IN THE COURT OF APPEALS
OF MARYLAND

September Term 2003

No. 128

MELANIE SENTER LUBIN,
SECURITIES COMMISSIONER FOR THE STATE OF MARYLAND,

Appellant,

v.

AGORA, INC.,

Appellee.

On Appeal from the Circuit Court for Baltimore City
(Honorable Robert I. H. Hammerman, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

---

BRIEF OF *AMICUS CURIAE* NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. (NASAA)

PETER E. KEITH
GALLAGHER, EVELIUS & JONES, LLP
218 North Charles Street, Suite 400
Baltimore, Maryland 21201
(410) 727-7702

MARK J. DAVIS
STEPHEN W. HALL
ASSISTANT GENERAL COUNSELS
NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
10 G Street, N.E., Suite 710
Washington D.C. 20002
(202) 737-0900

Attorneys for *Amicus Curiae* NASAA

April 28, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Constitutional Provision

Miscellaneous

IN THE COURT OF APPEALS
OF MARYLAND

September Term 2003

No. 128

MELANIE SENTER LUBIN,
SECURITIES COMMISSIONER FOR THE STATE OF MARYLAND,

Appellant,

v.

AGORA, INC.,

Appellee.

On Appeal from the Circuit Court for Baltimore City
(Honorable Robert I. H. Hammerman, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

---

BRIEF OF *AMICUS CURIAE* NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. (NASAA)

IN SUPPORT OF THE APPELLANT, MELANIE SENTER LUBIN, SECURITIES COMMISSIONER OF THE STATE OF MARYLAND

NASAA'S INTEREST IN THE CASE

Amicus curiae North American Securities Administrators Association, Inc. ("NASAA") is the nonprofit association representing state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. It has 66 members, including the securities regulators in all 50 states, the District of Columbia, and Puerto

Rico. Formed in 1919, it is the oldest international organization devoted to protecting investors from fraud and abuse.

The members of NASAA, including the Maryland Securities Commissioner, are responsible for administering state securities laws and regulations for the purpose of protecting investors from fraud and abuse in securities transactions. Their principal activities include enforcement, licensing, and investor education.

NASAA also promotes uniformity of regulation among the states, and between state and federal enforcement. Section 11-804 of the Maryland Securities Act, Md. Code Ann., Corps. & Ass'ns (1999 Repl. Vol. & 2003 Cum. Supp.), §§ 11-101, *et seq*. (the "Act" or "Maryland Act"), states: "This title shall be construed to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate interpretation and administration of this title with the related federal regulations." Such uniformity of regulation helps ensure that citizens of one state will not be targets of financial fraud to a greater degree than other states' citizens. It also limits improper activities originating in one state affecting people in another jurisdiction.

STATEMENT OF THE CASE

NASAA accepts and adopts the Statement of the Case in the Appellant's brief.

QUESTIONS PRESENTED

I. Whether the Securities Commissioner for Maryland ("Securities Commissioner"), in investigating possible violations of Maryland securities law, has the right to obtain subscriber information from a company that is not registered as an

investment adviser under the Maryland Securities Act, where the company appears to be engaged in illegal activities and activities for which it should be registered.

II. Whether the circuit court was correct when it dismissed in its entirety, and with prejudice, the Securities Commissioner's motion to enforce compliance with her subpoenas.

STATEMENT OF FACTS

The *amicus curiae* accepts the Statement of Facts included in the Securities Commissioner's brief. Appellant's Brief, pages 3-9. NASAA does, however, bring to the attention of the Court the following specific facts contained in the record that NASAA believes are relevant to this appeal.

The complainant to the Maryland Securities Division was an individual who had purchased a stock tip for $1,000 that was unprofitable. (E.10.)

The complainant received a May 15, 2002 e-mail from "The Oxford Club" of Agora, Inc. ("Agora") signed by "Porter Stansberry," with the subject line stating "Make 55% or More By May 22nd With This Tip." The body of the message stated in part that the opportunity "doesn't involve buying a risky stock." It also said that the source of the tip was "a business associate of mine, Jay McDaniel." (E. 16.) This message to investors was admittedly false – in responding to the Securities Commissioner's subpoena by letter dated July 7, 2003, counsel for Agora stated, "Jay McDaniel is a pen name and there exists no resume, employment application or other documents … concerning Jay McDaniel." (E.160.)

