

[No. 1751]

IN THE MATTER OF
MISSION CORPORATION

File No. 812-3. Promulgated March 26, 1943

(Investment Company Act of 1940—Section 3 (b) (2))

DEFINITION OF AN INVESTMENT COMPANY.

Excepted Companies—Company Primarily Engaged Directly and Through Majority-Owned Subsidiary in Industrial Activities.

Where a company's assets consist almost entirely of stocks of oil companies, and more than 51 percent of the value of its total assets is invested in the stock of its majority-owned subsidiary, and the principal business of the company is the operation and management of its majority-owned subsidiary, *held* that the company is entitled to an order declaring that it is primarily engaged directly or through its majority-owned subsidiary in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities.

APPEARANCES:

E. West Parkinson and Louis Loss, of the Investment Company Division of the Commission.

Leve, Hecht and Hatfield, for the applicant.

FINDINGS AND OPINION OF THE COMMISSION

Mission Corporation has filed an application pursuant to Section 3 (b) (2) of the Investment Company Act of 1940 for an order declaring it to be primarily engaged in a business other than that of investing, reinvesting, owning, holding, or trading in securities. Applicant has also raised the question whether or not it falls within the definition of an investment company under Section 3 (a) of the Act.

Applicant was organized in 1934 under the laws of the State of Delaware. Its outstanding securities as at December 31, 1940, consisted of 1,379,545 shares of one class of common stock, and its assets consisted almost entirely of securities of companies engaged in the business of producing and refining oil and oil and gas products. A summary of applicant's principal assets as at December 31, 1940, is as follows:

12 S. E. C.—I. C.—472

	<i>Book value</i>	<i>Market value</i> ^a	<i>Percentage of total assets at market value</i>
Tide Water Associated Oil Company common stock, 1,146,243 shares-----	\$11, 444, 635	\$11, 032, 589	46. 58
Skelly Oil Company common stock, 574,557 shares-----	3, 864, 943	12, 137, 517	51. 25
Pacific Western Oil Corporation common stock, 44,700 shares-----	493, 348	273, 788	1. 16

^a Market value is based on the last sale price on the New York Stock Exchange, on which the stocks of Tide Water, Skelly, and Pacific Western are listed.

The application involves the determination of the following questions: (1) Is the applicant an investment company as defined by Section 3 (a) of the Investment Company Act of 1940?¹ (2) Is the applicant primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities either directly or through majority-owned subsidiaries or other controlled companies conducting similar types of business within the meaning of Section 3 (b) (2) of the Act?²

THE APPLICANT AS AN INVESTMENT COMPANY

Section 3 (a) of the Act provides three criteria by which the status of a company as an investment company is determined.³ Of these,

¹ Section 3 (a) of the Investment Company Act provides as follows:

When used in this title, "investment company" means any issuer which—

(1) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

(2) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

As used in this section, "Investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which are not investment companies.

² The pertinent provisions of Section 3 (b) (2) are as follows:

Notwithstanding Paragraph (3) of subsection (a), none of the following persons is an investment company within the meaning of this title. . . . Any issuer which the Commission, upon application by such issuer, finds and by order declares to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities either directly or (A) through majority-owned subsidiaries or (B) through controlled companies conducting similar types of businesses.

³ Section 3 (a) (2) of the Act is inapplicable since the applicant has never engaged and does not propose to engage in the business of issuing face-amount certificates of the installment type. The applicability of Section 3 (a) (1), which involves essentially a determination of the nature of the applicant's business, will be resolved by a finding as to applicant's status under Section 3 (b) (2).

only the criterion contained in subdivision (3) of that section is pertinent. An investment company is there defined as any company which has more than 40 percent of its assets in investment securities other than "(A) Government securities; (B) securities issued by employees' security companies; and (C) securities issued by majority-owned subsidiaries of the owner which are not investment companies."

The applicant maintains that it is not an investment company within the purview of Section 3 (a) (3) on the ground that its investment in Skelly Oil Company, its majority-owned subsidiary which is not an investment company, comprises more than 60 percent of its assets. To support this contention the applicant has taken advantage of Section 2 (a) (39) of the Act.⁴ On October 28, 1940, the date of the original application, applicant revalued its holdings of Skelly stock as "considerably in excess of the present market price and not less than the sum of \$41 per share," although its market value at that time was \$19.25 per share.⁵ Comparing the value of its Skelly securities, thus determined, with the market value of the Tide Water and Pacific Western securities as reflected by current stock market quotations, the applicant estimates its investment in Skelly at approximately 68 percent of its total assets.

