

FILE COPY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

FILED

MAY 19 1960

**D M & F SECTION
SECURITIES & EXCHANGE COMMISSION**

In the Matter of :
:
RUDOLPH V. KLEIN, dba :
R. V. KLEIN COMPANY :
170 Broadway :
New York, New York :
:
File No. 8-3174 :

RECOMMENDED DECISION

IRVING SCHILLER
Hearing Examiner

Washington, D. C.

May 19, 1960.

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APPEARANCES:

Andrew N. Grass, Esq., for the
Division of Trading and Exchanges.

No appearance on behalf of registrant.

BEFORE: IRVING SCHILLER, HEARING EXAMINER

Rule IX(d) of the Rules of Practice of the Commission provides, inter alia, that all recommended decisions are advisory only and that the findings, conclusions and other matters contained therein are not binding upon the Commission.

These are proceedings pursuant to Section 15(b) and 15A(1)(2) of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether to revoke the registration as a broker and dealer of Rudolph V. Klein, doing business as R. V. Klein, a sole proprietorship ("registrant"), and whether to suspend or expel registrant from membership in the National Association of Securities Dealers, Inc. ("NASD").^{1/}

On July 14, 1958, registrant filed a request for withdrawal of his registration, the effectiveness of which was stayed, as provided in Rule 15b-6 (17 CFR 240.15b-6) under the Exchange Act, by the institution of these proceedings.

The Order for Proceedings alleges that during the period from approximately June 21, 1956 to approximately December 31, 1956 registrant, by the use of the mails and the means and instruments of transportation and communication in interstate commerce, offered to sell, sold and delivered to certain persons after sale shares of the common stock, par value 1¢, of Micro-Moisture Control, Inc. ("Micro-Moisture") when no registration statement had been filed or was in effect as to the said security under the Securities Act of 1933 ("Securities Act") in

^{1/} Section 15(b) of the Exchange Act as here pertinent provides that the Commission shall revoke the registration of a broker or dealer if it finds that such action is in the public interest and that such broker or dealer is enjoined by any court of competent jurisdiction from engaging in any conduct or practice in connection with the purchase or sale of securities or has willfully violated any provision of the Securities Act of 1933.

Section 15A(1)(2) of the Exchange Act provides for the suspension or expulsion from a registered securities association of any member who had willfully violated any provisions of the Securities Act if the Commission finds that such action is necessary or appropriate in the public interest or for the protection of investors.

willful violation of Section 5(a) and (c) of the Securities Act. It further alleges that the registrant is permanently enjoined by order of the United States District Court from further violations of Section 5 in connection with the offer and sale of Micro-Moisture stock.^{2/}

Service of the Order for Proceedings in the instant case was effected on registrant by registered mail at 170 Broadway, New York City, the address set forth in a supplement to registrant's application for registration, dated August 30, 1954 as the place to be notified of any proceedings in connection with its registration. Registrant's consent to be served with notice at the stated address was never revoked. However, notice of the time and place of hearing, pursuant to the aforesaid Order for Proceedings, and a subsequent notice postponing the hearing date, sent to the registrant by registered mail to the same address mentioned heretofore, were returned undelivered by the United States Post Office Department with the notation that the addressee had moved without leaving any other address.^{3/} An Investigator of the Commission visited the premises of the registrant on several occasions and was informed by an employee of the renting agent, on the occasion of his last visit,

^{2/} Sections 5(a) and 5(c) of the Securities Act make unlawful the use of the mails or facilities of interstate commerce to sell or deliver a security unless a registration statement is in effect as to such security, or to offer to sell any security unless a registration statement has been filed as to such security.

^{3/} The mailings constituted adequate notice to registrant. (See Valley State Brokerage, Inc., S.E.A. Release No. 6130 (December 9, 1959); Intermountain Securities, Inc., S.E.A. Release No. 6178 (Feb. 9, 1960)).

that the registrant had vacated the premises and left no forwarding address. No amendment was filed by registrant to show a new address.^{4/} Registrant did not appear at the hearing. Proposed findings were filed by the Division of Trading and Exchanges.

On April 23, 1958, the United States District Court for the Southern District of New York permanently enjoined registrant, among others, from further violations of Section 5 of the Securities Act in connection with the public offer and sale of unregistered stock of Micro-Moisture. Findings of fact and conclusions of law were entered by the Court.^{5/}

The Hearing Examiner takes official notice of the District Court's reported findings and conclusions which in so far as it relates to registrant are summarized below.

