

ADMINISTRATIVE PROCEEDING
FILE NO. 3-8155

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
DAVID M. HABER

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INITIAL DECISION

Washington, D.C.
July 13, 1994

Edward J. Kuhlmann
Administrative Law Judge

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APPEARANCES: Edwin H. Nordlinger, Ellen N. Hersh, and Bruce
H. Newman for the Division of Enforcement

David M. Haber, pro se.

BEFORE: Edward J. Kuhlmann, Administrative Law Judge

This proceeding was instituted by an order of the Commission dated September 13, 1993 pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78o(b) and 78s(h), to determine whether remedial sanctions are appropriate in the public interest in light of respondent David M. Haber having been permanently enjoined by the United States District Court of New Jersey, on consent, from violating Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, 15 U.S.C. §§ 77e(a), 77e(c), and 77q(a), and Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rules 10b-5 and 10b-6 thereunder. A hearing was held on March 24, 1994. The Division of Enforcement filed a brief and proposed findings and conclusions on May 2, 1994, the respondent filed a brief and proposed findings and conclusions on June 20, 1994, and the Division filed a reply on July 1, 1994.

FINDINGS OF FACT

According to the complaint filed on August 9, 1990 in the United States District Court for the District of New Jersey, the respondent began working, in October 1984, as a registered representative at Monmouth Investments, Inc., a Florida corporation that operated as a registered broker-dealer from August 1984 to the end of March 1989. Ex. 2.^{1/} In November

^{1/} The Division and the respondent cite in the their proposed findings an outline and legal theory of his case that the respondent filed on December 27, 1993. Rule 16 of the rules of practice states that initial decisions are to be based on facts "presented on the record." That requirement assumes that the evidence on which the findings are based has been submitted at the hearing and has been ruled relevant by the presiding officer. The outline submitted by the respondent was not submitted for the
(continued...)

1987, the respondent became a registered principal and 10 percent to 25 percent owner of Monmouth. Id. From November 1988 through the end of March 1989, he was the President of Monmouth. Id. Monmouth's principal place of business was in Englishtown, New Jersey; it maintained 14 branch offices in six states and employed 300 registered representatives.

The respondent controlled or shared control over the management, policies, and over-the-counter trading activities of Monmouth during the period that he was President of Monmouth. Id. The complaint alleged that the respondent participated in Monmouth's manipulation of the market for Beres Industries common stock, in violation of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The respondent allegedly participated in Monmouth's offers and sales to the public of unregistered shares of Beres Industries common stock in violation Sections 5(a) and 5(c) of the Securities Act. The complaint also stated that Haber caused Monmouth to bid for and purchase shares of Beres common stock which were the subject of a distribution, while Monmouth participated in the distribution, in violation of section 10(b) of the Exchange Act and Rule 10b-6 thereunder. Id.

The respondent represented that he offered to cooperate with the Commission if the Commission were willing to settle the case

^{1/} (...continued)
record during the hearing and will not be considered in this decision. It appears that the facts cited should have been stipulated.

against him. Tr. 54, 56. The record reflects, however, that the respondent refused to testify in the Division's investigation about matters alleged in the complaint and that he asserted the privilege against self-incrimination. Jt. Ex. 1; Ex. 13. The respondent took the same position in the District Court proceeding. Joint Ex. 1; Div. Ex. 14. He has also refused to testify about Monmouth in an investigation by the Commission staff into Corporate Capital Resources, Inc. Tr. 65. He said that he would consider the answers to all questions privileged pursuant to his right under the Fifth Amendment to the Constitution. Tr. 67.

The respondent stipulated in this proceeding that he resided at 365 Avenida de los Arboles #202, Thousand Oaks, California, but, in fact, that is not his residence. Joint Ex. 1; Tr. 69. The respondent's answer admits that he was associated with Monmouth between October 1984 and March 1989 but he denied in his answer that he was president from November 1988 through March 1989. This was after he had earlier admitted in his answer to the complaint in the federal district court that he was president. Div. Ex. 3 at 3.

