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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ELLIOT HANDLER, RUTH HANDLER, SEYMOUR M. ROSENBERG,

Plaintiffs,

v.

THE SECURITIES AND EXCHANGE COMMISSION; RODERICK M. HILLS, PHILIP A. LOOMIS, JR., JOHN R. EVANS, and IRVING M. POLLACK, as Commissioners of the SEC; STANLEY SPORKIN, Individually and as Director, Division of Enforcement, SEC;

IRWIN M. BOROWSKI, Individually and as Associate Director, Division of Enforcement, SEC; JAMES G. MANN, Individually and as Special Counsel, SEC; RALPH H. ERICKSON, Individually and as Assistant Administrator, Enforcement Division, Los Angeles Regional Office (Region 7), SEC; UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA; EDWARD H. LEVI, as Attorney General of the United States; WILLIAM D. KELLER, as United States Attorney for the Central District of California,

Defendants.

CV 77-0067-FW

1) NOTICE OF MOTION

2) MOTION TO DISMISS COMPLAINT, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

3) MEMORANDUM IN SUPPORT OF MOTION

TABLE OF CONTENTS

CITATIONS

Cases: Pages

Cases: Pages

NOTICE OF MOTION

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YOU WILL PLEASE TAKE NOTICE that the defendants will bring on for hearing the following Motion to Dismiss Complaint or in the Alternative for Summary Judgment before the Honorable Francis C. Whelan, United States District Judge, in his courtroom, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012, on Monday, January 31, 1977, at 10:00 A.M., or as soon thereafter as counsel may be heard.

Dated: January 24, 1977.

Respectfully submitted,

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MOTION TO DISMISS COMPLAINT, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants, by and through the undersigned, hereby move the Court to Dismiss the Complaint, or, in the alternative, for Summary Judgment, pursuant to Rule 12(b)(6) and Rule 56, Federal Rules of Civil Procedure, for the reasons respectively: that Plaintiffs failed to state a claim upon which relief may be granted; that there are no genuine issues as to any material facts, and the defendants are entitled to judgment as a matter of law.

This Motion is based upon the pleadings previously filed herein, and on the Memoranda in Support of Motion.

WILLIAM D. KELLER
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I. MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

In support of the instant motion to dismiss or in the alternative for summary judgment, defendants are filing two separate memorandums of points and authorities. Defendants hereby incorporate the separate memorandum of points and authorities which is filed this date and respectfully ask the Court to consider both memorandums in ruling upon the motion.

As more fully discussed infra, courts have consistently recognized that the public interest in prompt and complete criminal investigations militates strongly against interfering with Grand Jury investigations. Thus, because of its very nature, and the authorities cited herein, plaintiffs' complaint should be dismissed or in the alternative, summary judgment should be granted against plaintiffs.

II. THIS COURT SHOULD NOT ENJOIN THE PRESENTATION OF EVIDENCE TO A GRAND JURY, PARTICULARLY WHERE PLAINTIFFS CLEARLY HAVE AN ADEQUATE REMEDY AT LAW AND WILL NOT SUFFER IRREPARABLE INJURY IF THE INJUNCTON IS DENIED

A. Courts Should Not Enjoin The Presentation Of Evidence To A Grand Jury

It is a basic and well-settled doctrine of equity jurisprudence that courts of equity should not act, particularly with respect to enjoining a criminal investigation or proceeding, where the moving party has an adequate remedy at law and will not suffer irreparable injury if equitable relief is denied. O'Shea v. Littleton, 414 U.S. 488, 94 S.C. 669 (1974); GM Leasing Corp.

et al v. United States, ___ U.S. ___ #75-235 (January 12, 1977); Steiner v. Hocke, 272 F.2d 384 (9th Cir. 1960); Commonwealth of Pennsylvania v. Powers, 311 F.Supp. 1219 (E.D. Pa. 1970); Rosa v. Gil, 309 F.Supp. 1332 (P.R. 1969).

This historical limitation on the Courts' equity powers with respect to enjoining criminal proceedings stems in part from the existence of the grand jury and its all-important role in the criminal process. Recently, the Supreme Court reaffirmed the broad powers of the grand jury by observing:

> "Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. 'It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation

of crime.' Blair v. United States, 250 U.S. 273, 282 (1919)."

United States v. Calandra, 414 U.S. 338, 343 (1973); see also, United States v. Dionisio, 410 U. S. 18 (1973).