The U.S. Securities and Exchange Commission ("SEC") filed a complaint in the U.S. District Court for the District of Maryland, Baltimore Division, against Agora,

Frank Porter Stansberry, and Pirate Investor LLC for "an ongoing scheme to defraud public investors" in violation of Section 10(b) of the Exchange Act of 1934 (15 U.S.C. § 78j(b)). (E.80-81, 85.). The defendants were charged with fraudulent conduct "in connection with the purchase or sale of securities." (E.85.) The SEC complaint was based in part on the e-mail tip (the "Tip") offered for sale to the individual who complained to the Securities Commissioner. (E.82.) The SEC complaint asserted that Jay McDaniels was a pseudonym for Stansberry. (E.83.)

An Agora advertisement suggesting individuals could make "as Much as 304% in 2 weeks" appeared in *ALLPennyStocks* newsletter. (E.10)

With respect to the June 2002 subpoena, the Securities Commissioner offered to provisionally accept from Agora in return of the subpoena identifying information limited to Maryland subscribers and those individuals who were offered or had purchased the Tip. (E.11, E.68).

In addition to subscriber lists and circulation information, Agora withheld from production under the subpoena identifying information regarding all persons to whom the Tip was sent, and all persons who purchased the Tip. (E. 161, E.65-66.)

A solicitation for membership in the "Chairman's Circle" of the Oxford Club, an Agora enterprise, stated that those who joined would be offered opportunities to participate in "'Private Placement' deals." (E. 186.)

The order issued on November 12, 2003, by the Circuit Court for Baltimore City (Hammerman, J.), memorializing an October 16, 2003 bench ruling, denied the Securities Commissioner's motion to enforce certain provisions of the subpoena and dismissed the complaint with prejudice. (E.157.)

ARGUMENT

I. THE MARYLAND SECURITIES COMMISSIONER'S SUBPOENA IS VALID AND SHOULD BE ENFORCED

"Administrative subpoenas are subject only to limited judicial review." *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 475 (4th Cir. 1986). "[T]he burden of showing that an agency subpoena is unreasonable remains with the respondent, … and where … the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met." *SEC v. Brigadoon Scotch Distributing Co., supra,* 480 F.2d 1047, 1056 (2nd Cir. 1973), *citing in part U.S. v. Powell*, 379 U.S. 48, 58 (1964).

The Securities Commissioner is responsible for enforcing the Maryland Securities Act. Among the tools granted by the General Assembly to the Securities Commissioner is the authority to conduct investigations as necessary to determine "whether any person has violated or is about to violate" the Act, and the legislature specifically granted investigative power to subpoena documents deemed "relevant or material" to an inquiry. §§ 11-701(a) and 11-701(b) of the Act, respectively.

NASAA agrees with the Securities Commissioner's brief demonstrating that the Agora subpoenas are authorized, relevant, and not overbroad, thus meeting the test set forth by this Court in *Banach v. State Comm'n on Human Relations*, 277 Md. 502 (1976) and related federal precedent. *See Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946); *U.S. v. Morton Salt*, 338 U.S. 632, 652 (1950). *See* Brief of Appellant, pages 13-29. *See also Scheck v. Maryland Securities Comm'r*, 101 Md. App. 390 (1994), *cert. denied*, 337 Md. 43 (1994).

II. THE COMMISSIONER HAS BROAD AUTHORITY TO INVESTIGATE WHETHER INVESTORS HAVE BEEN HARMED OR ARE AT RISK OF BEING HARMED

A. Comparable Federal And State Laws Should Be Comparably Applied.

Maryland is part of a complementary system of securities regulation that includes other state and federal authorities. Virtually every state has enacted a law regulating the offer and sale of securities. The state laws are purposely similar.

Section 11-701 of the Maryland Act, authorizing the Commissioner to conduct investigations and subpoena information, is derived from Section 407 of the Uniform Securities Act of 1956 (the "Uniform Act"). Uniform Securities Act § 407, 7C U.L.A. 245-46 (2000 Repl. Vol. & 2003 Cum. Supp.). At least 33 states, plus the District of Columbia and Puerto Rico, have adopted the Uniform Act.[1] Others have adopted the 1985 or 2002 versions of the Uniform Act.[2]

In addition to looking at other states' application of the Uniform Act, "Maryland Courts examine federal case law when interpreting state securities statutes which … are worded similarly to their federal counterparts." *Moseman v. Van Leer*, 263 F.3d 129, 133 (4th Cir. 2001). Section 407 of the Uniform Act is modeled on Section 21 of the Exchange Act of 1934, 15 U.S.C. § 78u. "Official Comment to § 407," Louis Loss, COMMENTARY ON THE UNIFORM SECURITIES ACT 141 (1976).

