

ADMINISTRATIVE PROCEEDING
FILE NO. 3-6228

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
HAMMON CAPITAL MANAGEMENT CORPORATION :
(801-9795) :
and :
GABE HAMMON :

INITIAL DECISION

Washington, D.C.
February 24, 1984

Ralph Hunter Tracy
Administrative Law Judge

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APPEARANCES:

Lillian H. Filegar and John Kelly,
attorneys, Denver Regional Office,
for the Division of Enforcement.

Kenneth M. Christison, attorney for
respondents at hearing.
William D. Taylor, attorney for
respondents on brief.

BEFORE:

Ralph Hunter Tracy
Administrative Law Judge

This public proceeding was instituted by a Commission Order (Order) dated March 21, 1983, issued pursuant to Sections 203(e) and (f) of the Investment Advisers Act of 1940 (Advisers Act) to determine whether Hammon Capital Management Corporation (HCM) and its president, Gabe Hammon (Hammon), had engaged in the misconduct charged by the Division of Enforcement (Division), and what, if any, remedial action would be appropriate in the public interest.

The Order alleges, in substance, that HCM has willfully violated and Hammon has willfully aided and abetted violations of Section 204 of the Advisers Act and Rule 204-1 thereunder by failing to file an amended Form ADV and any annual reports on Form ADV-S. The Order charges, further, that HCM and Hammon have not complied with undertakings, to which they had agreed, prescribed in Commission Order of April 30, 1982.

The evidentiary hearing was held in Denver, Colorado, on July 11 and 12, 1983, and in San Francisco, California, on July 14 and 15, 1983. Respondents were represented by counsel; proposed findings of fact, conclusions of law, and supporting briefs were filed by respondents and by the Division.

The findings and conclusions herein are based upon the preponderance of the evidence, as determined from the record, and upon observation of the witnesses.

Respondents

HCM, a California corporation, has been registered with the Commission as an investment adviser pursuant to Section 203(c) of the Advisers Act since January 10, 1974. Hammon has been HCM's president and sole owner since its inception.

Form ADV filed when HCM became registered shows that Gabe Hammon was born August 3, 1938; that he graduated from high school in Winnsboro, Texas; that he attended the University of Oklahoma, Norman, Oklahoma and the University of Denver, Denver, Colorado, but did not receive a degree; that he was employed by the First National Bank of Denver from 1961 to 1966 and at the same time took several courses at the American Institute of Banking, Denver, Colorado; that he was variously employed in retail sales from 1966 to 1968; that from 1968 until 1974 he was employed as a stockbroker with various brokerage firms in New York, N.Y., and San Francisco, California; and that since January 1974 he has been the sole proprietor of HCM.

Background and Previous Violations

In its registration with the Commission on January 10, 1974, HCM showed its business address as 2230 Turk Boulevard, San Francisco, California. An amendment on Form ADV filed November 3, 1976 shows a business at 1330 Lincoln Avenue, Suite 311, San Rafael, California and a mailing address as P. O. Box 2069, San Rafael, California. An amendment filed on December 18, 1978 shows its principal place of business as 2800 University Boulevard, Suite 100, Denver, Colorado. These are the only filings made by HCM since its registration as an investment adviser.

On February 27, 1979, the Commission instituted an administrative proceeding against HCM and Hammon charging violations of Section 204 of the Advisers Act and Rules 204-1 and 204-2 thereunder. Following a hearing and an

initial decision by an administrative law judge, the Commission reviewed the record and issued its findings in Investment Advisers Act of 1940 Release No. 744/January 8, 1981. In affirming the law judge, the Commission stated:

As indicated above, respondents seek review only with respect to the sanctions imposed on them. The law judge's unchallenged findings as to respondents' violations, based on their admissions and the evidence in the record, may be summarized as follows.

1. On October 12, 1978, during regular business hours, staff members of this Commission's Denver Regional Office sought to examine registrant's books and records. However, on Hammon's instructions, they were denied access to those records. As a result of respondents' refusal to permit the examination, this Commission obtained a court order, pursuant to which the examination was conducted.
2. During the period from about September 30, 1977 to December 20, 1978, respondents failed to make and keep current the following books and records:
 - (a) A journal or journals showing cash receipts and disbursements;
 - (b) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts;
 - (c) A memorandum of each order given by registrant for the purchase or sale of any security;
 - (d) All bills or statements (or copies thereof), paid or unpaid, relating to registrant's business;
 - (e) All trial balances, financial statements, and internal audit working papers relating to registrant's business; and
 - (f) For each security in which clients had a current position, information from which registrant could promptly furnish the name of the client, and the client's current amount or interest.
3. Respondents failed promptly to amend registrant's application for investment adviser registration to disclose the following:

(a) As of July 1, 1977, the State of California suspended registrant's corporate powers, rights and privileges, a condition that remained in effect until at least April 23, 1979;

(b) On November 28, 1978, the State of California summarily suspended registrant's state investment adviser certificate; and

(c) Registrant changed its address twice in 1978, and once in 1979.