Similarly, in United States v. Cox, 342 F.2d 167, 175 (5th Cir. 1965), the Court of Appeals for the Fifth Circuit recognized the importance of the grand jury's function, as well as its unfettered right to investigate possible violations of law. In so doing, the Court in United States v. Cox, supra, quoted from In Re Grand Jury Proceedings, 4 F.Supp. 283, 84 (E.D. Pa. 1939), and held:

> "The inquisitorial power of the grand jury is the most valuable function which it possesses today and, far more than any supposed protection which it gives to the accused, justifies its survival as an institution. As an engine of discovery against organized and far-reaching crime, it has no counterpart. Policy emphatically forbids that there should be any curtailment of it except in the clearest cases." (342 F.2d 167, 175) See also, Nixon v. Sirica, 487 F.2d 700, 712-713 (D.C. Cir. 1973).

Because of the compelling public interest in a complete investigation of possible criminal violations and full disclosure of facts in that regard, courts have ruled that the grand jury should not be inhibited by technical rules of evidence. United

States v. Calandra, supra; Blair v. United States, 250 U.S. 281 (1919), and that illegally obtained evidence can be considered by the grand jury. Stone v. Powell, ___ U.S. ___, 96 S.Ct. 3037 (1976); United States v. Calandra, supra. Similarly the grand jury can consider information was obtained in violation of a defendant's constitutional privilege against self-incrimination. United States v. Calandra, supra; Lawn v. United States, 355 U.S. 339 (1958).

For the same reasons, involving a compelling public interest, the Supreme Court has repeatedly recognized that grand jury proceedings should not be interrupted. United States v. Calandra, supra; United States v. Dionisio, supra; Gelbard v. United States, 408 U.S. 41, 70 (1972), and that courts should not enjoin criminal proceedings. Stefanelli v. Minard, 342 U.S. 117 (1951); Douglas v. City of Jeanette, 319 U.S. 157 (1943). See also: Replay v. Stidd, 308 F.Supp. 854 (D. Minn. 1970). This fundamental prohibition regarding the exercise of equity jurisdiction to enjoin a criminal prosecution applies to cases in which prosecution is anticipated, as well as to cases where prosecution is already underway. Ackerman v. International Longshoreman's and Warehousemen's Union, 187 F.2d 860 (9th Cir. 1951), cert. denied, 342 U.S. 859.

The importance of an uninterrupted grand jury investigation was underscored in United States v. Calandra, supra, where the Supreme Court ruled that the exclusionary rule did not apply to grand jury proceedings. The court reasoned:

> "Permitting witnesses to invoke the exclusionary rule before a grand jury would

precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings. Suppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective. The probable result would be protracted interruption of grand jury proceedings. Gelbard v. United States, 408 U.S. 41, 70 (1972) (White, J., concurring), effectively transforming them into preliminary trials on the merits. In some cases the delay might be fatal to the enforcement of the criminal law. Just last Term we reaffirmed our disinclination to allow litigious interference with grand jury proceedings:

> 'Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws' United States v. Dionisio, 410 U.S. 1, 17 (1973).

Cf. United States v. Ryan, 402 U.S. 530 (1971); Cobbledick v. United States, 300 U.S. 323 (1940).

/

In sum, we believe that allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties."

United States v. Calandra, 414 U.S. 338, 349-50 (footnotes omitted).

In addition to the established proscription against enjoining criminal prosecution, it is equally well-settled that courts should not interfere with government attorneys who exercise control over criminal investigations and prosecutions. In United States v. Cox, supra, the court ruled that:

" . . . the attorney for the United States . . . exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." 342 F.2d 167, 171 (footnote omitted). [Emphasis supplied]

Moreover, the Ninth Circuit has recently reaffirmed the principle that courts should not enjoin government attorneys from presenting evidence to a grand jury which is investigating possibl criminal violations. Midwest Growers Co-op Corp. v. Kirkemo, 553 F.2d 455 (9th Cir. 1976). In that case Midwest Growers sought

damages and injunctive relief against the I.C.C., the United States of America and various individuals including, among others, the United States Attorney and two Assistant United States Attorneys for this district based on an illegal search of plaintiff's premises. Specifically, the plaintiff sought in part to enjoin the United States of America, its agents and employees from using evidence obtained from the search in any criminal or civil proceeding. The district court dismissed the plaintiff's claims as to the United States of America and the I.C.C. but granted a permanent injunction regarding the use of information derived from the search. On appeal, this Circuit ruled, in part, that the district court properly dismissed the claims against the United States of America and the Interstate Commerce Commission, but the court went on to hold that the permanent injunction against the defendants was improper and should be dissolved. The court concluded that the injunction was "overly broad, premature, and legally improper." (553 F.2d 455, 466). In so ruling, the Court opined:

> " . . . we question the propriety of enjoining the individual defendants from making any use of the information obtained through their search of Midwest's office. In the first place, plaintiff has failed to show either irreparable harm or lack of any adequate remedy at law -- both pre-requisites to injunctive relief. Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 57, 95 S.Ct. 2069, 2075, 45 L.Ed.2d 12, 20 (1975).

"In the second place, it is impossible to determine now what, if any, use the defendants will make of the materials and information obtained in their search. In any future action in which the defendants may seek to use the material, the court may properly consider Midwest's motion to suppress, and whether the search was in violation of the Fourth Amendment. This remedy is adequate to redress whatever abuses may have occurred in the search.

"Moreover, there may be contexts in which the evidence obtained from Midwest could be admitted despite the illegality of the search . . . .

" . . . Since it is impossible to predict what future use may be made of this evidence an injunction against all use at this time is premature and improper." (553 F.2d 455, 465-66). [Emphasis added]

That courts have been loathe to interfere with the orderly and expeditious discharge of the grand jury's duties is apparent from the case law. For example in United States v. United States District Court for the Southern District of West Virginia, 238 F.2d 713 (4th Cir. 1956), an application was made by the United States for a writ of mandamus directing the judge of the United States District Court for the Southern District of West Virginia to vacate an order which, inter alia, precluded the

grand jury from completing an anti-trust investigation of the milk industry. The court of appeals, citing Blair v. United States, supra, held that the action of the District Court judge:

> "[I]nterfered unduly with the powers of the grand jury and the proper functions of goverment counsel in the investigation which the grand jury was conducting. In this connection it must be remembered that, while a grand jury is not independent of the court, it is not subject to the court's directions and orders with respect to the exercise of its essential functions.
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> * * *
>
> "While the grand jury is summoned, empaneled and sworn by the court, it is essentially independent of court control. As said by Judge Fee in United States v. Smyth, D.C., 104 F.Supp. 283, 292: 'While the court may exercise an influence over the proceedings, there is neither a method whereby an indictment by a grand jury can be pre-emptorily required, nor, on the other hand, is there any method of preventing the presentment of an indictment except by summary discharge.' While the judge has the supervisory duty to see that its process is not abused or used for purposes of oppression or injustice, there should be no curtailment of its inquisitional power except in the

clearest cases of abuse." (238 F.2d 713, 719-722) (Citations omitted).

To the same effect is Application of Texas Co., 27 F.Supp. 847 (E.D. Ill. 1939), in which petitioners sought to enjoin the Attorney General and the United States Attorney and their assistan from presenting certain evidence to a grand jury. The court denied the application and declared:

> "A grand jury is a part of the court machinery, an all-important element in the agency of the government endowed with judicial power, for one accused of felony may not be prosecuted except upon a true bill returned by a grand jury. It is under control by the court to the extent that it is organized and the legality of its proceedings determined by the court in accordance with the statutes. Its members are subject to the court's supervision and control for any violation of their duties. Beyond this supervisory power over them, however, the court cannot limit them in their legitimate investigation of alleged violations of the law." (27 F.Supp. 847, 850) [Emphasis supplied].

In Chakejian v. Trout, 295 F.Supp. 97 (E.D. Pa. 1969), the taxpayer sought to enjoin enforcement of an I.R.S. summons and to enjoin presentation of evidence obtained by the I.R.S. to the grand jury. The court held that the plaintiff was not entitled to injunctive relief since he had an adequate remedy at law

(i.e., a motion to suppress), quoting from United States v. Blue, 384 U.S. 251, 255 (1966) to the effect that cases ordering exclusion of illegally obtained evidence "assume implicitly that the remedy does not extend to barring the prosecution altogether." Chakejian v. Trout, supra, at 102-103. See In re April 1956 Term Grand Jury, 239 F.2d 263, 270-271 (7th Cir. 1956).