---

[1] Alabama, Alaska, Arkansas, California, Colorado, Connecticut, District of Columbia, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Utah, West Virginia, Wisconsin, and Wyoming.

[2] Links to the various state versions of the Uniform Securities Act can be found at http://www.law.cornell.edu/uniform/vol7.html#secur .

Similar to the authority of the Securities Commissioner, the SEC has broad discretion to investigate "whether any person has violated, is violating, or is about to violate" the law, 15 U.S.C. § 21(a)(1), and to require by subpoena the production of materials it "deems relevant or material to the inquiry." 15 U.S.C. § 21(b). As is discussed in detail *infra*, precedent supports federal regulators obtaining subscriber information to investigate whether illegal activities have occurred. Maryland's Securities Commissioner should be permitted the same flexibility to conduct her inquiry.

B. Securities Laws Should Be Broadly Interpreted To Protect Investors.

The United States Supreme Court has instructed that remedial legislation such as the securities statutes should be broadly construed to effectuate their purpose. *Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553 (1967). Further, "form is to be disregarded over substance and the emphasis should be on (the) economic reality" of the transaction. *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 848, 95 S.Ct. 2051, 2058 (1975). As recently as January of this year, a unanimous Supreme Court affirmed these principals. *See SEC v. Edwards*, 124 S. Ct. 892, 896 (2004).

The Maryland Act explicitly references in a number of instances the important objectives of "protection of investors" and acting "in the public interest." *See, e.g.*, §§ 11-102(5)(i), 11-203(b), 11-401(b)(1), 11-601(12). Other jurisdictions also have recognized the necessity of a broad reading of the securities statutes to promote investor protection. *See, e.g., Carrington v. Arizona Corp. Comm'n*, 199 Ariz. 303, 305, 18 P.3d 97, 99 (2001); *Sterling Trust Co. v. Adderly,* 119 S.W.3d 312, 317 (Tex. App.-Fort Worth 2003); *King v. Pope*, 91 S.W.3d 314, 324 (Tn. 2002).

C. An Adverse Maryland Decision Could Harm Other States' Investors, In Addition to Those in Maryland.

The lower court's decision in this case is of great concern to NASAA and its members. This case involves communications sent out by Agora to citizens of Maryland and other states. Direct contact with investors about their interaction with Agora is the most efficient way for the Securities Commissioner to obtain needed information. If the Court refuses to enforce the subpoena as to the subscriber information, some of Agora's potentially violative activities could fall beyond the reach of the Maryland Securities Act and investigation by the Securities Commissioner.

Two troublesome outcomes are possible if the lower court's ruling is upheld. If the ruling below is affirmed and followed by courts in other states, investors both inside and outside of Maryland could suffer from state regulators' inability to conduct investigations and fully protect investors. On the other hand, if the decision below is affirmed but other state regulators refuse to follow such a decision, there would be disparate protection of citizens of Maryland compared with individuals in other jurisdictions.

D. Precedent Supports Production Of Circulation Information and Subscriber Lists.

Under the Commodity Exchange Act, 7 U.S.C. §§ 1-25, the Commodities Futures Trading Commission (CFTC) has broad authority to investigate compliance. The CFTC's authority is similar to that of the Maryland Securities Commissioner. 7 U.S.C. § 15. In *CFTC v. Tokheim*, 153 F.3d 474 (7th Cir., 1998), *cert. denied*, 525 U.S. 1122 (1999), *reh'g denied*, 526 U.S. 1034 (1999), the CFTC's subpoena for circulation information and subscriber lists was upheld.

Tokheim published a report on commodity performance. He advertised trading systems to the public through direct-mail solicitations and elsewhere, offering personal contact to investors. *Id.* at 475. The question was whether he should have been registered as a Commodity Trading Advisor (CTA). The CFTC sought production of his client lists and subscribers in order to contact them and "to determine whether the possible violations can be substantiated." *Id.* at 476. Although Tokheim did not expressly raise First Amendment objections, he argued that he provided only "'impersonal' advice to his subscribers much as a newspaper would." *Id*.