The Commission ordered HCM to be suspended from registration as an investment adviser for 90 days and Hammon to be suspended from association with any investment adviser in a proprietary or supervisory capacity for 90 ^{1/}days.

Subsequently the Commission determined to resolve the above proceeding by accepting an offer of settlement, and on April 30, 1982, issued Investment Advisers Act Release No. 801 in which it modified the remedial sanctions imposed on respondents (but not its opinion) as follows:

IT IS ORDERED that Hammon Capital and Hammon be, and they hereby are, censured; and

IT IS FURTHER ORDERED that Hammon Capital and Hammon comply with their undertakings in their offer of settlement as follows:

a. Hammon Capital shall retain an accounting firm for a period of eighteen months subsequent to the date of this Order to maintain the records

1/ The Commission noted that although respondents requested oral argument neither Hammon nor counsel appeared on the scheduled date.

required by the Advisers Act and by regulations promulgated thereunder, and to maintain at all times a duplicate set of the client records of Hammon Capital. After the eighteen-month period has expired, Hammon Capital may terminate the accounting firm and maintain the required records internally, upon written notice filed with the Denver Regional Office of the Commission ten days prior to such termination.

b. Hammon Capital shall retain a second accounting firm to conduct four unannounced compliance audits in the eighteen months subsequent to the date of this Order. Such compliance audits shall be conducted to determine that the accounting firm referred to in the immediately preceding subparagraph is maintaining the records required by the Advisers Act and by regulations promulgated thereunder, and maintaining a duplicate set of the client records of Hammon Capital. The results of such compliance audits shall be reported to Hammon Capital and to the staff of the Denver Regional Office of the Commission.

Current Violations

The Order alleges that HCM, willfully aided and abetted by Hammon, willfully violated Section 204 of the Advisers Act and Rule 204-1 thereunder by failing to file an amended Form ADV setting forth the current business address of HCM and by failing to file annual reports on Form ADV-^{2/}S.

In support of the allegations that HCM failed to file amending and annual reports, the Division introduced an attestation of the Commission's Records Officer certifying

^{2/} Rule 204-1 requires every registered investment adviser to promptly file an amendment reflecting its current business address whenever the business address of the registrant is changed; and to file annual reports with the Commission.

that a diligent search of the Commission's records and files on January 14, 1983 had disclosed that an amendment on Form ADV was received in the Commission on December 18, 1978; and that no filing has been received since that date. A similar attestation, dated May 12, 1983, stated that the Commission's records and files do not disclose that any Form ADV-S has been received in this Commission under the name of Hammon Capital Management Corp., File 801-9795, pursuant to the provisions of the Investment Advisers Act of 1940.

The respondents admit that they have not complied with the undertakings set forth in Commission Order of April 30, 1982. However, they contend that such failure to comply was not willful and, based upon mitigating circumstances, it is not in the public interest to impose severe sanctions.

The record in this proceeding discloses that not only do all of the violations found in the prior proceeding still exist but that Hammon has been consistently deceiving the Commission under the guise of cooperating.

On January 8, 1981, the Commission issued Advisers Act Release No. 744, affirming the administrative law judge and ordering a three-month suspension for both respondents. Hammon thereupon engaged the Denver office of

the national accounting firm of Coopers & Lybrand (Coopers) presumably to set up an accounting system for HCM in accordance with the Advisers Act. At Hammon's request Coopers wrote a letter, dated July 6, 1981, to the Commission's Denver office outlining the procedures it proposed to establish for HCM.

On July 7, 1981, the Denver office of Arnold & Porter, a prominent Washington, D.C., law firm, addressed a letter to the Denver office of the Commission which included a copy of the Coopers letter; a draft of an ADV to be filed by HCM; a draft of a letter to be sent to HCM's customers; and a manual of procedures, prepared by Coopers, to be followed in the future relating to records to be maintained by HCM. The draft ADV shows HCM's principal place of business (as of 8/1/81) to be Colorado Square, 13th floor, 2 North Nevada Ave., Colorado Springs, Colorado.

