UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
ASSURANCE INVESTMENT COMPANY PAUL A. MILLER HAROLD M. PELTON	:
File No. 8-11787	:

INITIAL DECISION

Warren E. Blair
Hearing Examiner

Washington, D. C.
July 6, 1965

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ASSURANCE INVESTMENT COMPANY PAUL A. MILLER HAROLD M. PELTON	INITIAL DECISION
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BEFORE: Warren E. Blair, Hearing Examiner

APPEARANCES: R. G. de Quevedo, Esq., for the Division of Trading and Markets

Samuel P. Norton, Esq., for Respondents

Proceedings in this matter were instituted by the Commission on September 21, 1964 under an Order for Public Proceedings ("Order") pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether allegations of the Division of Trading and Markets ("Division") that the respondents, Assurance Investment Company ("registrant"), Paul A. Miller ("Miller"), and Harold M. Pelton ("Pelton"), wilfully violated and aided and abetted wilful violations of the Securities Act of 1933 ("Securities Act") and the Exchange Act are true, and whether remedial action pursuant to Sections 15(b) and 15A of the Exchange Act is appropriate.

The Division alleged in substance that the respondents wilfully violated Sections 5(a) and 5(c) of the Securities Act by the offer and sale of unregistered shares of the common stock of Kramer-American Corp. ("Kramer-American") and, further, wilfully violated Section 10(b) of the Exchange Act and Rule 10b-6 thereunder by making bids for and purchasing Kramer-American stock while participating in a distribution of that stock. Additionally, the Division alleged that wilful violations of Section 15(a) of the Exchange Act occurred when respondents effected transactions in securities while registrant was not registered as a broker-dealer under the Exchange Act and also because registrant's application for registration as a broker-dealer contained a false statement of the date registrant succeeded to the business of its predecessor. The Division also alleged that registrant wilfully violated and Miller and Pelton aided and abetted the wilful violation of Section 17(a) of

the Exchange Act and Rule 17a-3 thereunder by making fictitious entries in registrant's books and records. The Order further sets forth that the public files disclose that the United States District Court for the Southern District of California, Central Division, entered an order on April 23, 1964,[1/] preliminarily enjoining registrant and Pelton from violations of Sections 5(a) and 5(c) of the Securities Act in the offer and sale of Kramer-American stock.[2/]

Counsel for respondents filed an answer on October 7, 1964 which contained a general denial of the Division's allegations except as to the violation of Section 5 of the Securities Act. As to the latter, respondents admit they "may have committed technical violations of Sections 5(a) and 5(c)" but "deny that any such violation was wilful."

A hearing on the issues was held on February 23, 24 and 25, 1965 in which the respondents appeared and participated through counsel. Timely successive filings of proposed findings, conclusions and supporting briefs were made by the Division and by the respondents.

1/ S.E.C. v. Kramer-American Corp., et al, Civil Action No. 64-463-PH.

2/ During the course of the hearing, a motion by the Division to amend the Order was granted by the Examiner. As a result, the Order further reflects that a permanent injunction prohibiting violations of Sections 5(a) and 5(c) of the Securities Act was entered by consent on October 15, 1964 against registrant and Pelton. In addition, an allegation was added to the Order to the effect that respondents wilfully violated and aided and abetted wilful violations of Section 15(b) of the Exchange Act and Rule 15b-2 thereunder by failing to amend registrant's Form BD application for registration to disclose, first, the preliminary injunction, and, later, the permanent injunction.

The findings and conclusions herein are based upon the record and upon observation of the various witnesses.

Application for Registration

Registrant, a partnership in which Miller and Pelton are general partners, became registered as a broker-dealer on December 26, 1963 and is a member of the National Association of Securities Dealers, Inc. ("NASD"). Registrant's application for registration dated November 26, 1963 indicated that registrant was a successor to Paul Miller d/b/a Assurance Investment Co. ("predecessor"), a registered broker-dealer, and that the date of succession was to be "upon approval of registration." Whether registrant's succession actually took place some eleven months earlier, on or about January 1, 1963, and whether, if so, registrant was doing business as a broker-dealer prior to its registration are in question. Respondents have stipulated that during the period from January 1, 1963 through March 31, 1964, registrant, its predecessor, Miller and Pelton made use of the mails to effect transactions otherwise than on a national securities exchange.