In United States v. Blue, supra, where petitioner sought dismissal of the indictment prior to trial, the Court held:

> "Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, [petitioner] would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial.
>
> * * * *
>
> "Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book. (384 U.S. at 255) (Emphasis supplied).

Thus it is apparent from the cases in this and other circuits, as well as the decisions of the Supreme Court, that this court

should not enjoin the defendants from presenting evidence to a grand jury or otherwise using such evidence in a civil or ciminal proceeding.

B. The Plaintiffs Have Failed To Make Any Showing Of Irreparable Injury

An injunction is a drastic remedy, and as the cases discussed hereafter show, courts have, therefore, carefully imposed strict requisites which plaintiff must allege and establish to show entitlement to an injunction.

Two such requisites are threat of immedate irreparable injury to the plaintiff and lack of adequate remedy at law. GM Leasing Corp. et al v. United States, supra; Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975); Granny Goose Foods v. Teamsters, 415 U.S. 423 (1974); O'Shea v. Littleton, supra; Samuels v. Mackell 401 U.S. 66 (1971); Wilson v. Schnettler, 365 U.S. 381 (1961); Midwest Growers Co-op Corp v. Kirkemo, supra; Canal Authority of State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974).

The burden of persuasion as to both, immediate irreparable injury and lack of adequate remedy at law, is on the party seeking the injunction, and the respondent need not show lack of irreparabl injury or existence of adequate remedy at law. Granny Goose Foods v. Teamsters, supra; Canal Authority of State of Florida v. Callaway, supra.

Abstract, conjectural injury is not enough to warrant issuance of an injunction. Plaintiff must allege and establish that he has sustained or is in immediate danger of sustaining some direct, specific injury as a result of the challenged conduct. O'Shea v. Littleton, supra. General allegations of violations of con-

stitutional rights are insufficient. O'Shea v. Littleton, supra; Boyle v. Landri, 401 U.S. 71 (1971).

Mere injury, even though it may be substantial is not sufficient to form the basis for the issuance of an injunction. United States v. Commonwealth of Pennsylvania, 533 F.2d 107 (3rd Cir. 1976). The injury sustained must be irreparable. Santa Barbara Co. v. Hickel, 426 F.2d 164 (9th Cir. 1970), cert. denied, 400 U.S. 999.

Even the costs, anxiety and inconvenience of having to defend against a criminal prosecution cannot in itself be consider "irreparable injury", Younger v. Harris, 401 U.S. 37 (1971); Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1 (1974). Furthermore, where adequate remedy at law exists, there is no irreparable injury even where party seeking the injunction is alleging violation of constitutional rights. O'Shea v. Littleton, supra; Samuels v. Mackell, supra.

Plaintiffs in the case at bar fail to show any harm whatsoever, much less irreparable harm which is the prerequisite for the issuance of the injunction they seek. In an attempt to bolster their unsupported claims of injury, plaintiffs vaguely assert that their rights to indictment and trial by impartial jurors have been impaired and have "possibly" been destroyed. Such a nebulous and conclusory claim is nothing more than mere conjecture and cannot consititute "irreparable injury". O'Shea v. Littleton, supra.

Similarly, plaintiffs' claims that they have been subjected to increased costs of litigation in civil actions and may have to

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defend a criminal action, pale in comparison to the required showing of irreparable harm. Younger v. Harris, supra.

Moreoever, plaintiffs spuriously infer that irreparable harm will result when and if the defendants present certain alleged evidence unlawfully obtained to the Grand Jury. Assuming, without conceding that evidence was unlawfully obtained and assuming arguendo plaintiffs had standing to contest the legality of such evidence, Plaintiffs' claim must fail as a matter of law. United States v. Calandra, supra; Midwest Growers Co-op Corp. v. Kirkemo, supra. This argument was addressed by the Ninth Circuit in Midwest Growers, supra, where the court rejected the same claim which is now raised by plaintiffs by ruling:

> " . . . there may be contexts in which the evidence obtained from Midwest could be admitted despite the illegality of the search. As the Supreme Court noted in United States v. Calandra, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 571 (1974): 'The exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons.' When evidence is sought to be suppressed the court must consider the purpose of the rule -- to discourage unlawful conduct by government agents -- and the nature of the proceeding involved. In performing such a balancing test the Seventh Circuit recently held in Honeycutt v. Aetna Insurance Co., 510 F.2d 340, 348 (1975), cert. denied,

421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975), that the exclusionary rule does not extend to certain civil cases. Since it is impossible to predict what future use may be made of this evidence an injunction against all use at this time is premature and improper."

