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ADMINISTRATIVE PROCEEDING
FILE NO. 3-6571

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 11, 1989

In the Matter of

THOMAS J. FITTIN, JR.
116 Pitney Avenue
Spring Lake, New Jersey

REPORT TO COMMISSION
ON JENCKS ACT MATERIALS

Pursuant to the Commission's Order of May 17, 1989, as amended by Order adopted June 20, 1989 ("Order"), this matter was referred to the undersigned administrative law judge to make an *in camera* examination of certain written materials, consisting of contemporaneous notes of interviews by Division of Enforcement attorneys, to determine whether all or parts of such notes should be producible to respondents under the requirements of the "Jencks Act" (18 U.S.C. 3500) and Commission's Rule 11.1 of its Rules of Practice (17 C.F.R. 201.11.1) [1/]

In compliance with the Order, the Division has furnished to me in a sealed envelope approximately 240 pages of notes involving for the most part some 35 interviews with the nine

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1/ The evidentiary hearing in this proceeding had been held before another administrative law judge (since retired) who refused to conduct an *in camera* examination of these writings to determine whether they were producible pursuant to the Jencks Act. His initial decision finding respondent had violated the anti-fraud provisions of the securities laws and recommending the imposition of a sanction is now on review by the Commission.

witnesses named in the Order. With but one exception, there were from 3 to as many 7 interviews with each of the witnesses.[2/]

My examination was restricted to determining whether the materials involved reflected a "substantially verbatim recital of an oral statement" made by the respective witnesses. There is no dispute that the statements were not otherwise under the Jencks Act since they were not written statements made by the witnesses and signed or otherwise adopted or approved by them [§3500, ¶(e)(1)], nor were they stenographic, mechanical, electrical or other recording of such statements. There is also no dispute that the writings involved were recorded contemporaneously with the making of oral statements by the respective witnesses [§3500, ¶(e)(2)].

In conducting my <u>in camera</u> examination, I examined each set of notes as prepared by the Division's interviewers (who also were the trial attorneys for the Division), the testimony in the hearing transcript concerning the manner in which the interviews were conducted and the notes prepared, and statements by respective counsel both during the hearing and in their briefs on review concerning the issue herein. I also relied upon various

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2/ Included among the materials furnished are some 24 pages of notes which have no relation to interviews. These include notes pertaining to hearing dates, efforts to make the witnesses available, interviews with non-witnesses, etc. There are also two type-written "testimony outlines" consisting of questions to be asked of witnesses and prepared by Division's counsel for the purpose of trial and in no way reflect notes of interviews with witnesses. These writings have not been considered.

court decisions interpreting the phrase in the statute: "substantially verbatim recital of an oral statement".

As a result, I found that I was able to make my determination of the question involved without resort to any extrinsic evidence or additional inquiry.[3/]

It appears that the majority of the interviews were over the telephone. With respect to those that were confrontational, most witnesses recalled that the interviewers were taking notes, although some of them were not sure that there was note taking. Some remember being asked questions and giving answers. None of them recalls the interviewers referring back to their notes in order to remind the witness of answers nor were they confronted with the notes or asked to review them for accuracy.

Counsel for the Division does not dispute that they were contemporaneously taking notes of these interviews but they

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3/ Among the interview notes sent to me by the Division is a copy of a 5-page letter dated October 21, 1985, from a witness, Walter Fabisiak, addressed to Jack Barrett, a Division attorney, fully descriptive of his transactions with respondent. As such, it is indisputably "Jencks" material. According to the trial transcripts and to the Commission's correspondence records, a copy of this letter was sent during the course of the hearing to counsel for respondent via Federal Express on May 9, 1986 which, immediately prior to his cross-examination of this witness, counsel denied having received. Nevertheless, he proceeded to conduct an extensive cross-examination of Fabisiak without ever asking for the letter. Hence, it is concluded either that respondent received the letter, or, having knowledge of its existence, did not deem it useful. It is also assumed that this letter was inadvertently included with the other materials furnished me since it in no way resembles the interview notes with which we are herein concerned.

state that they were merely recording fragments of the witnesses' statements, as well as their own impressions and summarizations without an intent to record the speaker's actual words verbatim or nearly so. Further they asserts that they were writing down those portions of the respective witness conversations they thought appropriate to be recorded.