Miller, called as a witness by the Division, testified that he became acquainted with Pelton in 1961 when they were both employed by a now defunct securities firm. Miller left that employ to continue in the securities business as a sole proprietor and became registered with the Commission in April, 1962.

On December 17, 1962 Miller filed an amendment to predecessor's application for registration to show a change of address to 14401 Sylvan

St., Van Nuys, California, which address was also that of Pelton's office. Although Miller was not entirely consistent in fixing the time he and Pelton became partners, his testimony indicates that the partnership came into being shortly after he had moved into Pelton's office.

The import of Miller's testimony on this point is consonant with that of two sets of financial statements filed during 1963 with the California Division of Corporations on behalf of Assurance Investment Company. Those financial statements which relate to periods from January 1, 1963 to April 30, 1963 and from January 1, 1963 to May 31, 1963 reflect that the registrant was formed by Miller and Pelton on or about January 1, 1963.[3/] Each of these filings shows a liability captioned "Loans By Partners", and also reflects that as of January 1, 1963 the respective capital investments of Pelton and Miller were $1,500 and $375. The financial statements further indicate that Pelton and Miller shared the firm's profits for those periods on an 80% to 20% basis, the same as that represented by their investments in the firm. In addition, an affidavit of Pelton dated June 30, 1963 attached to the April statements contains the averments that "he is a general partner or sole proprietor" of Assurance Investment Company and that he knows the contents of the April financial report to be true of his own knowledge and belief. Supplementing this proof is an official

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3/ DX1 (Exs. 12 and 13).

report dated July 22, 1963 prepared by an examiner with the California Division of Corporations. Included in the report is a comparison of the results of an examination of the books and records of Assurance Investment Company as of March 31, 1963 with the figures contained in the April 30, 1963 financial report filed by the firm. In the report, the firm's capital accounts as of March 31, 1963 reflect that Pelton and Miller had each contributed capital of $750 and that a third person, Philip Gardner, had also contributed $750.[4/] In conclusion, the report observes that although the firm registered with California as a sole proprietor, "the books and records are set up for a partnership."

Counter-evidence introduced by the respondents consisted primarily of self-serving declarations. In a letter dated August 2, 1963 addressed to the California Division of Corporations in reply to its inquiry concerning Pelton's status in Assurance Investment Company, Miller and Pelton denied that Pelton was a partner and represented that his interest in Assurance Investment Company was "by way of a loan." The respondents also produced a copy of a partnership agreement submitted to the Commission by counsel for registrant on December 13, 1963 as a supplement to registrant's application for registration. The formal partnership agreement, of course, does not exclude the possibility

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4/ Registrant's application for registration includes a statement to the effect that Gardner had applied to the California Division of Corporations "but was turned down for difficulties."

of the existence of an earlier oral or written arrangement between Miller and Pelton; neither does the formal agreement nor any other evidence offered by the respondents prevail over the fact that Assurance Investment Company recorded its operations as a partnership after January 1, 1963.

In view of the foregoing, the Examiner rejects the contention of the respondents that registrant's date of succession was not earlier than shown on registrant's application for registration and finds that the actual date of that succession was on or about January 1, 1963. It is further found that registrant, aided and abetted by Miller and Pelton, wilfully made a false statement of a material fact in its application for registration,[5/] and that registrant, aided and abetted by Miller and Pelton, wilfully violated Section 15(a) of the Exchange Act by continuing the predecessor's business during the period from on or about January 1, 1963 to December 26, 1963 without being effectively registered as a broker-dealer.

The respondents have admitted that no amendments have been filed to registrant's application for registration to disclose that registrant and Pelton were initially subject to a preliminary injunction, and, on April 8, 1964, permanently enjoined from the offer and sale of Kramer-American stock in violation of Section 5 of the Securities Act. The Examiner therefore finds that registrant failed to

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5/ This was a material misstatement; the date of succession not only determines whether a successor can continue in business pursuant to Rule 15b-4 of the Exchange Act, but also fixes the date that a predecessor discontinued business.

promptly file amendments required by Rule 15b-2 under the Exchange Act, and that registrant, aided and abetted by Miller and Pelton, wilfully violated Section 15(b) of the Exchange Act and Rule 15b-2 thereunder.