If such a valuation is supportable, then obviously less than 40 percent of applicant's assets consists of investment securities and the applicant is not an investment company within the meaning of Section 3 (a) (3) of the Investment Company Act of 1940. Applicant attempts to substantiate its valuation with a report of an oil expert who appraised Skelly's oil and gas properties both producing and undeveloped at \$53,357,490 as against a book value of \$25,775,437, the book value being based on cost with adjustments for depreciation and depletion reserves.

However, the propriety of applicant's valuation is open to serious question. While Section 2 (a) (39) appears to confer the right to fix a value for the securities of a majority-owned subsidiary "not in excess of the higher of market value or asset value," that right may not be exercised arbitrarily.⁶ When applied to investment companies, asset value is a meaningful term, since the value of an investment

⁴ The pertinent provisions of Section 2 (a) (39) are as follows:

Notwithstanding the fact that market quotations for securities issued by controlled companies are available, the board of directors may in good faith determine the value of such securities: *Provided*, That the value so determined is not in excess of the higher of market value or asset value of such securities in the case of majority-owned subsidiaries, and is not in excess of market value in the case of other controlled companies.

⁵ The alleged asset value was entered on the books of applicant at \$41.68 per share.

⁶ See *The Aviation Corporation*, 10 S. E. C. 26 (1941).

company's assets is easily determinable. On the other hand, the term "asset value" is rarely used in connection with companies other than investment companies.⁷ When applied to industrial companies "asset value" is often synonymous with "book value,"⁸ and is thus dependent largely upon historical and other factors which may have little relation to fair value as that term is used in Section 2 (a) (39).

Whether the existence of special conditions, such as a particularly inactive market for an industrial company's stock, would justify the adoption of a value other than market value is not here decided. Where, however, the stock of an industrial company is registered and actively traded on the New York Stock Exchange, it seems to us that the only fair value which can be placed on the shares is market value.⁹

The determination of the good faith of the applicant or the accuracy of its valuation is unnecessary, however, if the applicant is primarily engaged directly or through majority-owned subsidiaries in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities within the purview of Section 3 (b) (2).¹⁰ The determination of this question involves an examination of the history and business activities of applicant.

APPLICANT'S STATUS UNDER SECTION 3 (b) (2)

A. HISTORY OF APPLICANT

An examination of the history of applicant involves necessarily a study of the background of a group of companies of which applicant is a member. For purposes of this opinion, this group may be designated as the Getty System, since its development was sponsored by George F. Getty, and continued by his son, J. Paul Getty. The re-

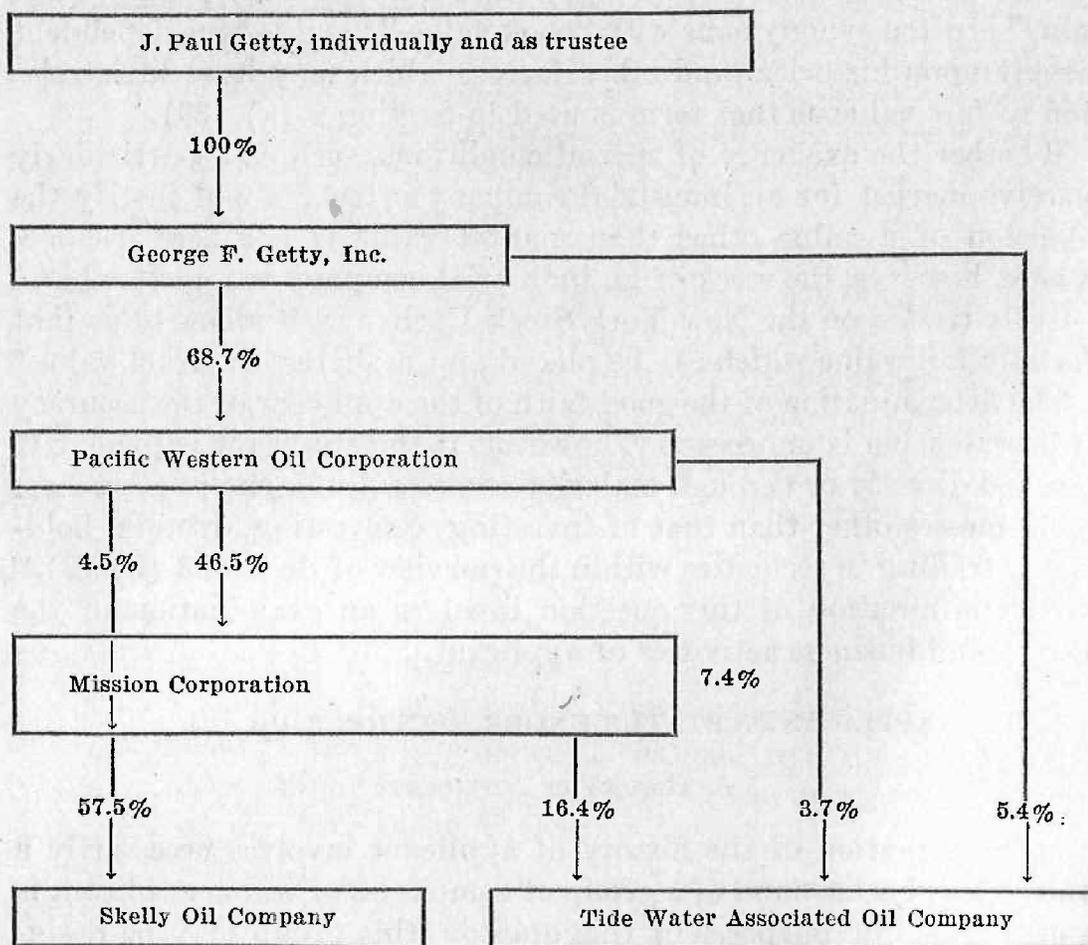
⁷ This construction is supported by a recent amendment to the Internal Revenue Code (Supplement Q, Revenue Act of 1942) which prescribes the methods of valuation of assets of regulated investment companies. The amendment paraphrases in part Section 2 (a) (39) of the Investment Company Act and provides that as to certain assets fair value may be determined in good faith by the board of directors, with the proviso, however, "that in the case of securities of majority-owned subsidiaries *which are investment companies*, such fair value shall not exceed market value or asset value, whichever is higher." [Emphasis ours]