From my examination of the notes I find that they appear to be a recording of highlights, key words or phrases, parenthetical remarks and short incomplete sentences. There are not many full sentences and even less full paragraphs. In many instances the notes are hardly legible and appear to have been written hurriedly, rather than at the pace to be expected when one attempts to record what is being said in a verbatim or nearly so fashion. None of the questions that were being asked to elicit responses are given. It also appears that there are significant omissions which affect an understanding of the meaning of what remains in the notes. There are, of course, snippets and portions of statements that would appear to be the actual words of a witness or nearly so. However, there are very few statements in quotations marks.

In view of the manner in which the statements appear to have been written, as described above, it would be difficult to find and to excise those portions of the statements that might appear to be the words, impressions, or summarizations of the interviewers from that which might be deemed the words of the

witnesses. As indicated in the leading case of Palermo v. U.S., 360 U.S. 343, 352-3 (1958):

> "It is clear that Congress was concerned that only those statements which could properly be called the witnesses' own words should be made available to the defense for purposes of impeachment. It was important that the statement could fairly be deemed to reflect fully and without distortion what had been said to the government agent. Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions . . . We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material . . . are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions". (Underlining added).

With respect to interview notes of the type found in this proceeding the Court of Appeals stated, in United States v. Consolidated Packaging Corp., 575 F.2d 117, 129 (7th Cir., 1978):

> "We also have examined the sealed memoranda and find them to be as represented by the government. The original notes, as far as they are intelligible, are mere long-hand words and phrases and fall far short of coming within the Jencks Act requirements. They cannot be characterized as 'substantially verbatim' even interpreting that phrase to mean less than 'precisely verbatim', NRLB v. Safeway Steel Scaffolds Co., 383 F.2d 273, 278 (5th Cir. 1967), cert. denied, 390 U.S. 955 (1968)".

In his concurring opinion in Goldberg v. U.S., 425 U.S. 94 (1976) Mr. Justice Powell states, in footnote 9 at page 122:

> "But the fact that counsel usually will take notes does not mean that the notes often will be 'statements'. Counsel rarely take down verbatim what witnesses say in these

> preparatory conferences. Consequently, prosecutors' notes may be expected to meet the requirements of subsection (e)(2) very infrequently". . . The notes taken will vary from cryptic "memory jogs to full summaries of the anticipated testimony." (underlining added).

Further, Justice Powell concludes, at p. 126, that:

> "Typical interview notes are selective - even episodic - and therefore fall outside of subsection (e)(2)".

In U.S. v. Hodges, 556 F.2d 366, 368 (5th Cir.) cert. denied, 434 U.S. 1016 (1977), quoting U.S. v. Cruz,, 478 F.2d, 408, 413 (5th Cir. 1973), the Court of Appeals stated that:

> "Investigator's notes of interviews do not fall under the Jencks Act even if they contain occasional verbatim recitation of phrases used by the person interviewed'".

In summary, based upon my in camera review of the materials furnished,[4/] I conclude that these statements do not appear to be complete on their face, do not set forth a running account of

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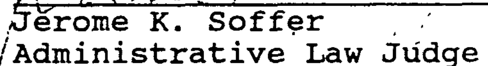
4/ In his letter dated July 11, 1989 addressed to Chief Administrative Law Judge Blair, counsel for respondent requests that the Division should file by way of affidavit a statement showing how the notes that were served had been preserved and protected. In view of the fact that there are records of from 3 to 7 interviews with each of the witnesses involved I am quite satisfied that the Division has furnished me with all witness statements. Moreover, in his covering letter dated June 28, 1989, Division counsel has assured me that all notes of interviews were being sent to me under seal. I do not think it appropriate for attorneys to be put under oath to support statements they make to this Commission and to this or any other tribunal.

Additionally, Respondent's counsel complains of prejudice in the fact that in its June 28th letter, the Division attempted to characterize the papers being furnished to me as not being Jencks material. Such self serving observations have played no part in the determination herein.

what the witnesses said, and the attorney's notes at issue herein contain incomplete episodic statements as to what information the witness possessed. They do not purport to transcribe in a substantially verbatim fashion the witnesses' various interviews with the Commission attorneys, even recognizing that the term "substantially verbatim" does not mean "precisely verbatim". Hence, they are not producible to the respondents under the Jencks Act.

I have resealed and delivered to the Secretary of the Commission all of the interview notes and other written matter as delivered to me by counsel for the Division.



Jerome K. Soffer
Administrative Law Judge