Kramer-American Stock

Kramer-American, a California corporation formed in 1960 to distribute German-made tractors and related equipment, issued options for 150,000 shares of its stock to the management and promoters of the company. Vern Coggle, president and one of the promoters, received 60,000 of the options and Raymond Moore, secretary, received 40,000. In July, 1960 Kramer-American offered and sold to the public 150,000 shares of its common stock, which stock was covered by a filing made pursuant to Regulation A under the Securities Act.

Pelton met Coggle in 1963, when Kramer-American was looking for an underwriter. As the acquaintance developed, Pelton became interested in the distribution of Kramer-American products and spent time and money on sales promotion efforts. Because Kramer-American had no funds, Coggle gave 15,000 shares of Kramer-American stock to Pelton during a period of September, 1963 to March, 1964, with the understanding that if those shares had a value of less than $50,000, additional shares would be forthcoming. In the same period, Pelton bought or otherwise acquired almost 10,000 additional shares. Kramer-American's stock transfer records reflect that Pelton's stock, as well as another 1,000 shares issued to registrant, came from the exercise

of options held by Coggle and Moore.

Between January 2, 1964 and March 25, 1964, Pelton sold 11,610 of his Kramer-American shares to registrant, which then sold those shares, together with the 1,000 it had acquired from Coggle's holdings, to the public. No registration statement under the Securities Act has ever been filed relating to Kramer-American stock and no exemption from such registration appears to have been available with respect to respondents' offers and sales of the stock acquired from Pelton.

Respondents argue that the evidence raises the possibility that the intrastate exemption from registration provided by Section 3(a)(11) of the Securities Act was available for the issue of securities from which came the shares that registrant offered and sold, and that no evidence was introduced to negate such possibility. This argument would have substance if the Division were required to prove that no exemption from the registration requirements was available. The law is quite the opposite. The person claiming an exemption from the registration requirements of the Securities Act has the burden of establishing the availability of that exemption.[6/] The evidence relied upon by the respondents consists almost entirely of statements by Coggle to Pelton and others to the effect that the Kramer-American stock he gave or sold to them was free for trading. In the opinion of the Examiner, that evidence is not sufficient to carry the burden imposed upon the respondents. Pelton knew Coggle's

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6/ S.E.C. v. Ralston Purina Co., 346 U.S. 119, 126 (1953); Gilligan, Will & Co. v. S.E.C., 267 F. 2d 461, 466 (C.A. 2. 1959).

position in Kramer-American and neither he nor the other respondents can be permitted to escape responsibility by deciding to accept the representations at face value.[7/] Respondents had a duty to investigate or otherwise learn the facts underlying the representation that stock coming from Coggle was free for trading without registration. Moreover, it appears that Coggle also sold thousands of Kramer-American shares emanating from his options to an individual who immediately resold through brokers doing a nation-wide business. No restrictions having been placed upon the sale of that stock, it is a reasonable inference that some of those resales were to non-residents of California.

Under the circumstances, the Hearing Examiner finds that the respondents wilfully violated Sections 5(a) and 5(c) of the Securities Act by virtue of their participation in an illegal public distribution of unregistered Kramer-American Stock.

While registrant was reselling the Kramer-American stock purchased from Pelton, it was continuously trading in that stock. Quotations by registrant appeared in the Pacific Coast Section of the National Daily Quotation Service almost daily from January 2, 1964 to March 18, 1964, with bid prices ranging from a low of 1-7/8 at the beginning to a high of 3-5/8. In view of the prohibitions of Rule 10b-6 under the Exchange Act, registrant's purchasing and bidding for Kramer-American stock while it was selling Pelton's stock was illegal.

7/ Cf. S.E.C. v. Mono-Kearsarge Consolidated Mining Co., 167 F. Supp. 248, 259 (D. Utah, 1958).

