

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-3620

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of  
DINKY'S INC.  
(24SF-3852)

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**FILED**  
JAN - 3 1973  
SECURITIES & EXCHANGE COMMISSION

INITIAL DECISION

January 3, 1973  
Washington, D.C.

Warren E. Blair  
Chief Administrative Law Judge

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(24SF-3852)

INITIAL DECISION

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APPEARANCES: Carl B. Noelke, Michael A. Bertz, and Walter McCormies, of the Los Angeles Regional Office of the Commission, for the Division of Corporation Finance.

Milo M. Marchetti, Jr., for Dinky's Inc.

Samuel R. Calabrese, pro se.

Charles A. Calabrese, pro se.

Edward R. Ressler, pro se.

Charles F. Camarata, pro se.

William J. Raggio, pro se.

Rose M. Murray, pro se.

BEFORE: Warren E. Blair, Chief Administrative Law Judge

By order of the Commission dated April 5, 1972 ("Order"), the exemption of Dinky's Inc. ("Dinky's") from the registration requirements of the Securities Act of 1933 ("Securities Act") provided under Regulation A of that Act was temporarily suspended. The Order charged that Dinky's notification and offering circular filed under Regulation A contained untrue statements of material facts and omitted to state material facts necessary in order to make the statements made not misleading. In substance, the Order alleged that Samuel Calabrese, who is subject to an injunction involving Federal securities laws, and Charles Calabrese were undisclosed promoters of Dinky's, that Samuel Calabrese was also an undisclosed affiliate of the company, and that proper disclosure was not made concerning the issuance and sale of Dinky's common stock to officers and directors of the company. It is further alleged that the offering, if made, would be in violation of Sections 5 and 17 of the Securities Act.

An answer which generally denied the allegations in the Order was filed by Dinky's and a hearing was held pursuant to the requests of Dinky's and Contemporary Securities Corporation, the underwriter of the proposed offering. Dinky's appeared and was represented by counsel <sup>1/</sup> throughout the hearing, but no appearance was made by Contemporary Securities Corporation. Additionally, Samuel Calabrese was admitted as a party upon request of his counsel,

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1/ Dinky's counsel, Milo Marchetti, Jr., is also Dinky's president.

who thereafter actively participated in the hearing on behalf of his client. <sup>2/</sup> Upon their separate requests, certain of Dinky's officers and directors <sup>3/</sup> as well as Charles Calabrese and Rose Murray, president of Project Inc., an affiliate of Dinky's, were also admitted as parties, but they did not actively participate in the hearing as such, nor did they desire counsel to represent them.

As part of the post-hearing procedures, successive filings of proposed findings, conclusions and briefs were specified. Timely filings were made by the Division of Corporation Finance ("Division") but none of the other parties filed proposals or briefs.

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

#### ISSUER

Dinky's Inc., was incorporated on October 27, 1971 under the laws of Nevada for the purpose of operating a group of mobile fast food units specializing in popular food items. The company's offices are located in Las Vegas, Nevada.

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- <sup>2/</sup> Shortly after the hearing, Ivan Ezrine, counsel for Samuel Calabrese, withdrew from the proceeding. Samuel Calabrese was given time within which to engage other counsel but did not avail himself of that opportunity.
- <sup>3/</sup> Edward R. Ressler, vice-president and director, Charles F. Canarata, secretary and director, and William J. Raggio, director.

On January 24, 1972 Dinky's filed a notification and offering circular for the purpose of obtaining an exemption from the registration requirements of the Securities Act pursuant to Section 3(b) thereof and Regulation A thereunder for a proposed public offering of 100,000 shares of its 1¢ par value common stock at \$5 per share. The underwriter, Contemporary Securities Corporation, agreed to use its best efforts to find purchasers for that stock.

