

under brief

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

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

MOTION OF THE DEFENDANT, SECURITIES AND EXCHANGE COMMISSION: (1) TO STRIKE PORTION OF ORDER TO SHOW CAUSE, ISSUED JULY 22, 1977, WHICH DIRECTS THE COMMISSION TO BRING TO COURT ON RETURN DAY THE COMPLETE REPORT OF INVESTIGATION IN THE MATTER OF THE CITY OF NEW YORK; AND (2) TO SET FOR HEARING THE MOTION BY THE COMMISSION TO DISMISS THIS ACTION

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UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

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

MOTION OF THE DEFENDANT SECURITIES AND EXCHANGE
COMMISSION: (1) TO STRIKE PORTION OF ORDER TO
SHOW CAUSE, ISSUED JULY 22, 1977, WHICH DIRECTS
THE COMMISSION TO BRING TO COURT ON RETURN DAY
THE COMPLETE REPORT OF INVESTIGATION IN THE MATTER
OF THE CITY OF NEW YORK; AND (2) TO SET FOR HEARING
THE MOTION BY THE COMMISSION TO DISMISS THIS ACTION

The Securities and Exchange Commission (the "Commission"), a
defendant herein, respectfully represents as follows:

1. In this action, under the Freedom of Information Act ("FOIA"),
5 U.S.C. 552, the plaintiffs seek access to all records contained in the
file relating to the Commission's investigation in the matter of the City
of New York. 1/ On July 22, 1977, the Commission served and filed a motion
to dismiss the complaint since the plaintiffs have failed either to pursue
or exhaust their administrative remedies under the Freedom of Information
Act, and this Court accordingly lacks jurisdiction over the subject matter
of the complaint and the plaintiffs have failed to state a claim upon
which relief can be granted. Moreover, the Commission asserts that the
action is frivolous and was instituted in bad faith, and thus the Court
should award the Commission its costs of defending the action, including
reasonable attorney fees.

2. On July 22, 1977, this Court, on application of the plaintiffs,
issued an Order to Show Cause, directed to the Commission, returnable on

1/ See Complaint, p. 19.

Tuesday, July 26, 1977, requiring the Commission, among other things, to produce for in camera inspection the "complete Securities and Exchange Commission report" of investigation.

3. Contrary to the Court's apparent understanding of the facts in issuing its order, 2/ the New York Regional Office of the Commission, which has been conducting an investigation in the matter of the City of New York, has not yet completed a report of the results of its investigation which that Office intends to present to the Commission, in Washington, D.C., for its consideration. As appears from the annexed affidavit of William D. Moran, Regional Administrator of the New York Regional Office, the staff is, at the present time, diligently working on that report. Accordingly, since the Commission is unable to bring the "complete * * * report," as ordered by the Court, the Commission seeks an order striking

2/ The affidavit of Joel Harnett in support of his request that the Court issue its show-cause order is replete with numerous misstatements of fact. Thus, for example, Mr. Harnett would have this Court believe:

- (1) that the Commission has completed its investigation in the matter of the City of New York (Aff. ¶7);
- (2) that a report of investigation has been completed and has been sent to Washington (Aff. ¶10);
- (3) that "a few bureaucrats" at the Commission "who may be politically motivated" may withhold, or time the release of, the report for political considerations, or may censor or expurgate the report (Aff. ¶¶13, 20, 22, 29-30).