Respondents' contention that registrant's sales of Pelton's stock did not constitute participation in a distribution of Kramer-American stock is rejected. Although the number of Kramer-American shares outstanding in September, 1963 is not definite, the record indicates that the 150,000 shares sold under the Regulation A offering were all that had been issued. Commencing in September, 1963 and continuing for the next six months at an accelerating rate, Kramer-American stock traceable to Coggle entered the market; by the end of March, 1964, around 100,000 additional shares of unregistered Kramer-American stock had reached the public as a result of Coggle's activities. Unquestionably, Coggle was engaged in the distribution of Kramer-American stock during the period in question, and the sales by respondents of 11,610 shares of the 25,000 shares Pelton received from Coggle were part and parcel of that distribution. But even if consideration is limited to the shares that can be traced through Pelton to Coggle's options, the conclusion would be the same. As indicated above, the offer and sale of those shares constituted a part of a distribution subject to registration under the Securities Act. It is well-settled that Rule 10b-6 is applicable to offerings which constitute such distributions.[8/] Furthermore, respondents' sales of 11,610 of those shares, a sales volume equal to 4% or more of Kramer-American's outstanding stock within less than a three-month period, may well be considered a major selling effort amounting to a distribution

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8/ J. H. Goddard & Co., Inc., Securities Exchange Act Release Nos. 7321, p. 4 (1964), 7618 p. 4 (1965); Sutro Bros. & Co., Securities Exchange Act Release No. 7053, p. 8 (1963).

within the meaning of Rule 10b-6.[9/]

In keeping with the foregoing, the Hearing Examiner concludes that the respondents wilfully violated Section 10(b) of the Exchange Act and Rule 10b-6 thereunder.

Bookkeeping and Net Capital Violations

The Division contends that a customer account on registrant's books under the name of H. B. Wade is fictitious. Entries relating to that account indicate that on November 26, 1963 registrant sold 2,000 shares of Kramer-American stock to Wade for $4,250, which shares registrant repurchased on January 8, 1964 at the same price, and that a sale to Wade for $7,250 of 2,000 shares of Kramer-American stock on January 31, 1964 was either canceled or the stock again repurchased on February 10, 1964 at the same price.

Wade, a resident of Salt Lake City, Utah, was unknown to Pelton or Miller, and he personally had never done business with registrant. The orders were placed by Coggle, who had known Wade for several years. Coggle paid registrant with his own check for the stock purchased and received registrant's check, payable to Wade, after the repurchase on January 8, 1964.[10/]

The method of settling the transactions and the identical prices involved in the related purchases and sales in the Wade account,

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9/ Cf. S.E.C. v. Scott Taylor & Company, Inc., 183 F. Supp. 904, 906-8 (S.D.N.Y., 1959); Gob Shops of America, Inc., 39 S.E.C. 92, 103, n. 25 (1959).

10/ The check payable to Wade has two endorsements. The first, purportedly by Wade, is in blank; the second endorsement, "Cr acct Vern Coggle," appears to be in Coggle's handwriting.

the fact that Wade lived hundreds of miles distant from registrant, and respondents' knowledge that Coggle controlled Kramer-American, compel the conclusion that respondents knew or should have known that Coggle, not Wade, was registrant's customer and that the account in question should have been entered on registrant's books in the name of Coggle. The fact that confirmations relating to the transactions were mailed to Wade, when considered in the light of the other circumstances, merely indicates that registrant carried out its deception in the manner least likely to arouse the suspicion of regulatory agencies. Inasmuch as the requirement that books and records be kept by broker-dealers implies that the entries in those books and records be true and accurate,[11/] the Examiner finds that registrant, aided and abetted by Miller and Pelton, wilfully violated Section 17(a) of the Exchange Act and Rule 17a-3 thereunder.

The evidence relating to violations of Rule 15c3-1 ("Net Capital Rule") under the Exchange Act conclusively shows that registrant's financial condition was not in compliance with the Net Capital Rule on four occasions, and that the deficiencies amounted to $1,032.88 as of March 31, 1963; $4,141.93 as of April 30, 1963; $3,263.99 as of May 31, 1963; and $2,261 as of February 29, 1964. The Division, however, has not satisfactorily proved that registrant was also in violation of

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11/ Continental Bond & Share Corporation, Securities Exchange Act Release No. 7135 (September 9, 1963); R. L. Emacio & Co., Inc., 35 S.E.C. 191, 202 (1953).

the Net Capital Rule as of January 31, 1964. The latter issue turns upon whether the 2000 shares of Kramer-American reflected on registrant's books as sold to Wade on January 31, 1964 should be considered a fictitious sale and the 2000 shares regarded as part of registrant's inventory. The circumstances leading to the conclusion that the Wade account was fictitious do not establish that the transactions shown in that account were also fictitious. Granting that the sale in question is suspect, the Hearing Examiner nevertheless finds that the Division failed to prove that Coggle, the actual person to whom the Wade account related, did not purchase the 2000 shares of Kramer-American on January 31, 1964.