On August 3, 1981, Coopers wrote to Hammon stating that it was stopping work on his HCM account because they had not been paid. This letter was sent by certified mail but was returned unclaimed. The managing partner of the Coopers Denver office testified that he had a number of telephone calls from Hammon concerning

payment, but Hammon repeatedly told him he did not have the money. The manager stated that Hammon was difficult to reach as he would not pick up mail or return telephone calls. Hammon could not be called directly but only through an answering service and he returned calls only when he wished to.

On January 4, 1982, Coopers again wrote to Hammon, referring to its August 3, 1981 letter, and setting out terms under which Coopers would resume work for Hammon and HCM. Copies of this letter were sent to Arnold & Porter at both its Denver and Washington, D.C., offices.

Following the correspondence by Coopers and Arnold & Porter with the Denver office, Hammon engaged in negotiations which resulted in the submission on January 30, 1982 of an offer of settlement of the prior proceeding. This offer was accepted by the Commission in Advisers Act Release No. 801, dated April 30, 1982, in which the sanctions were reduced from a 90-day suspension to a censure and certain undertakings. (See pps. 4,5, supra).

It should be noted that at the time of the settlement negotiations Coopers was no longer doing work for Hammon or HCM and that the ADV prepared by Arnold & Porter was never filed. (Incidentally, the Colorado

Square address on the ADV was also incorrect since Hammon never had an office in Colorado Springs.)

Although Hammon had indicated to the Commission's Denver office that he was not actively engaged as an investment adviser and therefore did not have to file reports, the record indicates otherwise. Mrs. R., a client who retained Hammon as an adviser from April 1981 until May 1983, testified that Hammon wished to have quarterly meetings with his clients, and inasmuch as he lived in San Francisco he would hold them there. Accordingly, Mrs. R. and her husband would travel from their home in Tulsa, Oklahoma, to San Francisco every three months for a meeting with Hammon, who paid their expenses. In September 1982 the R's went to London at the behest of Hammon; he said he was going to interview staff for his new office and thus it would be easier to have the quarterly meeting there. They stayed at the Barkley Hotel for nine days, but Hammon never appeared and they were unable to locate him. Hammon paid for the hotel and airline tickets. At the last meeting with Hammon in San Francisco in January 1983 the R's stayed at the Huntington Hotel, as usual, but Hammon has not yet reimbursed them for their hotel bill of \$1,432.00.

Mrs. R. said she had difficulty contacting Hammon because he had an answering service but would not always return calls. Mrs. R. paid advisory fees to Hammon of \$60,500.00 in 1981 and \$32,433.79 in 1982. Hammon has billed her \$25,901.88 for services from January to April 1983; she states, however, that this billing is incorrect and she has therefore not paid it.

As the record clearly shows, Hammon has had funds available from fees, and he has been able to pay client expenses for meetings in San Francisco and London. He has, also, made statements orally and in writing that he is buying a \$700,000.00 home for cash; is renting offices on the fiftieth floor of the Bank of America building in San Francisco; is having a 737 jet airplane outfitted for the private use of HCM clients to attend meetings with him; is purchasing a Mercedes for clients to use in San Francisco; that he has a personal net worth of \$21 million; and that he has clients for whom he transacts business in excess of \$20 million a year. Despite all these claims of funds, Hammon told Coopers that he had no money to pay bills and has failed to pay the California franchise fee to maintain HCM's corporate entity.

While insisting that he is willing to cooperate

and that the Turk Street and San Rafael addresses are correct, Hammon has refused to accept service by mail or certified letters sent to him by the Commission, Coopers & Lybrand, and others. Also, he has established a selective communication system through an answering service by which he does not take direct telephone calls and returns only those he wishes.

The Order charges Hammon with willfully aiding and abetting HCM's violations of Section 204 of the Advisers Act and Rule 204-1 thereunder. In Securities and Exchange Commission v. Coffey,^{3/} the court said:

. . . we find that a person may be held as an aider and abettor only if some other party has committed a securities law violation, if the accused party had general awareness that his role was part of an overall activity that is improper, and if the accused aider-abettor knowingly and substantially assisted the violation.