(533 F.2d 455, 466)

Plaintiff's claims of damage of their reputation and impairment of their ability to secure employment are also vague and conclusory and do not constitute the irreparable injury required for issuance of an injunction.

C. Plaintiffs Are Not Entitled To Relief Since They Have An Adequate Remedy At Law

No claim for injunctive or other equitable relief is shown where there is adequate remedy at law, such as a motion to suppress evidence in a pending or future criminal action. GM Leasing Corp. et al v. United States, supra; Granny Goose Foods v. Teamsters, supra; Wilson v. Schnettler, supra; Younger v. Harris, supra; Samuels v. Jackell, supra; O'Shea v. Littleton, supra; Chakejian v. Trout, supra. Thus, in the Chakejian case, where an injunction against the use of evidence allegedly illegally obtained was denied, the court noted that the plaintiff had an adquate remedy at law, namely, a motion to suppress the evidence or objections to such evidence if and when a case was actually brought against him.

The Ninth Circuit has recently affirmed this long standing principle in Midwest Growers Co-op Corp. v. Kirkemo, supra.

There the court held that plaintiff had an adequate remedy at law by filing a motion to suppress in the criminal case. In that regard this Circuit held:

> " . . . In any future action in which the defendants may seek to use the material, the court may properly consider Midwest's motion to suppress, and whether the search was in volation of the Fourth Amendment. This remedy is adequate to redress whatever abuses may have occurred in the search."
>
> (533 F.2d 455, 466) [Emphasis supplied]

United States v. Calandra, supra. See also, Witte v. United States, ___ F.2d ___ #76-3061 (9th Cir. October 26, 1976); United States v. Blue, supra.

It is manifest that issues raised by plaintiffs in the instant case such as lawfulness of the court's actions and other constitutional claims can be determined as readily in a criminal case as in a suit for injunctive relief. Douglas v. City of Jeanette, supra; Wallach v. City of Pagendale, 376 F.2d 671 (8th Cir. 1967).

Therefore, assuming arguendo that unlawful acts occurred in this case, it is obvious that plaintiffs have a proper forum to litigate such issues, namely by motion to suppress if and when a criminal charge is made. Since an adequate remedy at law is available there is no irreparable harm to the plaintiffs and it is axiomatic that an injunction will not lie.

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III PLAINTIFFS HAVE NO STANDING TO ENJOIN THE PRESENTATION OF EVIDENCE TO THE GRAND JURY OR TO COMPLAIN OF THE INVESTIGATION OF SPECIAL COUNSEL

Plaintiffs in the instant case have no standing to prevent witnesses from appearing before the grand jury or to prevent the grand jury from receiving evidence from any source whatsoever. It is also apparent that plaintiffs have no standing to complain of the investigation conducted by Special Counsel.

As discussed more fully supra, it is now settled that the exclusionary rule does not apply to grand jury proceedings and that the grand jury can receive evidence which may have been illegally obtained.[1/] Stone v. Powell, supra; United States v. Calandra, supra; Midwest Growers Co-op v. Kirkemo, supra. Therefore, neither a witness before a grand jury nor a third party can enjoin the presentation of evidence to a grand jury on the basis that such evidence was illegally obtained. United States v. Mills ___ U.S ___ (1976); Stone v. Powell, supra; United States v. Calandra, supra; In re Vigorito, 499 F.2d 1351 (2d Cir. 1974), cert. denied,; Vigorito v. United States, 419 U.S. 1056.

This principle was recognized by the Second Circuit in In Re Vigorito, supra, where it held:

> " . . . we note that the exclusionary rule . . . does not give the appellees the right to suppress the use of evidence by a grand jury . . .

1/ It should also be noted that the exclusionary rule does not apply to civil cases. Midwest Growers Coop v. Kirkemo, supra.

> . . . The Calandra rationale applies with equal force in a case like the present, where a suppression hearing is brought by a non-witness's motion. The non-witness's interest in the investigation is more tenuous than a witness's interest since he is not subject to the court's contempt power. Giving the present appellees the benefit of the exclusionary rule would interfere with the function of the Grand Jury . . . "
>
> (499 F.2d 1351, 1353)

In United States v. Miller, supra, a subpoena duces tecum was issued on behalf of the grand jury to a bank which subpoena related to the defendant's account. The Supreme Court ruled that the depositor had no reasonable expectation of privacy with respect to the records kept by the bank and that he lacked standing to complain of their production to the grand jury. The Court reasoned:

> "Since no Fourth Amendment interests of the depositor are implicated here, this case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued." (96 S.Ct. 16, 19, 1624). See also California Bankers Association v. Shultz, 416 U.S. 21 (1974).