The court in *Tokheim* ordered enforcement of the CFTC subpoena. Citing *U.S. v. Powell*, 379 U.S. 48, 57 (1964) and *U.S.* v. *Morton Salt*, 338 U.S. 632, 642-3 (1950), the court upheld the CFTC's authority "to investigate whether conduct falls within its jurisdiction." 153 F.3d at 477. The Maryland Securities Commissioner essentially is seeking to do the same in the present case.

III. THE COMPELLING INTEREST OF INVESTOR PROTECTION OUTWEIGHS CONCERNS ABOUT PRODUCTION BY AN ENTITY ENGAGED IN ACTIVITIES THAT EXTEND BEYOND PUBLISHING

Unlike *Tokheim, supra, Lowe v. SEC*, 472 U.S. 181 (1985), involved an effort by the SEC to enjoin publication of certain investment materials based on the fact that the publishers were not registered as investment advisers under the Investment Adviser Act of 1940, 15 U.S.C. § 80b-1 *et seq*. The SEC argued that even if the advice given was impersonal, other factors precluded application of the exception to the definition of "investment adviser" for "the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation." 15 U.S.C. § 80b-2(a)(11)(D). The Court disagreed with the SEC's reading of the statute, and also took

note of the SEC's attempt to enjoin publication, taking specific note that in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), the Court "emphatically stated that the 'chief purpose' of the [First Amendment] press guarantee was to prevent prior restraints upon publication." 283 U.S. 697, 697-8.

More on point to the Securities Commissioner's subpoena to Agora is *SEC v. Wall Street Transcript Corp.*, 442 F.2d 1371 (2d Cir. 1970), *cert. denied*, 398 U.S. 958 (1970). In directing compliance with an SEC subpoena, the court stated:

> The Investment Advisers Act does not on its face abridge freedom of the press simply because it may be applied to publications which are classified formally as part of the 'press' for some purposes but are not 'bona fide' newspapers excluded under the Act. It is not necessary to base a construction of the Act on the assumption that the activities involved are entitled to the identical constitutional protection provided for certain forms of social, political or religious expression.
>
> * * *
>
> Determining whether a specific newspaper is 'bona fide' for the purposes of the Act requires the delineation of a boundary between the special type of 'merchandising' activities which must lead to registration and the publication of expression which lies beyond the Act's regulatory purposes. Since the Transcript's practices have not yet been explored, neither this court nor the district court is presently in an appropriate position to draw such a line. But the distinction required by the words 'bona fide' in the Act, when made, will be based on a study of the context in which the activity or expression in question occurs.

Id. at 1379 (Citations omitted). *Compare SEC v. The Hirsch Org., Inc*, Fed.Sec.L.Rep. 98,848, 1982 WL 1343 (S.D.N.Y. 1982).[3]

3 While noting that "there is no absolute First Amendment privilege against compelled production," and calling for a balancing of interests, the court held that the SEC had not demonstrated why a subscriber list was necessary when the allegation related to material misrepresentations and omissions. 1982 WL 1343 (Citations omitted).

The Maryland Securities Act includes a publishing exclusion from the state definition of an investment adviser that parallels the federal exclusion. Specifically excluded from the definition of an investment adviser is the "publisher of any bona fide newspaper, news column, newsletter, news magazine, or business or financial publication or service, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client." §11-101(h)(2)(v) of the Maryland Act.

The Maryland Act also includes provisions expressly prohibiting fraudulent practices. Among these prohibitions are employing any device, scheme or artifice to defraud, and engaging in acts that operate as fraud or deceit on other persons. § 11-302(a) of the Maryland Act.

The Securities Commissioner, having expertise and extensive experience investigating frauds on investors, perceived that there might be violations of the Maryland Act. Several factors raise concerns that not all of the activities of Agora were bona fide publishing. Specifically —

- Certain individuals were offered an opportunity to purchase the Tip.
- Investors were falsely told that the source of the Tip was a "business associate," whereas in fact the named source actually was the same individual who sought to sell the Tip, using a fictitious name.
- A federal fraud complaint against Agora had cited some of the same facts as were at issue in the Maryland investigation.
- Agora promised individuals joining the Oxford's Club's Chairman's Circle opportunities to participate in private securities offerings.

- A promise of extraordinarily high returns over a very short period of time, a hallmark of fraudulent activities, was promoted in Agora advertisements.

These all served as warning signals to the Securities Commissioner. As noted in the Commissioner's brief, access to subscriber information would facilitate inquiry into activities surrounding the stock Tip and the nature of any other services that may have been offered or provided to investors. Appellant's Brief at 26. The subscriber lists are important because the Securities Commissioner could contact subscribers to obtain factual information concerning Agora's activities in determining whether the company acted illegally.