The respondent participated in the distribution of unregistered Beres stock. On December 9, 1988, Harold Zuber sold 75,000 shares of restricted Beres stock to Monmouth, purportedly in conformity with the requirements of Rule 144. Div. Ex. 5; Div. Ex. 73; Div. Ex. 74. The respondent wrote the order ticket. Div. Ex. 2 at 25.; Div. Ex. 3 at 5. Monmouth purchased the Beres

stock at \$1.50 per share. Div. Ex. 73; Div. Ex. 74. At the time, Monmouth had a short position in Beres stock, which it had incurred by selling Beres stock to its customers for approximately \$3.00 per share. Div. Ex. 77; Joint Ex. 2; Resp. Ex. B. The respondent carried out the Harold Zuber sale despite the fact that he was "reluctant to ... since he had suspicions about earlier sales by certain Beres principals." Div. Ex. 4.

In connection with the Zuber sale, Haber instructed Lawrence Garfinkle to fill in the blanks on a broker's representation letter. Resp. Ex. H at 56-57. Haber then signed the broker's representation letter for the Zuber sale, in which Haber stated that:

We have either (1) purchased the shares directly from the Seller in our capacity as "market maker" as that term is defined in Section 3(a)(38) of Securities Exchange Act of 1934 or (11) done no more than execute the order or orders to sell the Shares as agent for the Seller; and received no more than the usual and customary broker's commission.

Div. Ex. 6.

False broker representation letters provided by Haber were used by Beres' counsel, Philip I. Kagan, to draft legal opinion letters which authorized Beres' transfer agent to remove the restrictive legend from the Beres affiliates' shares and convert them into "street name." Div. Ex. 2 at 26-27.

The respondent also had a role in the manipulation of the market for Beres stock. Monmouth established a rule in November or December 1988 that brokers who allowed customers to sell a security that the customer had not held for more than 90 days would lose the commission earned on the customer's original

purchase of the stock being sold. Resp. Ex. E at 17. The respondent enforced the rule by requiring registered representatives to write original customer purchase dates on customer sell tickets. Resp. Ex. E. at 19, 20. During the time that the respondent was President of Monmouth, registered representatives received commissions for customer purchase orders of stock but not for customer sell orders. Resp. Ex. E at 23-24. However, registered representatives would receive commissions if a customer sold Corporate Capital Resources, Inc. and used the proceeds to purchase Beres stock. Resp. Ex. G at 55-56.

The respondent played an active role in the management of Monmouth when he was president. The respondent determined the commission that registered representatives would receive on the purchases of Beres stock. Resp. Ex. F at 42. He monitored Monmouth's intra-day positions in Beres stock and determined markups and markdowns on the stock. Resp. Ex I at 29, 35-36.

CONCLUSIONS

On August 17, 1993, the respondent, David M. Haber, was permanently enjoined, on consent, by the United States District Court of New Jersey, from violating Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rules 10b-5 and 10b-6 thereunder. SEC v. Beres Industries, Inc., et al., 90 Civ. 3260 (MLP) (D.N.J.). The Division of Enforcement urges that, in light of the injunction,

the public interest would be served if the respondent is barred from associating with any broker-dealer.

"[T]he action required in the public interest as the result of an injunction may be inferred from all the circumstances surrounding the injunctive action." Charles Phillip Elliott, 52 SEC Docket 2011, 2018 (September 17, 1992). The allegations in the complaint may be given considerable weight for purposes of assessing the public interest. Id. The Commission generally takes into account the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct and the likelihood that his occupation will present opportunities for future violations. Steadman v. SEC, 603 F. 2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

The Egregiousness of the Respondent's Conduct

Respondent participated in a transaction that violated Sections 5(a) and 5(c) of the Securities Act when he purchased unregistered Beres stock at \$1.50 per share that was used to cover short sales at \$3.00 per share. The respondent signed the broker's representation letter in which he stated that the transaction represented no more than the usual and customary broker's fee, when in fact the profit to Monmouth was approximately 100 percent. These letters also served as the

basis for removing the restrictive legend from the shares by Beres' counsel.