Thus, plaintiffs have no standing to prevent others from appearing before the grand jury. See Application of Iaconi, 120 F.Supp. 589 (D. Mass. 1954). Furthermore, plaintiffs lack standing to enjoin the government from acquiring information from third party witnesses which may, in turn, be presented to the grand jury. Howfield Inc. v. United States, 409 F.2d 694 (9th Cir. 1969).

It is also obvious that plaintiffs have no standing to complain of Special Counsel's investigation and are merely attempting to assert the rights of other witnesses.

Although plaintiffs are quick to point out that in its Second Amended Judgment, this court ordered that officers, directors and controlling persons shall cooperate fully with Special Counsel. They fail to make any mention of the fact that in that same judgment this court stated:

> "It is further ordered, adjudged and decreed that none of the provision of this Second Amended Judgment And Order shall prevent the assertion of any applicable constitutional or legally recognizable privilege . . ." (Second Amended Judgment XIV)

Therefore, under the very terms of this court's order, all applicable privileges were available to those who might be interviewed by Special Counsel.

Despite the above, plaintiffs inaccurately claim that by virture of the Court's order " . . . any person connected with Mattel who chose not to cooperate with Special Counsel's investigation was potentially subject to a judicial contempt order."

(Plaintiff's Memo of Points and Authorties, p. 17). However, such was clearly not the case.

Indeed when plaintiffs were interviewed by Special Counsel they were advised of their constitutional rights and were at all times represented by able counsel. Hence they were in no way coerced to make any statement.

Insofar as plaintiffs seek to assert the constitutional rights of other witnesses, their attempt must fail since it has long been decided that one cannot assert the Fifth Amendment rights of others.[2/] Rogers v. United States, 340 U.S. 367 (1951); In Re Michaelson, 511 F.2d 882 (9th Cir. 1975), cert. denied; Michaelson v. United States, 421 U.S. 978. The Supreme Court has recently held that the Fifth Amendment privilege applies to the person but not to the information that may incriminate him. United States v. Nobles, 422 U.S. 225 (1975). See also: United States v. Howell, 470 F.2d 1064 (9th Cir. 1972); United States v. Le Pera, 443 F.2d 810 (9th Cir.), cert. denied, 404 U.S. 958 (1971); United States v. Ciniceros, 427 F.2d 658 (9th Cir. 1970).

2/ Plaintiffs also complain that Special Counsel had access to Mattel's records, (complaint p.12). This assertion is also without legal significance, not only because one cannot assert another's Fifth Amendment privilege, but also because a corporatio has no Fifth Amendment privilege. United States v. White, 322 U.S. 694 (1943); Hale v. Henkel, 201 U.S. 43 (1905).

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In Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969), the defendant claimed that certain government witnesses were coerced into testifying before the grand jury and that the use of evidence so obtained was a violation of his rights under the Fourth and Fifth Amendments. This circuit rejected the defendant's argument, and citing Diaz-Rosendo v. United States, 357 F.2d 124 (9th Cir. 1966) (en banc), stated:

> ". . . a defendant did not have standing to object to the admissibility of evidence seized in violation of the rights of one other than the defendant . . .
>
> . . . The right of witnesses to refuse to incriminate themselves is a personal right . . . They can waive that right and their failure to assert that right is nothing about which appellants are entitled to complain." (419 F.2d 520, 525-26)

Therefore, the long standing maxim that "a party is privileged from producing the evidence but not from its production" applies to plaintiff's claim in the case at bar. Johnson v. United States 228 U.S. 457, 458 (1913).