Each of these representations is false. After recounting in his affidavit the incorrect speculations of others, and adding his own false speculations, Mr. Harnett concludes by stating that

"the only way to end damaging speculations as to the integrity of the SEC and as to whether any officials of the SEC * * * is [sic] attempting to manipulate the results of the Primary Election by withholding the Report is to immediately take such information out of their hands and to release that Report to the public." (Aff. ¶36)

Mr. Harnett's conclusion, however, is as specious as the "facts" he brought before this Court in persuading it to enter its Order to Show Cause.

that portion of the order to show cause which directs that such report be brought to Court. Moreover, to require the Commission to collect and bring to Court various and sundry draft material, in different stages of completion, would seriously disrupt the preparation of the report and would be extremely counterproductive to the ultimate rendering of a final report, the completion of which, presumably, the plaintiffs do not wish to obstruct. Finally, as indicated in more detail in our Response to the Order to Show Cause, p. 4, n.3 and p. 6, n.4, in camera inspection of the documents in question is inappropriate and unnecessary even if the Court were to consider the merits of the plaintiffs' claim to the records under the FOIA. Environmental Protection Agency v. Mink, 410 U.S. 73, 91-92 (1972); New England Medical Center Hospital v. National Labor Relations Board, 548 F.2d 377, 385 (C.A. 1, 1976); Safeway Stores, Inc. v. Federal Trade Commission, 428 F. Supp. 346, 347 (D. D.C., 1977).

5. The Commission's motion to dismiss the complaint should provide the basis for a complete disposition of this case. Accordingly, we request that that motion to dismiss, a copy of which was served on counsel for the plaintiffs before 5:00 p.m. on July 22, 1977, be considered by the Court at the same time as the Order to Show Cause — Tuesday, July 26, 1977, at 10:00 a.m.

WHEREFORE, the Commission respectfully prays that this Court (1) strike from its Order to Show Cause dated July 22, 1977, the following language:

"And it is ORDERED that either or both of the defendants having possession of the complete Securities and Exchange Commission report relating to the sale of municipal bonds and securities of the City of New York and the finances of the City of New York and all the transactions relating thereto, bring said report to this Court on the return date of this motion for the purposes set forth in Section 552.";

and (2) that argument on the Commission's motion to dismiss this action be heard on Tuesday, July 26, 1977, at 10:00 a.m.

Respectfully submitted,

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Associate General Counsel

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Special Counsel

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Dated: Washington, D.C.
July 25, 1977

to be submitted, when completed by this Office, to the Securities and Exchange Commission in Washington, D. C. for its consideration.

4. If this Office were required, at the present stage of the investigation, to deliver to the Court draft portions of the report in various stages of completion, the effect would most surely be highly disruptive to the work of this Office in attempting to complete a report to the Commission as promptly as possible.

WILLIAM D. MORAN

Subscribed and sworn to before
me this ____ day of July, 1977

Notary Public

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, et al.,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION,
et al.,

Defendants.

77 Civ. 3110 (VLB)

ORDER: (1) STRIKING THE PORTION OF THE ORDER TO SHOW CAUSE ISSUED JULY 22, 1977, WHICH DIRECTS THE COMMISSION TO BRING TO COURT ON THE RETURN DAY THEREOF THE COMPLETE REPORT OF INVESTIGATION IN THE MATTER OF THE CITY OF NEW YORK: AND (2) SETTING FOR HEARING THE MOTION BY THE COMMISSION TO DISMISS THIS ACTION

Upon consideration of the motion of the Securities and Exchange Commission and the affidavit of William D. Moran, Regional Administrator of the New York Regional Office of the Securities and Exchange Commission, and being fully advised in the premises, it is hereby

ORDERED that the following language contained in the Order to Show Cause entered herein on July 22, 1977, is stricken:

"And it is ORDERED that either or both of the defendants having possession of the complete Securities and Exchange Commission report relating to the sale of municipal bonds and securities of the City of New York and the finances of the City of New York and all the transactions relating thereto, bring said report to this Court on the return date of this motion for the purposes set forth in Section 552.";

AND IT IS FURTHER ORDERED that the motion of the Securities and Exchange Commission to dismiss the complaint herein be set for argument on July 22, 1977, at 10:00 a.m., the plaintiffs having been served with

said motion by 5:00 p.m. on July 25, 1977, and having had an opportunity to respond thereto.

Dated: New York, New York
July __, 1977

VINCENT L. BRÖDERICK
United States District Judge