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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
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In the Matter of
TABBY'S INTERNATIONAL, INC.
(24SF-3470)

INITIAL DECISION

Washington, D.C.
April 13, 1972

Warren E. Blair
Chief Hearing Examiner

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
TABBY'S INTERNATIONAL, INC. : INITIAL DECISION
(24SF-3470) :

APPEARANCES: Marvin G. Pickholz, for the Division of Corporation
Finance of the Commission.

Richard B. Marx, of Frank, Strelkow & Marx, for
Tabby's International, Inc.

BEFORE: Warren E. Blair, Chief Hearing Examiner

By order of the Commission dated May 12, 1971 ("Order"), the exemption of Tabby's International, Inc. ("Tabby'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 Tabby'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 the notification failed to disclose all other present or proposed offerings of Tabby's securities, the correct underwriting discounts and commissions, and the method by which the stock was to be offered. It further alleged that the aggregate public offering price of the securities and the aggregate gross proceeds received exceeded the maximum amount permissible under Regulation A, and that the Form 2-A filed in connection with the offering was false and misleading with respect to the date of completion of the offering, gross proceeds received, underwriter's discount, and ultimate public offering price. Allegations were also made that the offering circular failed to disclose that the underwriter repurchased Tabby's stock prior to completion of the offering at prices higher than that at which such stock had been sold under the offering, failed to disclose financial inducements offered to brokers and dealers to promote Tabby's stock, failed to disclose that the underwriter would attempt to give an impression that the offering was

closed by transferring Tabby's stock to non-existent nominees, and failed to disclose the correct aggregate offering price of the offering. Additionally, the Order alleged that by reason of the foregoing activities the offering was made in violation of Section 17(a) of the Securities Act.

A request for hearing "for the purpose of refuting the charges" was filed by Tabby's, and the matter was then scheduled for hearing. Subsequently counsel for Tabby's and counsel for the Division of Corporation Finance ("Division") entered into a stipulation of facts which they agreed were to be deemed as proved and were to constitute "the factual basis for any Opinion, Findings of Fact and Order of the Commission." Pursuant to the request of counsel for the parties, the stipulation was accepted, thereby obviating the need for an evidentiary hearing. Post-hearing procedures requiring successive filings of proposed findings, conclusions, and briefs were specified; those documents were timely filed by the parties.

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

ISSUER

Tabby's International, Inc., was incorporated in June, 1969 under the laws of Florida for the purpose of engaging in the restaurant business by construction and operation of a restaurant in California. The company's principal office is in Miami Beach, Florida.

On June 25, 1969 Tabby's filed a notification and offering circular pursuant to Regulation A under the Securities Act for the purpose of obtaining an exemption from the registration requirements of that Act for a proposed offering of 150,000 shares of its common stock at \$2 per share. J.M. Kelsey & Co., Inc. ("Kelsey") was designated in October, 1969 as the underwriter for the offering on a "best efforts" basis, with the stock to be offered on terms of "50 percent or none for a period of 90 days." Kelsey remitted an aggregate of \$265,000 to Tabby's in November and December, 1969 as proceeds from the offering.

In accordance with the representation in the offering circular, Tabby's constructed and operated a restaurant in California. Several months after the opening, the restaurant was closed, and recently sold.

Misleading Statements in Offering Circular

Kelsey commenced offering Tabby's stock on November 10, 1969 but before completing the offering began without respondent's knowledge to repurchase Tabby's stock for its own account. A total of 74,900 shares were so repurchased on November 24, 1969 from 107 customers at prices ranging from \$4 to \$4.50 per share. Kelsey continued its repurchasing program into December, 1969 and also began to resell the repurchased Tabby's stock to the public. By December 24, 1969, at which date the offering was still not completed, 115,700 shares of Tabby's stock had been repurchased and 25,300 of those shares

resold by Kelsey.