Registrant became registered as a broker and dealer in September, 1942. Micro-Moisture was organized as a Delaware corporation in January, 1953. On June 21, 1956, Micro-Moisture issued 2,396,485 shares of its common stock to Converters Acceptance Corporation, Ltd. ("Converters"), a Canadian corporation, in exchange for that company's assets. Converters distributed these shares to its 31 stockholders, including one Joseph

^{4/} Section 15(b) of the Exchange Act provides in pertinent part that an application for registration as a broker or dealer shall contain such information as the Commission may require by rules and regulations, and Rule 15b-2 requires the filing of an amendment to the application whenever any of the information therein has for any reason become inaccurate.

^{5/} S.E.C. v. Micro-Moisture Controls, Inc., 167 F. Supp. 716 (1958); aff'd sub nom S.E.C. v. Culpepper, 270 F. 2d 241 (C.A. 2, 1959).

Herschorn. Twenty-six of the remaining stockholders immediately granted Herschorn irrevocable powers of attorney to sell their shares at his sole discretion. Of the shares issued in the Converters transaction, at least 710,623 shares were sold to a number of broker-dealers who resold them to the public in this country through the use of the mails. During the period from early in July, 1956 to approximately December 18, 1956, registrant acquired 53,000 of these shares through the use of the mails and offered to sell, sold and delivered them to public investors in this country.

Registrant arranged with Louis Levin, president of Micro-Moisture, to purchase 17,500 of such shares and "at the advice and instructions of Mr. Levin" made out the checks in payment of the said 17,500 shares to the order of John Herschorn and on further instructions of Levin delivered the checks to one John J. McKenna, a former officer of McGrath Securities Corporation and received delivery of the stock from the latter. Registrant admitted that the price for the 17,500 shares was set by Levin, who also advised registrant that such shares of stock "were free trading shares". Registrant also knew that Herschorn held powers of attorney at the time he purchased the 17,500 shares. No registration statement with respect to the 710,623 shares sold to the public had been filed with the Commission or was in effect under the Securities Act. Herschorn and the twenty-six stockholders mentioned above, through a record ownership of more than 43% of the common stock of Micro-Moisture, constituted a group in common control with or under the control of Louis Levin, who dominated and controlled that company.

The Court, in its findings, stated that under the definition of underwriter, as set forth in Section 2(11) of the Securities Act, Herschorn

and the other twenty-six stockholders were issuers and registrant was an underwriter in the purchase and sale of the 53,000 shares, that no exemption was available from the registration requirements of Section 5 of the Securities Act and that registrant used the mails in connection with such sales. The Court concluded that registrant violated Section 5(a)(1) and (2) of the Securities Act.

The Court, in its conclusions, further stated that registrant knew or in the exercise of reasonable care should have known he acted as underwriter in effecting sales through the use of the mails the public sales of a total of 53,000 shares of the common stock of Micro-Moisture.

The injunction decree enjoins, among others, registrant, its officers, agents, employees, assigns and all persons acting in concert or participation with them from directly or indirectly offering to sell and selling shares of the common stock of Micro-Moisture and carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, such securities for the purpose of sale or the delivery after sale, unless and until the registration statement is in effect or has been filed with the Commission as to such securities, providing that the foregoing shall not apply to any security or transaction which is exempt from the provisions of Section 5 of the Securities Act, and providing further, but without limiting the generality of the foregoing that nothing therein contained shall be deemed to restrain registrant from buying, selling, or trading in shares of common stock of Micro-Moisture, which have at any time been owed by any person who, at the time of such transaction, is not the issuer or person directly or indirectly controlling or controlled by the issuer or any person under

the direct or indirect common control with the issuer, or an underwriter within the meaning of Section 2(11) of the Securities Act.

In view of the aforesaid injunction, there is a statutory basis under Section 15(b) of the Exchange Act for revocation if the Commission finds that such action is in the public interest. Under all of the circumstances, including the nature and extent of the violations involving a distribution of unregistered stock upon which the injunction was based, it is the opinion of the Hearing Examiner that the public interest and protection of investors require that the registrant's registration as a broker and dealer be revoked.

In addition to the foregoing Section 15(b) provides an additional basis for revocation if the Commission finds such action is in the public interest, to wit, where a broker-dealer has willfully violated any provision of the Securities Act.

As indicated above, the Order for Proceedings alleges that respondent willfully violated Section 5(a) and (c) of the Securities Act and one of the issues to be determined in this proceeding is whether such willful violation occurred. In its proposed findings of fact and conclusions of law, the Division of Trading and Exchanges requests that a finding be made that registrant willfully violated provisions of Section 5(a) and (c) of the Securities Act.