⁸ See Graham and Dodd, *Security Analysis* (2nd ed. 1940). At page 567, they state that: "The book value is also referred to as the 'asset value.'"

⁹ The record contains substantial evidence tending to contravene applicant's valuation of its Skelly stock. An estimate of the value of applicant's Tide Water and Skelly holdings based upon an appraisal of the assets of the two companies places the value of the Skelly stock at 52.6 percent of applicant's assets and that of Tide Water at 47.4 percent, exclusive of the Pacific Western investment. Additional refutation of the applicant's valuation appeared during the pendency of these proceedings in a report prepared by Professors Bonbright and Dodd in connection with a proposed reorganization of Pacific Western wherein Skelly stock was valued at its market value. The valuation of Skelly stock was made in determining the value of Pacific Western's investment in applicant.

¹⁰ See *The Aviation Corporation*, 10 S. B. C. 26 (1941).
12 S. B. C.

relationship of applicant to its affiliates in the Getty System is illustrated in the following table:¹¹



From the time of its genesis in 1903, the companies of the Getty System have been engaged in the oil business. By a series of mergers and reorganizations, George F. Getty, Incorporated, emerged as the corporate apex of the Getty System, being succeeded in 1936 by George F. Getty, Inc. In 1930, when the stocks of many oil producing companies were severely depressed, Getty acquired a controlling interest in Pacific Western Oil Corporation, as an inexpensive means of expanding his oil properties. After the consolidation of the operations of George F. Getty, Inc. and Pacific Western, the system lacked a refining and marketing outlet for its crude oil. Since the acquisition of control of a major refining company appeared to offer the most effective solution to the marketing problem, the Getty companies in 1932 began to purchase stock of Tide Water Associated Oil Company.

¹¹ The percentages contained in the table are those which were obtained on December 12, 1940. During the course of these proceedings, the percentages have changed slightly by reason of additional stock acquisitions but to a degree insufficient to affect the issues involved. The percentages are given in terms of voting securities.

and by 1933 succeeded in obtaining representation on the Tide Water board of directors with the consent of the Tide Water management.¹²

The further acquisition of Tide Water stock was impeded by the ownership by Standard Oil Company (New Jersey) of the largest outstanding block of stock. Getty tried to bring about the sale of this block by demanding that Standard divest itself of ownership of the Tide Water stock in accordance with a Federal court decree entered in 1909 against Standard's predecessor in a suit brought under the Sherman Anti-Trust Act.¹³ Shortly thereafter, in December 1934, Standard arranged with the Tide Water management for the organization of Mission Corporation as a holding company for the Tide Water stock and the stock of Skelly Oil Company, a majority-owned subsidiary of Standard. Standard's stockholders were advised that the purpose of this arrangement was that these shares "be held intact and the stockholders of that Company (Mission Corporation) be enabled through this medium to exert a more effective influence in the management and development of the Tide Water Associated and Skelly companies than would be the case if such shares were distributed directly."