IV BY PLAINTIFFS' FAILURE TO ASSERT A TIMELY CLAIM, EQUITABLE RELIEF IS BARRED AS A MATTER OF LAW BY LACHES

It is axiomatic that equity aids only the vigilant and because of the drastic nature of equitable relief it has uniformly been held that such relief will be sparingly granted and only to those who have manifested due diligence. Mims v. Yarborough,

343 F.Supp. 1146 (S. Car. 1971), aff'd. 461 F.2d 1266 (4th Cir. 1972), cert. denied, 409 U.S. 1041; Barthelmes v. Morris, 342 F.Supp. 153 (D. Mc. 1972). The equitable doctrine of laches will act as a separate and independent basis for barring relief as a matter of law where a plaintiff sleeps on his rights and attempts to assert those rights at some later time. Mims v. Yarborough, supra; Citizens for Mass Transit Against Freeways v. Brinegar, 357 F.Supp. 1269 (D. Ariz. 1973).

A case in point in Quinn v. United States, 397 F.Supp. 1250 (D. Mass. 1975), where the court denied equitable relief holding that plaintiffs were barred by laches because they waited until July 1975 to institute a lawsuit challenging a military regulation that was issued in February, 1974.

Plaintiffs in the case at bar seek drastic, equitable relief, however, it is apparent on the face of their complaint that they have delayed in seeking any remedy and thus equitable relief should be denied as a matter of law.

On January 7, 1977, Plaintiffs filed the instant complaint attacking for the first time the validity of an order issued by this court on November 26, 1974. Plaintiffs now assert for the first time that the aforementioned order has caused them "irrepara harm", yet the order was issued more than two years ago. Plaintif who have been represented by counsel throughout, were aware of the existence of the second amended judgment at the time it was issued or shortly thereafter and were also aware of its terms. Indeed, Plaintiffs Ruth and Elliot Handler were board members at Mattel Inc. through October, 1975, and voted for the approval of the first and second judgments involving Mattel Inc. in this

case. Despite the above, plaintiffs did not see fit to pursue a myriad of alleged contitutional violations until more than two years after the issuance of the order.

Moreover, plaintiffs now attack for the first time the appointment of a Special Counsel by Mattel Inc., which appointment was approved by this court on January 9, 1975. Similarly, plaintiffs now complain of the issuance of the Report of Special Counsel and its subsequent dissemination.

It is apparent, however, that plaintiffs were fully aware of the appointment of Special Counsel and the subsequent approval of appointment by this court when it occurred. Plaintiffs who were represented by counsel were interviewed by Special Counsel on various occasions between May 16, 1975, and July 17, 1975, yet they have omitted until approximately eighteen months later to make even a threshhold complaint as to Special Counsel's existence.

With respect to the issuance of Special Counsel's report, plaintiffs argue that they have suffered continuing irreparable harm, yet they concede they personally received copies of that report at least three days before it was issued. Plaintiffs never attempted to intervene to have the report sealed or to prevent its dissemination. In short, they have chosen not to assert any of their rights until fourteen months after the issuanc of Special Counsel's report.

Moreover, based in part upon the results of the Special Counsel's investigation, the plaintiffs herein agreed to multi-million dollar settlements after being named in class actions. Although the Special Counsel's appointment was made two years ago, and although the plaintiffs herein paid millions of dollars in

settlement of lawsuits based upon facts which were disclosed by the Special Counsel's investigation, and despite the fact that they have been aware for at least six months of the United States Attorney's investigation, they have not until the matter is approaching a presentation to the grand jury attacked the Court's order appointing the Special Counsel.

Under the equitable doctrine of laches such an egregious and inexcusable delay surely bars the plaintiffs from obtaining the relief they seek. Mims v. Yarborough, supra; Quinn v. United States, supra.

V. CONCLUSION

Therefore, the complaint in this case at bar should be dismissed, or in the alternative, defendant's motion for summary judgment should be granted.

CERTIFICATE OF SERVICE BY MAIL

I, Ramona Souza, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California, who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on January 24, 1977, I deposited in the United States mails in the United States Courthouse at 312 North Spring Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Notice of Motion; Motion to Dismiss Complaint, or in the Alternative, for Summary Judgment; Memorandum in Support of Motion.

addressed to:

Mitchell Silberg & Knupp
Edward M. Medvene
Howard S. Smith
Howard J. Rubinroit
Patricia H. Benson
1800 Century Park East
Suite 800
Century City, CA 90067

Gibson, Dunn & Crutcher
Charles S. Battles, Jr.
C. Thomas Long
Robert A. Miller
9601 Wilshire Blvd.
Beverly Hills, CA 90210

at their last known address, at which place there is delivery service by United States mail.

USA-12c-240
(Rev. 1/1/77)

This Certificate is executed on January 24, 1977,

at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

Ramona Souza