The record discloses that Hammon's conduct brought him squarely within the requirements for an aider and abettor. Accordingly, it is found that HCM, willfully aided and abetted by Hammon, failed to amend Form ADV

3/ SEC v. Coffey, 493 F.2d 1304,1316 (6th Cir. 1974); cert. denied, 420 U.S. 908 (1975). See, also, Woodward v. Metro Bank of Dallas, 522 F.2d 84,97 (5th Cir. 1975); In the Matter of Carter and Johnson, Securities Exchange Act Release No. 17597/February 28, 1981. 22 SEC Docket 292,316.

and to file any annual reports, in willfull violation of Section 204 of the Advisers Act and Rule 204-1^{4/} thereunder. It is also found that HCM and Hammon have not complied with the undertakings in Commission Order dated April 30, 1982.

Other Matters

On December 23, 1983, respondents filed their proposed findings of fact and conclusions of law and brief in support together with an application to reopen the administrative record for receipt of additional evidence in the form of an affidavit of Hammon's. The Division had no objection to its admittance, and it was received in evidence as respondents' exhibit "R" by order of January 9, 1984.

On January 18, 1984, respondents filed a joint motion to dismiss the administrative proceeding, and in the alternative, an application to reopen the hearing and stay the administrative proceeding.

Respondents motion to dismiss is filed pursuant to Rule 11(e) of the Commission's Rules of Practice and is based on two contentions. The first contention is that targets of SEC investigations are entitled to notice

^{4/} Except for the anti-fraud provisions of the securities laws, it is well established that a finding of willfullness does not require an intent to violate the law; it is sufficient that the person charged with the duty knows what he is doing. Billings, Associates, Inc., 43 SEC 641, 649 (1967); Tager v. SEC, 344 F.2d 5,8 (2d Cir. 1965); Hughes v. SEC, 174 F.2d 969,977 (D.C. Cir 1949).

of third-party subpoenas. Respondents rely on the decision in Jerry T. O'Brien, Inc., v. SEC^{5/}. The second contention is that respondents were denied the opportunity to submit a written statement to the Commission in response to the proposed charges. This is known as a Wells Committee Submission.

The Division asserts that respondents' reliance on O'Brien is misplaced because respondents tend to confuse subpoenas issued under formal orders of investigation and those issued during administrative proceedings. The crux of O'Brien is the need for notice to potential targets of investigations during the nonpublic, fact-gathering stages. This is because potential targets cannot be present when a third party testifies pursuant to an investigative subpoena issued under a formal order of investigation. There was no such formal order issued in this case. Moreover, subpoenas issued during administrative proceedings are signed by an administrative law judge for witnesses to appear at a public hearing at which the respondent and counsel are present. In addition, in this case, the Division's witness and documents lists were furnished to Hammon and various attorneys prior to the July 11, 1983 hearing. The record shows that respondents and counsel appeared at the hearing and cross examined all witnesses called by the Division.

^{5/} 704 F.2d 1065 (9th Cir. 1983).

The Wells Submission is an informal and discretionary procedure in which persons who become involved in preliminary investigations may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation. As the Division points out, this procedure is available only prior to any Commission action. In the instant case there was no preliminary investigation. The alleged violations were discovered during a routine audit in January 1983, and this proceeding was then instituted. The Division experienced difficulty in informing Hammon of the proceeding because all of the notices sent to him by certified mail were returned unclaimed. Therefore, it was necessary for staff members to serve him personally in order to ensure that respondents had notice of the proceeding and an opportunity to appear.

Upon consideration of all of the circumstances and the arguments advanced by both parties, it is concluded that the holding in the O'Brien case, and the Wells Submission procedure, are irrelevant to this proceeding. Accordingly, respondents' motion to dismiss this proceeding is denied.

In their alternative application on January 18, 1984, respondents request that the record in this proceeding be reopened and, in the interim, that the matter be stayed until the hearing can be reconvened, preferably

in mid-June 1984. At this further hearing respondents will appear and offer the evidence outlined by way of an offer of proof as set forth in an attached affidavit of Hammon. The principal reasons for reopening the hearing are: (1) that respondents were not properly represented by counsel during the administrative hearing; and (2) additional evidence will be offered regarding steps taken by respondents to rehabilitate corporate operations of HCM, the registered investment adviser.