The Court in its findings of fact stated that registrant violated Section 5(a)(1) and (2) of the Securities Act. Since the instant proceeding is between the same parties (the Commission and registrant) and involves the same issues of fact determined by a court of competent jurisdiction, (whether the registrant sold unregistered stock of Micro-Moisture), it is

well settled that such issues so determined between the same parties must be taken as conclusively established where such judgment remains unmodified and cannot be collaterlly attacked.^{6/} However, the Court made no findings that such violations were willful nor does it appear from such findings that question of willfulness was considered or litigated. It is well settled, and the Commission has held that a violation of Section 5(a) of the Securities Act to be "willful" within the meaning of Section 15(b) of the Exchange Act and Section 15A(1)(2) does not require a finding of intention to violate. It is sufficient that a registrant be shown to know what he is doing, even though he may be ignorant of the legal consequences of his act.^{7/} It is evident from the Court's findings that registrant was fully aware of the nature of his activities. The Court pointed out that with respect to 17,500 shares of unregistered stock of Micro-Moisture sold by the registrant, arrangements for their acquisition had been made between registrant and Louis Levin, president of Micro-Moisture, who admittedly fixed the purchase price and instructed registrant regarding payment for the stock. Significantly, on Levin's instructions, the checks in payment for said shares were made to the order of John Herschorn who, registrant

6/ Southern Pacific R. Co. v. United States, 168 U.S. 1, 48, 49, 18 S. Ct. 18, 27, 42 L. Ed. 355; Partman Corp., et al v. Paramount Picture Theatre Corp., et al., 347 U.S. 89, 91, 74 S. Ct. 414, 416 (1953); the Commission has held that an injunction issued by a court of competent jurisdiction cannot be collaterlly attacked in a Commission proceeding (see In the Matter of James F. Morrissey, 25 S.E.C. 372, 381 and cases cited therein).

7/ Thompson Ross Securities Co., 6 S.E.C. 1111, 1122-23 (1940); Hughes v. S.E.C., 174 F. 2(d) 969, 977 (C.A.D.C. 1949); Shuck v. S.E.C., 264 F. 2d 358 (1958).

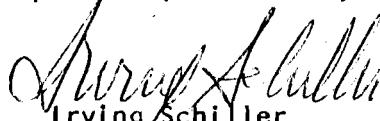
knew, held powers of attorney with respect to such shares. The Court found that registrant knew, or in the exercise of reasonable care should have known, that he acted as an underwriter in connection with the sale of the total of 53,000 shares. Such a finding clearly indicates that the conduct of the registrant was such that he either knew he was an underwriter or was completely unconcerned with compliance with the Securities Act and negligent in not making proper investigation. Certainly the Court's findings make it evident that registrant was aware of what he was doing. Registrant's activities with, and instructions he received from, Levin indicates a complete awareness of his actions. It is the Hearing Examiner's opinion that within the purview of the cases cited, registrant willfully violated Section 5(a) and (c) of the Securities Act.^{8/}

^{8/} The Commission, in the Matter of A.J.Grayson & Co., Incorporated, (S.E.A.Release No. 6242) found that A.J.Grayson willfully violated Section 5 of the Securities Act within the meaning of Section 15(b) of the Exchange Act and revoked its registration as a broker-dealer. It is noted that Grayson agreed that the applicable findings of fact and conclusions of law and the judgment entered in the District Court may be considered as a part of the record in the Commission's proceeding. The Commission concluded that Grayson's violation was willful on the basis of the findings by the Court of Appeals that Grayson knew, or in the exercise of reasonable care should have known, that he acted as underwriter of unregistered stock and that it was a reasonable inference that Grayson, because of his close association with the control group, knew the totality of circumstances surrounding the offering. The District Court made exactly the same finding that registrant knew, or in the exercise of reasonable care should have known, that he acted as underwriter of unregistered stock. It is the view of the Hearing Examiner that a similar reasonable inference concerning association with the control group can also be drawn with respect to registrant's conduct based on the District Court's findings as noted herein.

RECOMMENDATION

It is the recommendation of the Hearing Examiner that the Commission adopt and publish an order revoking the registration of the registrant as a broker and dealer, and find that under the circumstances of this case the public interest and protection of investors requires that registrant's registration as a broker and dealer be revoked, that his request for withdrawal be denied and that he be expelled from the NASD.^{9/}

Respectfully submitted,


Irving Schiller
Hearing Examiner

Washington, D. C.

May 19, 1960.

^{9/} The proposed Findings of Fact and Conclusions of Law submitted by the Division of Trading and Exchanges have in substance been adopted. To the extent they are inconsistent with the foregoing rules they are overruled.