#### DEFICIENCIES IN REGULATION A FILING

##### Failure to Disclose Identities of Promoters and Affiliate

The genesis of Dinky's can be traced to Rose M. Murray, a member of the Calabrese family living in Las Vegas. In September, 1971, needing a means of making a living, she telephoned her nephew, Samuel Calabrese ("Calabrese"), who lived near Los Angeles, to ask his aid in organizing a fast-food business. Specifically, Calabrese's help was sought in connection with financing and locating sites for the operation because she knew that he had more business experience than anyone else in the family. Calabrese, being a member of a close-knit family group and feeling a moral obligation towards his aunt because of financial set-backs she had suffered in connection with other family businesses, reacted by talking with his uncle, Charles Camarata, and traveling with him to Las Vegas for a meeting with her. There they had a long discussion with Rose Murray regarding the fast food concept that she had in mind and

concluded that an attorney should be engaged to handle the matter.

Returning to California, Calabrese held a meeting in his office on October 7, 1971 which his brother, Charles Calabrese, attended together with Camarata, Milo Marchetti, Jr. ("Marchetti"), an attorney, Milo Marchetti, Sr., the attorney's father, and Edward Ressler, brought by Marchetti as a person who might also be interested in the proposed operation. In the course of that meeting, the formation and financing of the proposed corporation were discussed, the name "Dinky's" was suggested, and Marchetti became Dinky's counsel at Calabrese's request. Additionally, Calabrese participated in at least one other preincorporation meeting at which the topics of Dinky's financing and Camarata's becoming an officer of Dinky's were discussed. At that meeting Calabrese also suggested that Ivan Ezrine, a New York lawyer who had previously represented Calabrese in securities matters, be contacted regarding the proposed financing of Dinky's through a Regulation A stock offering. That suggestion was adopted and Calabrese telephoned Ezrine, informing him about the proposed financing and asking him to review the documents that Marchetti was preparing for the Regulation A filing. Ezrine agreed and at Calabrese's request attended a meeting in Los Angeles on December 10, 1971 at which Calabrese, Marchetti, Larry G. Ruttan, Ressler, and Charles Calabrese were also present. During that meeting Ezrine reviewed various documents that Marchetti had

brought, made various suggestions concerning the financing, and mentioned Contemporary Securities Corporation as the broker which would handle the offering. Calabrese and his brother also took part in the discussions regarding Dinky's financing.

Pursuant to an appointment arranged by Charles Calabrese, Marchetti and Charles Calabrese conferred with William Raggio, a Las Vegas attorney, on October 11, 1971 for the purpose of having Raggio incorporate Dinky's as a Nevada corporation. Marchetti gave Raggio the basic information needed for forming the corporation to be known as Dinky's, and also requested Raggio to be one of the incorporators and a director of Dinky's. Raggio agreed that he would so act and subsequently brought about the incorporation of Dinky's on October 27, 1971.

At about the same date that Dinky's was incorporated, another corporation, Project Inc. ("Project"), was formed at Marchetti's suggestion for the purpose of limiting Rose Murray's "exposure".<sup>4/</sup> Marchetti informed Calabrese that under Nevada law Project would require only one officer and director and that Rose Murray could serve in those capacities. Project was then used as the vehicle through which Calabrese financed Dinky's by arranging to have his father and mother give Rose Murray \$25,000 in December 1971, \$24,000 of which she placed in Project. In turn, Project gave that \$24,000 to Dinky's as consideration for 400,000 shares of Dinky's stock, 290,000 shares of which were to be issued to Project, 80,000 to

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<sup>4/</sup> Tr. 124.

Marchetti, as Trustee, 10,000 to Ressler, 10,000 to Camarata, and 10,000 to Ruttan, who became an officer of Dinky's after Charles Calabrese asked if he would be interested.

The record clearly establishes that Calabrese and his brother Charles were promoters of Dinky's whose identities as such were required to be disclosed in the notification and offering circular filed by Dinky's under Regulation A. <sup>5/</sup> It is equally clear that Calabrese was also an affiliate of Dinky's as that term is defined under Regulation A and that he should have been so identified in the Dinky's filing.