The hearing in this matter was originally scheduled to start on May 3, 1983. However, because the staff was unable to serve Hammon, the hearing was postponed until June 7, 1983. Hammon did not secure an attorney to represent respondents until June 3, 1983. The attorney requested a postponement to enable him to review the case and prepare for trial. The matter was then postponed until July 11, 1983 and, at Hammon's request, was scheduled for both Denver and San Francisco. Counsel for respondents was an experienced attorney with previous administrative trial experience as a member of the Commission's San Francisco office. He presented evidence and cross-examined witnesses in a competent manner. Following the hearing he resigned as respondents' counsel, for personal reasons, and other counsel

was engaged to file the post-hearing briefs.

The additional evidence proposed to be adduced by Hammon consists of showing that he is buying a home with room for an office; that he is interviewing for two secretarial positions; that he and counsel have contacted the Department of Corporations and the State Franchise Tax Board of California to ascertain the tax deficiency which must be satisfied so that HCM can be reinstated as a state corporation; that HCM has initiated action to reinstate its California Investment Advisers Certificate; that Hammon is organizing a "team" of attorneys and other professionals in order to form the nucleus of an advisory committee which will assist in the management and operation of HCM. In his affidavit Hammon says:

As a result of the turmoil which has existed the last six years, I have now changed my management philosophy and have agreed to rely on the advice and counsel of attorneys and advisors who have uniformly agreed that HCM must get back on its feet through a joint concerted effort with me.

Although Hammon may have disagreed with his attorney's trial strategy, that is not sufficient reason to reopen the hearing. As to the proposed evidence, these are just more promises of what he has been going to do for the last

six years. Hence, the application to reopen the hearing and to stay the proceeding is denied.

Public Interest

The remaining issue concerns the remedial action which is appropriate in the public interest with respect to the violations found herein. The Division urges that HCM's registration be revoked and that Hammon be barred from association with a registered investment adviser. In making this recommendation the Division points out that in the prior administrative proceeding it was stated that a 90-day suspension "should suffice to impress Hammon with the need for close attention to those regulations . . ." but that, unfortunately, such was not the case.

Hammon's conduct clearly demonstrates his total lack of fitness to remain in "an occupation which can cause havoc unless engaged in by those with appropriate background and standards^{6/}." It is well established that an investment adviser is a fiduciary whose actions must be governed by the highest standards of conduct.^{7/}

6/ Marketlines, Inc., v. SEC 384 F.2d 264,267 (2d Cir. 1967), cert. denied, 390 U.S. 947 (1968).

7/ See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180,191-192 (1963); Rosenfeld v. Black, 445 F.2d 1337, 1342-1344 (2d Cir. 1971); Joseph P. D'Angelo, 46 SEC 736,737, aff'd without opinion, 559 F.2d 1202 (2d Cir. 1977).

Here it is abundantly clear that Hammon's actions reflect a wholly callous disregard of those standards^{8/}.

Upon careful consideration of the record and the arguments and contentions of the parties, it is concluded that Hammon's careless disregard of, and cavalier attitude toward, his obligation to file reports under Rule 204-1 after repeated notice, and other evidence of his inability or unwillingness to meet the standards expected of an investment adviser, warrant revocation of HCM's registration and Hammon's bar from association with any investment adviser.^{9/}

ORDER

Accordingly, IT IS ORDERED that the registration of Hammon Capital Management Corporation as an investment adviser is revoked;

FURTHER ORDERED that Gabe Hammon is barred from association with any investment adviser.^{10/}

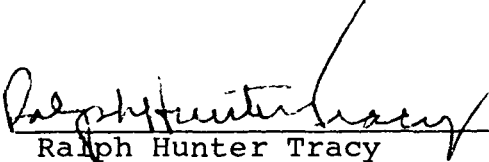
^{8/} Richard W. Suter, Investment Advisers Act Release No. 886 (October 17, 1983) 28 SEC Docket 1729.

^{9/} Scientific Investors Corp., 41 SEC 618,619 (1963); Gregerson & Chatham, 46 SEC 387,394 (1976).

^{10/} It should be noted that a bar order does not preclude the person barred from making such application to the Commission in the future as may be warranted by the then existing facts. Fink v. SEC, 417 F.2d 1058,1060 (2d Cir. 1969); Vanasco v. SEC, 395 F.2d 349,353 (2d Cir. 1968); Ross Securities, Inc., 41 SEC 509,517 n.10 (1963).

This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Commission's Rules of Practice.

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of the initial decision upon him, filed a petition for review pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.^{11/}


Ralph Hunter Tracy
Administrative Law Judge

Washington, D.C.
February 24, 1984

^{11/} All proposed findings, conclusions, and contentions have been considered. They are accepted to the extent that they are consistent with this decision.