Pursuant to the arrangement Standard transferred to Mission 1,128,123 shares of Tide Water stock, representing approximately 20 percent of the outstanding voting securities, and 557,557 shares of Skelly stock, representing approximately 56 percent of the outstanding voting securities, in exchange for 1,399,345 shares of the stock of Mission. The transfer to Mission, however, was made subject to an option given to Revada Incorporated, a Nevada corporation, to purchase 250,000 shares of the Tide Water stock from Mission.¹⁴

The creation of Mission Corporation initiated a protracted contest between the Getty companies and the Tide Water management for

¹² The evidence supports applicant's contention that the Tide Water stock was not acquired for investment purposes. At the hearing, J. Paul Getty testified that at the time of the initial purchases, "It was about the farthest removed from an investment calendar stock of any oil stock listed on the New York Stock Exchange."

¹³ See *United States v. Standard Oil Company of New Jersey*, 173 Fed. 177 (C. C. E. D., Mo.), affirmed, 221 U. S. 1, 31 Sup. Ct. 502. In this suit Standard Oil Company of New Jersey was found to be violating the provisions of the Sherman Anti-Trust Act and was enjoined from entering into any combination or conspiracy to restrain commerce in petroleum or its products.

¹⁴ Whether Getty's demand on Standard was a factor in the creation of Mission Corporation is questionable, since Standard had previously attempted unsuccessfully to dispose of its Tide Water holdings. In 1930, Standard agreed to sell the Tide Water stock to Mission Securities Ltd., a corporation formed by the Tide Water management. Mission Securities defaulted after making substantial payments and Standard reacquired the stock in 1934. Mission Securities demanded some consideration for its investment and thereafter the parties entered into the agreement pursuant to which Mission Corporation was formed. Revada Incorporated, organized by the Tide Water management, was given the option on the Tide Water stock in consideration for the release by Mission Securities of all claims against Standard under the original contract. The Revada option was distributed among the group which had financed the original purchase and among various Tide Water employees.

control of Mission, which held what appeared to be the controlling interest in Tide Water. In 1935, Getty purchased large amounts of Mission's stock from the Standard stockholders, to whom the stock had been distributed. Early in 1937, when it appeared that Getty would obtain control at the approaching annual meeting, the Mission management, still controlled by Tide Water, attempted to distribute the Tide Water stock among Mission's stockholders. This action was enjoined by Getty and since that time the Getty companies have controlled Mission. Notwithstanding the ownership by Mission and the other Getty companies of 27.5 percent of Tide Water's outstanding stock, constituting 25.5 percent of its voting securities,¹⁵ Mission presently disclaims control of Tide Water.¹⁶

Nevertheless, the differences between the Getty group and the Tide Water management appear to have been resolved. The present relationship between the companies has been described by J. Paul Getty and William F. Humphreys, president of Tide Water as "very friendly" and "harmonious." Since 1940 the Getty companies have voted their stock in favor of the Tide Water management, and have entrusted the operation of a substantial part of the oil properties of Pacific Western and George F. Getty, Inc., to Tide Water. Applicant admits, moreover, that "the principal purpose for the continued acquisition by Mission Corporation of common stock of Tide Water Associated Oil Company is to attempt to obtain control of that company."

B. APPLICANT'S BUSINESS ACTIVITIES

The evidence is clear that applicant's majority-owned subsidiary, Skelly Oil Company, is an industrial company. Skelly was organized in 1919 by William G. Skelly, then an independent oil operator, as an oil-producing company in the midcontinent area. Its activities in the oil business have increased so that at present it is a fully integrated company actively engaged in acquiring and developing oil and gas properties, and producing, selling, and purchasing crude oil, natural gas and its derivatives. As of December 31, 1940, it owned directly and through its subsidiary, East Texas Refining Company, a total of 2,237 producing wells on 622 properties located in nine midwestern

¹⁵ Section 2 (a) (9) of the Act provides that—

Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 per centum of the voting securities of a company shall be presumed to control such company. . . .

¹⁶ While the block of Tide Water stock owned by Mission originally constituted 20 percent of Tide Water's outstanding common stock, its voting power was diluted by the issuance of additional shares of Tide Water common stock and the issuance of preferred stock with voting rights, and the size of the block was diminished on the exercise of the Nevada option.