Under Rule 251 of Regulation A, "the term 'promoter' includes —  
(a) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes the initiative in founding and organizing the business or enterprise of an issuer. " In construing language of similar import, the Commission has ruled that "[o]ne need not take the primary initiative . . . it suffices that his initiative is secondary in character," <sup>6/</sup> and also that, "[t]he situation must be viewed . . . to the end that the substance, <sup>7/</sup> not the form of the transaction, shall control."

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<sup>5/</sup> See Form 1-A, Item 3; and Schedule I, ¶9(a).

<sup>6/</sup> Gold Dust Mining & Milling Co., 3 S.E.C. 55, 61 (1938).

<sup>7/</sup> Ypres Cadillac Mines Limited, 3 S.E.C. 41, 49 (1938).



Here, Calabrese was the moving force behind the creation of Dinky's and the source of the initial financing that Dinky's required pending an infusion of additional capital to be forthcoming from the public. He and his brother, Charles, were active in recruiting the personnel needed to operate Dinky's and the legal, financial, and business talent necessary to launch its operations, and Calabrese personally undertook to find appropriate sites for Dinky's operations. Such activities, and their participation in Dinky's preorganization and subsequent planning sessions, unquestionably brought Calabrese and his brother Charles within the letter as well as the spirit of the term "promoter" as defined under Regulation A. Additionally, it is manifest from testimony in the record that Rose Murray was incapable of directing or controlling either Dinky's or Project and that she relied implicitly upon Calabrese to transform her dream of financial security into reality. It is apparent under the circumstances that Calabrese had the power to exercise and did exercise control of Project, that Dinky's was and is under common control with Project, a holder of over 70% of Dinky's outstanding stock, and that Calabrese through his direct and indirect control of Project and Dinky's was a Dinky's affiliate <sup>8/</sup> whose identity as such should have been

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8/ Under Rule 251, "affiliate" is defined as follows:

An "Affiliate" of an issuer is a person controlling, controlled by or under common control with such issuer. An individual who controls an issuer is also an affiliate of such issuer.

disclosed in the Regulation A filing.<sup>9/</sup>

Misrepresentation of Stock Purchases

Under the caption "Interest of Management in Certain Transactions,"

Dinky's offering circular recites:

Contemporaneously with the organization of the Company on October 27, 1971, the Company issued and sold an aggregate of 400,000 shares of Common Stock to a group of five persons. Included in such group are Milo Marchetti, Jr., President and director (80,000 shares); Edward R. Ressler, Vice President and director (10,000 shares); Charles F. Camarata, Secretary and director (10,000 shares); and Larry G. Ruttan, Treasurer and director (10,000 shares). Each of such persons paid \$.06 per share, the Company thereby receiving in cash an aggregate of \$24,000 for such 400,000 shares. Each of such persons executed an investment representation relating to the shares acquired by him and all of such shares have been deposited in escrow for a period terminating thirteen (13) months from the date hereof. [Emphasis added]

In Item 9 of the notification, Dinky's represented that ". . . on October 27, 1971, the Issuer sold an aggregate of 400,000 of its authorized but unissued shares to five persons [Project Inc., Milo Marchetti, Jr., as Trustee, Edward R. Ressler, Charles F. Camarata, and Larry G. Ruttan]. . . at the purchase price of \$.06 per share."

In fact, as was testified at the hearing, Project put up the \$24,000 referred to in the offering circular. Marchetti was to pay 6¢ per share to Project for his 80,000 shares only "if the underwriting was successful" which, in his opinion, would have occurred "if the issue was approved by the S.E.C."<sup>10/</sup>

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<sup>9/</sup> See Form 1-A, Item 2; and Schedule I, ¶9(a).

<sup>10/</sup> Tr. 36-37.

Ressler admitted that he paid nothing for his shares, testifying in effect that he felt the contribution of his reputation and good standing was sufficient consideration for his 10,000 shares, that his counsel had warned him against putting up notes and cash in Regulation A situations, and that Marchetti had told him that payment would not be required unless the underwriting was successful.