Quotations on Tabby's stock by five broker-dealers began appearing in the National Quotation Bureau's daily quotation service ("pink sheets") on November 20, 1969. Four of the five broker-dealers making the market at a price of \$4 were in the pink sheets at the request of Kelsey, who had represented to them that the offering of Tabby's stock had been closed. These broker-dealers were not told by Kelsey that the offering was not closed, nor was it disclosed to them by Kelsey that Tabby's stock had been sold to Kelsey nominees, and that Kelsey was repurchasing and reselling Tabby's stock at prices above the offering price. Additionally, during the period from November 10, 1969 through December 24, 1969, Kelsey offered broker-dealers, other than the referred-to market makers, a premium of 50¢ per share, and guaranteed that if they held Tabby's shares for one month, another broker-dealer would purchase the stock from them at a profit.

It is concluded that the Tabby's offering circular is materially false and misleading in failing to disclose (1) the activities of Kelsey in connection with its repurchases and resales of Tabby's stock during the offering period, (2) the financial inducements Kelsey made to other broker-dealers to promote Tabby's stock, and (3) the correct aggregate offering price, which exceeded \$300,000 by reason of Kelsey's method of distribution.

Contrary to the representations in the offering circular, Kelsey did not offer 150,000 shares of Tabby's stock to the public

at \$2 per share. Instead, a portion of that offering was simply placed with Kelsey nominees and persons who either returned or allowed Kelsey to repurchase their Tabby's stock. Tabby's stock that was so returned to Kelsey's hands had not come to rest in the hands of the investing public and therefore continued to be part of the distribution under the Regulation A offering at the time of its resale. ^{1/} Since Kelsey sold the repurchased stock "at prices above the offering price," it is also clear that the actual offering price of Tabby's stock exceeded \$2 per share and the aggregate offering price to the public exceeded \$300,000, thereby rendering the offering circular materially misleading in those respects. ^{2/} Moreover, the absence of disclosure in the offering circular of Kelsey's manipulative attempts to create the appearance of an independent market for Tabby's stock at a level of \$4 per share left an erroneous impression of the attractiveness of Tabby's stock as an investment which would be highly misleading to potential investors.

Failure to Comply With Terms and Conditions of Regulation A

As has been noted, the sales of Tabby's stock by Kelsey at prices higher than the \$2 offering price resulted in an aggregate offering price of the securities exceeding \$300,000. Since Regulation A at the time in question limited the exemption available under that regulation to an aggregate offering price of not more

^{1/} Lewisohn Copper Corp., 38 S.E.C. 226 (1958).

^{2/} Id., at 235.

than \$300,000, it follows that the Tabby's offering failed to comply with the limitation governing the amount of securities exempted under Regulation A.

Additionally, it is evident from Kelsey's sales of Tabby's stock at prices higher than the offering price that Kelsey received more than the amount of underwriting discounts or commissions shown in the offering circular. At the time of the Tabby's offering, Schedule I under Regulation A required the offering circular to set forth the underwriting discounts or commissions on a per share or other unit basis, and the failure to do so in a true and correct manner constituted a failure to comply with the terms and conditions of Regulation A.

Schedule I also required, under Item 5, that the offering circular describe the method by which Tabby's stock was to be offered. Tabby's offering circular makes no mention of the method of offering actually adopted by Kelsey, and that omission makes the offering circular inadequate to meet the required description.

Respondent also failed to comply with the reporting requirements imposed by Rule 260 under Regulation A in that the Form 2-A filed by Tabby's on April 6, 1970 erroneously stated that the offering commenced on October 15, 1969 and was completed November 19, 1969. As stipulated by respondent, Kelsey "actually commenced to offer Tabby's stock on November 10, 1969 and had not completed the offering as of December 24, 1969." In view of that stipulation, respondent's argument that the

date of completion of the offering remains open to question is without substance. Additionally, the Form 2-A as filed was inaccurate with respect to the gross proceeds received from the sale to the public and the underwriter's discount. Kelsey's activities, as noted before, raised the gross proceeds from the public to above the \$300,000 reported by Tabby's, and the underwriter's discount did not conform to that shown in the offering in the offering circular and reported in the Form 2-A.