Another factor likely to generate suspicion is Agora's advertising high returns in a short time in a penny stocks publication. Penny stocks are thinly-traded, low-priced company shares that often trade outside of major exchanges and are subject to manipulation.[4]

Agora cites its publishing activities to justify the refusal to provide a number of items subpoenaed by the Securities Commissioner, attempting to cloak in the First Amendment activities that do not appear protected. As noted previously, among the items were the identities of those to whom the offer to sell the Tip was sent, as well as those who purchased the Tip. The Securities Commissioner indicates that Agora also withheld documentation related to investor workshops and hotline phone numbers. Appellant's Brief, page 7.

---

4 Penny stock frauds were rampant in a number of states until state securities regulators moved in and shut them down. *See* "Phone Huxsters Target Investors in Stocks" and "Microcap Fraud," NASAA Investor Education publications at http://www.nasaa.org/nasaa/scripts/prel_display.asp?rcid=56 and http://www.nasaa.org/nasaa/scripts/prel_display.asp?rcid=57, respectively.

The U.S. Supreme Court in *Lowe* has indicated that "hit and run tipsters" and "touts" are not considered bona fide publishers. "Presumably a 'bona fide' publication would be genuine in the sense that it would contain disinterested commentary and analysis as opposed to promotional material disseminated by a 'tout.' Moreover, publications with a 'general and regular' circulation would not include 'people who send out bulletins from time to time on the advisability of buying and selling stocks.'" *Lowe, supra*, 472 U.S. at 206. Under *Lowe*, not all of Agora's activities are "bona fide" publishing protected by the First Amendment. Accordingly, the lower court should have enforced the subpoenas in full, as written.[5]

CONCLUSION

The protection of investors in Maryland and elsewhere warrants compelling Agora to comply with the Securities Commissioner's subpoenas. The decision of the Circuit Court for Baltimore City should be reversed in its entirety, so that the Securities Commissioner is permitted to conduct her inquiry. In the alternative, this Court should direct the lower court to modify the subpoenas in a manner that would permit the

5 Even if the lower court believed the subpoenas were overbroad, the court had the power to limit the scope of the subpoenas but still compel production of information relating to the issue of whether Agora was engaged in activities that would require it to register as an investment adviser. "'Under appropriate circumstances, trial courts may modify subpoenas issued by administrative agencies.'" *Equitable Trust Co. v. State Comm'n on Human Relations*, 287 Md. 80, 97 (1980) (Citations omitted). *See also SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047 (2d Cir. 1973), where the district court had granted in part and denied in part enforcement of an SEC subpoena. The Circuit Court for Baltimore City improperly denied the Securities Commissioner's motion to compel further production in its entirety, because the facts merit full enforcement of the subpoenas. Furthermore, although the Securities Commissioner offered provisionally to narrow her request, the court failed to explore any alternatives to full denial of the motion to compel production.

Securities Commissioner to obtain necessary information so as to determine whether Agora has acted illegally or not.

Respectfully submitted,

PETER E. KEITH
GALLAGHER, EVELIUS & JONES, LLP
218 North Charles Street, Suite 400
Baltimore, Maryland 21201
(410) 727-7702

MARK J. DAVIS
STEPHEN W. HALL
ASSISTANT GENERAL COUNSELS
NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
10 G Street, N.E., Suite 710
Washington D.C. 20002
(202) 737-0900

Attorneys for NASAA

April 28, 2004

Pursuant to Md. Rule 8-504(a)(8), this brief has been printed with proportionally spaced type: Times New Roman - 13 point.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of April 2004, two copies of the foregoing brief of *amicus curiae* North American Securities Administrators Association, Inc., were sent by first class mail, postage prepaid, to the following persons at the following addresses:

Bruce W. Sanford
Lee T. Ellis, Jr.
William J. Conti
BAKER & HOSTETLER
1050 Connecticut Ave., N.W., Suite 1100
Washington, D.C. 20036-5304

J. Joseph Curran, Jr.
Attorney General of Maryland

Julie L. Tewey
Assistant Attorney General
200 St. Paul Place
Baltimore, Maryland 21202

Matthew J. Turner
General Counsel
Agora, Inc.
14 West Mt. Vernon Place
Baltimore, Maryland 21201

Peter E. Keith