Respondent was responsible for practices at Monmouth which violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rules 10b-5 and 10b-6 thereunder. From November 1988 through March 1989, Monmouth dominated and controlled trading in Beres stock. During that time the respondent implemented practices that manipulated the market for Beres stock. He enforced a rule at Monmouth that withdrew the commission a registered representative earned on the sale of Beres stock if the stock was sold within 90 days of the purchase. Respondent also distributed unregistered Beres stock and induced Monmouth's clients to buy it by having Monmouth bid for the Beres stock in order to create the unjustifiable impression of market activity. Haber's practices utilized Monmouth's domination and control of the market to establish and maintain artificial price levels for Beres stock. The policies he maintained and enforced were designed to discourage Monmouth's registered representatives from accepting customer sell orders in Beres stock. His actions also restricted the supply of Beres stock that was taken into Monmouth's proprietary account and thereby artificially supported the price without informing Monmouth's customers.

The Respondent's Scienter

Even after the respondent had been told by his counsel that the purchase of unrestricted stock to cover Monmouth's short position may not have been legal, he completed the transaction.

He misrepresented in the broker's representation letter the true nature of the transaction. He also knew of and enforced practices that permitted Monmouth to manipulate the market for Beres stock. He knew that actions he took induced Monmouth and Monmouth's customers to bid for Beres stock. His actions exhibited an intent to deceive, manipulate and defraud. Under any method of evaluation, his actions were reckless.

The Recurrent Nature of Respondent's Conduct

The conduct described in this decision took place over five months when the respondent was president of the firm. The manipulative and illegal practices were numerous and recurring.

The Respondent's Recognition of His Wrongdoing and the Risk of Future Violations

The respondent has not offered any assurance that he will not use the same practices and schemes again if he is given the opportunity. He does not admit or deny that he engaged in the activities cited. He has repeatedly and consistently invoked the privilege of remaining silent about his role. The evidence of his illegal conduct has all been derived by the Commission from other sources. While the respondent stated at the hearing that he had offered to cooperate, he did not. There is no evidence that the respondent has recognized his misconduct.

Moreover, the respondent has indicated that he would like to continue in the brokerage business. After he left Monmouth, he became president of a broker-dealer for a period of time. He did not state in this proceeding what he does now. His secretiveness has led to his falsely stipulating that his mail

drop was his residence. He did so, he said, in order to avoid having other people who have legal claims against him know where he lives.^{2/}


The respondent has not demonstrated that he no longer presents a risk to investors. He introduced no evidence that he is now reliable and recognizes that his conduct at Monmouth was wrong. Instead, his behavior in this proceeding exhibited a willingness to lie and withhold the truth. There is every reason to believe that the respondent if given an opportunity would not act in an honest and forthright manner in dealing with customers for securities. The respondent has been unwilling to cooperate with the Division in its efforts to uncover illegal activity at Monmouth. His conduct requires a sanction in order to deter others and to protect the public.

Based on a preponderance of evidence, the appropriate sanction in the public interest is to bar the respondent from any association with a broker-dealer.

^{2/} The respondent in his answer raised five affirmative defenses which the Division has addressed in its brief. Those defenses are that the proceeding is barred by laches, the allegations restated from the complaint in the Federal District Court proceeding are so vague it would be unconstitutional to premise a sanction on them, the Commission is estopped to rely on matters raised in the complaint, the Commission is barred from seeking monetary sanctions against the respondent as a result of his bankruptcy proceeding, and the respondent is already effectively barred as a result of the injunction and is no longer associated with a broker-dealer. The respondent did not address these defenses at the hearing and failed to do so in his brief as required by Rule of Practice 16(d) and, therefore, any claim he may have had based on these arguments is waived.

ACCORDINGLY, IT IS ORDERED, that pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934, David M. Haber is barred from associating with any broker-dealer.

Pursuant to Rule 17(f) of the Rules of Practice, this initial decision will become the final decision of the Commission as to any party who has not, within fifteen days after service of this initial decision, 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 the decision. If the applicants timely file a petition for review, or the Commission takes action to review, the initial decision will not become final. ^{3/}


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^{3/} The respondent raises various other arguments which have been considered and rejected. All proposed findings and conclusions submitted by the parties have been considered, as have their arguments. To the extent such proposals and contentions are consistent with this initial decision, they are accepted. The conclusions reached are based upon a preponderance of the evidence.