Section 17(a) of the Securities Act

The acts and practices of Kelsey which made the offering circular misleading operated as a fraud and deceit upon purchasers of Tabby's stock who were unaware that Kelsey had manipulated the price of that stock. It is therefore concluded that the Tabby's offering was made in violation of Section 17(a) of the Securities Act.

Suspension of the Regulation A Exemption

The exemption under Regulation A is conditional and its availability dependent upon compliance with the specific provisions and standards laid down by the provisions of that regulation. In view of the findings that the Tabby's offering circular was false and misleading, that the terms and conditions of Regulation A were not complied with, and that the offering was made in violation of Section 17(a) of the Securities Act, it is concluded that the exemption of Regulation A should be permanently suspended.

Respondent argues that it cannot be held responsible for the underwriter's activities, of which it was entirely unaware. That argument is contrary to the Commission's ruling in Utah-Wyoming Atomic Corporation,^{3/} and cannot be accepted.^{4/} Here, as in the Utah-Wyoming case, the issuer's lack of knowledge concerning the underwriter's unlawful activities does not determine the issues. The question under consideration is not whether the issuer had knowledge of the underwriter's conduct but whether the express provisions and standards of Regulation A have been met in connection with the Tabby's offering.

It is true that respondent should not be viewed in the same light as an issuer who has knowingly misused Regulation A or permitted its underwriter to do so, but standing alone, a showing of lack of knowledge of an underwriter's activities is not sufficient to justify a vacation of a temporary suspension nor the granting of relief from the effects of an order of permanent suspension.^{5/} The record is barren of evidence relating to the circumstances which led to respondent's selection of Kelsey as its underwriter from which a determination can be made as to whether respondent used reasonable care. Without a showing that the

^{3/} 36 S.E.C. 454 (1955).

^{4/} Respondent's contention that the Utah-Wyoming case cannot be given weight is based upon erroneous assumptions that the decision was that of a hearing examiner and that the Commission had not rendered its decision in the matter. As set forth in the Utah-Wyoming opinion at p. 455, the Commission noted: "On the basis of an independent review of the record, we make the following findings and conclusions."

^{5/} Cf. Decorative Interiors, Inc., 41 S.E.C. 811 (1964).

selection was made only after careful weighing of Kelsey's qualifications to act as an underwriter, respondent cannot be found deserving of relief from consequences flowing from the actions of its chosen agent.^{6/}

An argument is advanced by respondent to the effect that a finding against it in this matter would be in derogation of the prohibition in the United States Constitution against the passage of ex post facto laws.^{7/} While the rationale of that argument is unclear, it appears that respondent is claiming that the notification and offering circular were free of defects at the time of filing and that under the Constitution respondent cannot be held responsible for the later actions of Kelsey which caused the filing to become defective. If that is the thrust of respondent's contention, it cannot be accepted. The burden of continuing compliance with the terms and conditions of Regulation A falls upon the person seeking the Regulation A exemption.^{8/} That being so, there can be no ex post facto aspect involved in a finding that because of a failure to comply with Regulation A, the exemption should be suspended.^{9/}

^{6/} Automata International, Inc., Securities Act Release No. 4719 (1964), Baxter & Friedman as the Mandingo Company, Securities Act Release No. 4783 (1965), and Mid-Hudson Natural Gas Corp., 38 S.E.C. 639 (1958), relied upon by respondent to support its request for relief are of no avail in the absence of facts that would justify vacation of the temporary suspension order or relief under Rule 252(f) of Regulation A.

^{7/} U.S. Const. Art. 1, §9.

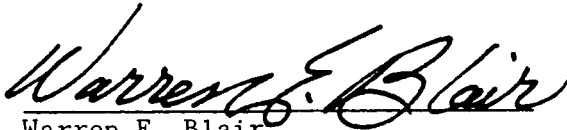
^{8/} See S.E.C. v. Ralston Purina, 346 U.S. 119 (1953).

^{9/} All proposed findings and conclusions submitted by the parties have been considered, as have their 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 Tabby's International, 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 Hearing Examiner

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