But whether registrant had net capital deficiencies on five occasions or only four does not affect the ultimate conclusion that the Division has proved that registrant continued operations while out of compliance with the Net Capital Rule. Accordingly, the Hearing Examiner finds that registrant, aided and abetted by Miller and Pelton, wilfully violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.

Wilfulness

Respondents argue that even though violations may have been committed, wilfulness has not been shown. Their position, however, predicated upon absence of previous warnings by the Division and lack of proof of intent to violate the law, is untenable in the light of well-established principles on this point. The Commission and the courts have ruled on a number of occasions that for purposes of Section

15(b) of the Exchange Act, wilfulness does not require that a person have been previously warned or notified about similar acts,[12/] nor that a person know that he is breaking the law, but only that he intended to do the act that resulted in the violation.[13/] Measured by such standard, there is no question that respondents' violations were wilful.

Public Interest

In view of the injunction and the wilful violations found herein, it is necessary to determine what remedial action is appropriate in the public interest. Respondents believe that a suspension of not more than six months would be sufficient because the public has not been harmed, the violations are "technical," and publicity resulting from the proceeding has been prejudicial to respondents. The Hearing Examiner disagrees. The 11,610 shares of Kramer-American stock that Pelton disposed of through registrant enriched him by nearly $35,000 at the expense of a public which is now without a market for that stock. Moreover, the effect of respondents' activities was to raise the market price of Kramer-American stock at a time when Coggle and Pelton were benefitting from an increased price the public would not have paid in an independent market. Nor were other violations

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12/ Gearhart & Otis, Inc., Securities Exchange Act Release No. 7329, p. 8 (1964).

13/ Hughes v. Securities and Exchange Commission, 174 F 2d 969, 977 (C.A.D.C., 1949); Churchill Securities Corp., 38 S.E.C. 856, 859 (1959), and cases cited therein.

"technical," for the rules relating to the application for registration, bookkeeping, and net capital of a broker-dealer are at the heart of the regulatory scheme adopted by the Commission under the Exchange Act for protection of investors.[14/]

The Examiner concludes that the public interest requires revocation of registrant's registration as a broker-dealer and expulsion of it from membership in the NASD, and that Miller and Pelton should be found causes of that action. It is further concluded, in view of the absence of prior disciplinary action by regulatory authorities, that the public interest does not require a bar from association with a broker-dealer to be imposed against Miller and Pelton.[15/]

Accordingly, effective as of the date that the Commission enters an order pursuant to this initial decision as provided for by Rule 17 of the Rules of Practice (17 CFR 203.17), and subject to the provisions for review afforded by that rule, IT IS ORDERED that the

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14/ S.A.E. Corporation, Securities Exchange Act Release No. 6956, pp.1-2 (1962); Midas Management Corporation, 40 S.E.C. 707, 709 (1961).

15/ The parties have engaged in considerable argument over the significance to be attached to Pelton's failure to testify. The Examiner agrees with the Division's position that an inference may be drawn that Pelton's testimony, if given, would be adverse to his cause. N. Sims Organ & Co. v. S.E.C., 293 F. 2d 78, 80-81 (C.A. 2, 1961), cert. denied 82 S. Ct. 440; Heft, Kahn & Infante, Inc., Securities Exchange Act Release No. 7020, p. 7 (1963). However, the Examiner did not take such inference into consideration in determining whether violations had been proved nor in deciding the extent of the remedial action necessary in the public interest.

registration as a broker and dealer of Assurance Investment Company be revoked; that Assurance Investment Company be expelled from membership in the National Association of Securities Dealers, Inc.; that Miller and Pelton each be found a cause of the ordered revocation and expulsion; and that each of them be suspended for a period of twelve (12) months from being or becoming associated with any broker or dealer as that term is defined in Section 3(a)(18) of the Securities Exchange Act of 1934.[16/]

Warren E. Blair
Hearing Examiner

Washington, D. C.
July 6, 1965

16/ To the extent that the proposed findings and conclusions submitted by the parties are in accord with the views set forth herein they are sustained, and to the extent that they are inconsistent therewith they are expressly overruled.