Ruttan also admitted that he had not paid for his 10,000 shares, denied that he had purchased those shares, and testified that he had been told by Charles Calabrese and possibly also by Marchetti that the shares were being issued to him for services to be rendered when Dinky's commenced business. Camarata claimed that he had paid \$600 to Rose Murray for his shares. However, the payment to her in cash took place in September, 1971 when she spoke about her idea for a fast food service, and there was no mention to her that the money was in payment for shares in a new corporation. While Camarata testified that at the time he gave Rose Murray the \$600 in September, 1971 he knew that he was to receive 10,000 shares and that at a second meeting with her in September he told her that he was giving her \$600 to pay for 10,000 shares of Dinky's, his testimony is in conflict with evidence that places the first detailed discussions regarding the organization of Dinky's at the October 7 meeting. Further, it appears that Marchetti first learned of the proposed corporation at that meeting on October 7, which would make it impossible for Camarata to have been told, as he testified, that

Marchetti set the price for Dinky's original 400,000 shares at 6¢ per share in September, 1971. Camarata's testimony concerning his payment of \$600 for Dinky's shares is therefore rejected as unworthy of credit, and it is concluded that the \$600 was in fact a loan made to Rose Murray by Camarata and that sometime after the fact, the decision was made to give Camarata 10,000 shares of Dinky's stock as a repayment of that loan.

It is clear from the foregoing that the offering circular and notification materially misrepresented the nature of Dinky's initial financing, concealing the fact that not one of the named individuals had put at risk in Dinky's the sums which a prospective investor would believe were invested by those persons. Further, there was no disclosure of the material fact that Calabrese was the real source of the funds that Dinky's received.

#### UNAVAILABILITY OF REGULATION A EXEMPTION

On December 30, 1969 a permanent injunction was entered against Calabrese and certain others by the United States District Court for the Southern District of Florida enjoining Calabrese and his codefendants from engaging in acts and practices which constitute violations of Sections 5(a) and 5(c) of the Securities Act. <sup>11/</sup> Under the provisions of Rule 252(d) of Regulation A, no

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11/ S.E.C. v. Standard Computer & Pictures Corporation, et al., 69-1522 Civ. (S.D. Fla. 1969).

exemption was available for the securities of Dinky's by reason of the permanent injunction against Calabrese, who was, as earlier noted, a promoter, affiliate, and a finder of desirable locations for Dinky's food outlets at the time of Dinky's Regulation A filing.<sup>12/</sup> Further, the absence of disclosure of the existence of the permanent injunction against Calabrese in Item 6 of the Form 1-A Notification makes the response to that Item false and constitutes an added failure to comply with the terms and conditions of Regulation A.

#### CONCLUSION

In view of the false and misleading notification and offering circular filed by Dinky's and the finding that an exemption under Regulation A is not available for the proposed offering in question, it is concluded that the offering, if made, would be in violation of Sections 5 and 17 of the Securities Act. It is also concluded that the noted deficiencies are of such nature that the temporary suspension of Dinky's exemption under Regulation A should be made<sup>13/</sup> permanent.

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<sup>12/</sup> Rule 252(d), in pertinent part provides:

No exemption under this regulation shall be available for the securities of any issuer, if . . . any of its promoters presently connected with it in any capacity, . . . (2) is subject to any order, judgment or decree of any court of competent jurisdiction . . . permanently enjoining . . . such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security . . . .

<sup>13/</sup> All proposed findings and conclusions submitted have been considered, as have the contentions. To the extent such proposals and contentions are consistent with this initial decision, they are accepted.

Accordingly, IT IS ORDERED, pursuant to Rule 261 of Regulation A under the Securities Act of 1933, that the exemption of Dinky's Inc., under Regulation A be, and it hereby is, permanently suspended.

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

Pursuant to Rule 17(f) of the Rules of Practice, this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision 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.



Warren E. Blair  
Chief Administrative Law Judge

Washington, D.C.  
January 3, 1973