States. The central location of Skelly's properties and its interest in the Great Lakes Pipeline give Skelly an advantage over those companies which must rely on other transportation facilities. These factors have increased the importance of Skelly to applicant and to the other companies of the Getty System.

The Getty System consists of a group of affiliated companies, the principal business of each of which is to engage in various phases of the oil and gas industry.¹⁷ In addition to the interrelation by cross-ownership, the various companies are operated largely by the same men. As of the date of the application, the officers and directors common to the companies are as follows:

Name	Mission	Skelly	Getty	Pacific Western
Wm. G. Skelly.....	President and director.	President and director.	-----	President and director.
Harold L. Rowland..	Vice president and director.	Director.....	President and director.	Vice president and director.
Arch H. Hyden.....	Director.....	Vice president..	Director.....	
Emil Kluth.....	Vice president and director.	Director.....	-----	Vice president and director.
Fero Williams.....	Treasurer.....	Director.....	-----	

The record shows that applicant, through its directors, is actively engaged in the operation of Skelly. Four out of applicant's seven directors are directors of Skelly, including William G. Skelly, who is president of both companies. At least three of these four have had considerable experience in operating oil properties. The principal activity of applicant's directors appears to be the management and operation of Skelly. The activity of applicant in the operations of its majority-owned subsidiary is a material factor in determining its status under the Act.¹⁸

As we indicated earlier, the Skelly stock constitutes more than 51 percent of the market value of applicant's assets. Applicant's income from Skelly during 1940 amounted to \$716,846, while the amount received from Tide Water was \$754,591. Its net income from its sales of crude oil during that year was \$17,805.¹⁹ During the years 1938 through 1940, applicant's income from Skelly increased in relation to

¹⁷ Although Pacific Western's status under the Investment Company Act is as yet undetermined, a substantial part of its assets was invested in and the principal portion of its income for the year 1940 was derived from oil and gas producing properties.

¹⁸ See *The M. A. Hanna Company*, 10 S. E. C. 581 (1941).

¹⁹ In May 1938, applicant's certificate of incorporation was amended to permit it to engage in all phases of the oil business. Subsequently, applicant purchased a small oil lease, from which some income is derived.

that from Tide Water.²⁰ The only accretions to applicant's portfolio since 1934 have served to increase its activities in the oil business.²¹

CONCLUSION

From the foregoing, it is evident that the applicant was not organized as an investment company, but was created for the purpose of influencing the management and development of two oil companies. The investment in Skelly, a majority-owned subsidiary, constitutes the major part of applicant's assets valued at market prices, and the management and operation of Skelly appear to be the primary activity of applicant's directors. The chief importance to applicant of its Tide Water investment arises not from the income derived but from its assurance of an outlet for the oil produced by applicant and its associated companies.²² The ownership by applicant and its associated companies of more than 25 percent of Tide Water's voting securities constitutes presumptive control under the Investment Company Act,²³ and, while control is presently disclaimed, the endeavor to obtain control is admitted. Applicant thus falls within the category of companies which "are essentially industrial corporations . . . which may have a substantial part of their assets in marketable securities" and which were intended to be exempted under Section 3 (b) (2).²⁴ We find, therefore, that applicant is primarily engaged in a business other than that of investing, reinvesting, owning, holding, or trading in securities within the meaning of Section 3 (b) (2) of the Investment Company Act.

A proper order will issue upon provision that such order shall be subject to modification or revocation on motion of the Commission or otherwise after notice and opportunity for hearing at any time when it appears that the facts herein become materially changed.

By the Commission: (Chairman Purcell and Commissioners Pike, Burke, and O'Brien) Commissioner Healy not participating.

²⁰ See the following table:

Year	Dividends from Tide Water	Dividends from Skelly
1938-----	\$946, 498	\$587, 057
1939-----	818, 723	428, 368
1940-----	754, 591	716, 846

²¹ Since 1937, applicant has purchased 44,700 shares of Pacific Western stock in addition to augmenting its holdings of Skelly and Tide Water stock.

²² Even if the Tide Water investment is to be regarded as an investment security, it appears that on the basis of stock market quotations as of December 31, 1942, the value of the Tide Water securities constitute only 41 percent of applicant's assets.

²³ See footnote 15, *supra*.

²⁴ Testimony of David Schenker in hearings before subcommittee on Banking and Currency, U. S. Senate, on S. 3580 (76th Cong., 3d sess.) at page 177.