is formidable. 35/ The availability of an adequate legal remedy will preclude injunctive relief. See, e.g., Reisman

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34/ The Constitution also provides no basis for a claim of injury to one's reputation, contrary to plaintiff's contention (Comp. ¶¶ 15-16). Paul v. Davis, 424 U.S. 693, 711 (1975). Even public opprobrium and scorn or the loss of one's job, as a result of a law enforcement inquiry, does not per se result in a violation of due process, and is not cognizable harm. Hannah v. Larche, 363 U.S. at 442-43. FTC v. Standard Oil Co. of Cal., 449 U.S. at 244; Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1976).

35/ As Chief Justice Burger (then a D.C. Circuit Court judge) explained in Wolf Corp. v. SEC, 317 F.2d 139, 142-143 (D.C. Cir. 1963):

> Judicial power to impose prior restraint is not called an extraordinary remedy without reason. Even as between private parties the ordinary remedy is legal action after inquiry * * *. Still higher hurdles stand in the way of prior restraint against the processes of a regulatory body exercising quasi-judicial powers which can be judicially reviewed as a matter of right before they become final (emphasis added).

v. Caplin, 375 U.S. 440, 443 (1964). Similarly, the absence of irreparable harm will also preclude injunctive relief. Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. at 24.

Plaintiff has adequate legal remedies. The investigations he seeks to enjoin are fact-gathering inquiries that cannot result in the imposition of any sanction. See SEC v. Jerry T. O'Brien, Inc., 104 S. Ct. at 2725; Hannah v. Larche, 363 U.S. at 446-48. 36/ Should the Commission determine at the conclusion of those investigations to institute enforcement proceedings against plaintiff, he may assert in those proceedings that his rights were abridged. 37/ The availability of such a remedy precludes the granting of equitable relief. See, e.g., Reisman v. Caplin, 375 U.S. at 443. For this reason, courts have held that they

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36/ In Hannah v. Larche, 363 U.S. at 441, the Supreme Court described the investigative role of an agency such as the Commission:

> It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights.

37/ Indeed, plaintiff has done so, albeit unsuccessfully. In SEC v. Champion Sports Management, Inc. and Richard Hirschfeld, he argued in the district court that the Commission violated his rights by obtaining information from Ms. Bellah. Having been enjoined by that court, plaintiff has appealed pursuant to 28 U.S.C. 1491. Thus, plaintiff has available legal remedies, which he has invoked.

lack jurisdiction to enjoin Commission investigations. See, e.g., First Jersey Securities, Inc. v. SEC, 553 F. Supp. 205, 211 (D.N.J. 1982) (district court dismissed for "lack of equity jurisdiction" a claim to enjoin Commission from commencing an enforcement proceeding because plaintiffs could assert, by way of defense in the enforcement proceeding, any arguments they had as to why the Commission had violated their rights and thus had an adequate legal remedy). See also Reisman v. Caplin, 375 U.S. at 443; Bird v. SEC, [1980] Fed. Sec. L. Rep. (CCH) ¶97,506 (D.P.R. 1980); Peoples Bank of Danville v. Williams, 449 F. Supp. 254, 261 (W.D. Va. 1978); SEC v. Isbrantsen, 245 F. Supp. 518, 520 (S.D.N.Y. 1965).

Moreover, plaintiff does not allege -- nor could he -- any irreparable harm which will result in the absence of injunctive relief. Plaintiff's claims concerning the harm that may result from the Commission's use of certain information against him are speculative and thus not ripe for review. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). 38/ For example, at the

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38/ In Abbott Laboratories, the Supreme Court explained the rationale for the ripeness doctrine:

> "to prevent the courts, through avoidance of premature litigation, . . . from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Id. at 148-49.

conclusion of its investigations, the Commission may determine that no action against plaintiff is warranted or required. Unless, and until, the Commission commences an enforcement proceeding against plaintiff, his rights are unaffected and he cannot show any harm, let alone irreparable harm. See SEC v. Jerry T. O'Brien, Inc., 104 U.S. at 2725; Hannah v. Larche, 363 U.S. at 443; First Jersey Securities, Inc. v. Bergen, 605 F.2d 690, 700 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980). 39/

Although plaintiff has alleged that his business activities or relationships with his clients will be irreparably harmed if the Commission continues its investigations, such harm, even if real, is not legally cognizable. "It is a necessary hazard of doing business to be the subject of inquiry by a government regulatory agency." SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1056 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974). 40/ Moreover, primary consideration must be given to the public

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39/ In Hannah, plaintiffs attempted to enjoin a fact-finding, non-adjudicative Civil Rights Commission investigation. They argued that, as a result of the investigation, they could be subject to the irreparable harm of public opprobrium and scorn, loss of their jobs, and possible criminal prosecution. The Supreme Court held that those consequences, even if real, would not constitute irreparable harm. 363 U.S. at 443.

40/ The costs and burdens attendant to defending government investigations and enforcement proceedings also do not constitute cognizable harm. As the Supreme Court has stated, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." FTC v. Standard Oil Co. of Cal., 449 U.S. at 244; Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. at 24; Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51-52 (1938).

interest as the statutory intent of the securities laws is to protect investors. Associated Securities Corp. v. SEC, 283 F.2d 773, 775 (10th Cir. 1960) (denying a stay pending review of Commission orders effectively excluding petitioners from the securities business). See also Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 15 (1942).

In sum, as plaintiff has adequate remedies at law and can make no showing of irreparable harm, his complaint for injunctive relief must be dismissed.

CONCLUSION

Based on the foregoing, this Court should dismiss the complaint for lack of subject matter jurisdiction or, alternatively, for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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Dated: January 28, 1985

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 1985, I caused a copy of the Defendants' Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim, memorandum in support thereof, a proposed order and the Supplemental Affidavit of Venrice R. Palmer to be served, by regular mail, upon:

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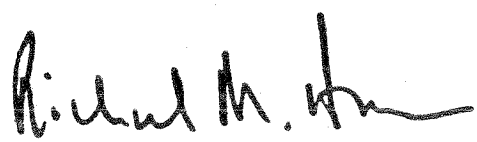

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