

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

FILE COPY

In the Matter of

SANDKUHL & COMPANY, INC.
1180 Raymond Boulevard
Newark, New Jersey

File No. 8-7582

RECOMMENDED DECISION

Washington, D. C.
December 28, 1964

Irving Schiller
Hearing Examiner

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of :

SANDKUHL & COMPANY, INC. :
1180 Raymond Boulevard :
Newark, New Jersey :

File No. 8-7582 :

RECOMMENDED DECISION

BEFORE:

Irving Schiller, Hearing Examiner

APPEARANCES:

John P. Cione, Alfred V. Greco and William
Lerner, Esqs., for the Division of Trading and
Markets, Securities and Exchange Commission

Bernard J. Coven for Henry Sandkuhl and
Marvita Sandkuhl

John Henry Handforth, pro se

These are proceedings pursuant to Section 15(b) and Section 15A of the Securities and Exchange Act of 1934 ("Exchange Act") to determine whether Sandkuhl & Company, Inc. ("registrant") willfully violated certain provisions of the Exchange Act, whether remedial action is appropriate in the public interest with respect to registrant's registration as a broker and dealer, whether within the meaning of Section 15A(b)(4) of the Exchange Act Henry Sandkuhl ("Sandkuhl"), Marvita Sandkuhl, Florence Marcelin ("Marcelin"), Barbara Anne Kunz ("Kunz") and John Henry Handforth ("Handforth"), or any of them, should be found causes of any remedial action, whether a notice of withdrawal from registration filed by registrant should be permitted to become effective, and if so, whether it is necessary in the public interest or for the protection of investors to impose terms and conditions under which said notice may be permitted to become effective.^{1/}

^{1/} The securities acts amendments of 1964 (Public Law 88-467) amends, among other sections, Sections 15(b) and 15A of the Exchange Act. Since these proceedings were instituted prior to August 20, 1964, the date President Johnson signed the said securities acts amendments the references throughout this recommended decision will be to the provisions of the Exchange Act as in effect prior to August 20, 1964.

Section 15(b) of the Exchange Act, as applicable here, provides that the Commission shall revoke the registration of a broker or dealer if it finds that it is in the public interest and that such broker or dealer or any officer, director, or controlling or controlled person of such broker or dealer, has willfully violated any provision of that Act or of the Securities Act of 1933 or any rule thereunder.

Section 15A(1)(2) of the Exchange Act provides for the suspension for a maximum of twelve months or the expulsion from a national securities association of any member who has violated any provision of the Exchange Act or has willfully violated any provision of the Securities Act of 1933 or any rule or regulation thereunder if the

The amended and substituted order for proceedings, as further amended at the hearing, alleges that from approximately June 7, 1962 to February 6, 1964 registrant, aided and abetted by Sandkuhl, Marvita Sandkuhl, Marcelin and Kunz willfully violated Section 15(c)(3) of the Exchange Act and Rule 17 CFR 240.15c3-1, in effecting transactions of securities otherwise than on a national securities exchange, at times when the aggregate indebtedness of registrant to all other persons exceeded two thousand (2,000) per centum of its net capital computed in accordance with the provisions of said rule; that during the period from July 31, 1962 to February 6, 1964 registrant, aided and abetted by Sandkuhl, Marvita Sandkuhl, Marcelin, Kunz and Handforth willfully violated Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-3 in failing to make and keep current certain books and records required to be maintained by the said Rule and that from approximately December 10, 1962 to January 30, 1963 registrant, aided and abetted by Henry Sandkuhl and Kunz, willfully violated Section 15(c)(1) of the Exchange Act and Rule 17 CFR 240.15c1-2 in connection with inducing the purchase and sale of certain securities. The order also alleges that on September 13, 1962 a preliminary injunction was entered by the United States District Court for the District of New Jersey enjoining registrant, Sandkuhl,

Commission finds such action to be necessary or appropriate in the public interest or for the protection of investors.

Under Section 15A(b)(4) of the Exchange Act, in the absence of Commission approval or direction, no broker or dealer may be admitted to or continued in membership in a national securities association if the broker or dealer or any partner, officer, director or controlling or controlled person of such broker or dealer was a cause of any order of revocation which is in effect.

Marvita Sandkuhl and Marcelin ~~was~~^{from} violating the net capital requirements of the Exchange Act and the Rules thereunder, that on January 28, 1963 the same Court on the basis of a supplemental complaint entered a further preliminary injunction enjoining the foregoing persons and Kunz from violating additional provisions of the Exchange Act and the Rules thereunder and that on June 18, 1963 the same Court upon the consent of Marcelin and Kunz permanently enjoined them from violating certain provisions of the Exchange Act and the Rules thereunder.

Prior to the commencement of the hearings Marcelin and Kunz filed consents to the entry of an order by the Commission finding that registrant willfully violated the Exchange Act as alleged in the order for proceedings and that each of them is a cause, within the meaning of Section 15A(b)(4) of the Exchange Act, of any Commission order entered revoking the broker-dealer registration of registrant and expelling or suspending it from the National Association of Securities Dealers, Inc. ("NASD"). Each of the said individuals waived a hearing under the Exchange Act, the filing of facts and conclusions of law, a recommended decision by the hearing examiner, exceptions and briefs and oral argument before the Commission. Accordingly, their consents are respectfully submitted to the Commission for appropriate disposition and no findings will be made herein with respect to Marcelin and Kunz.

After appropriate notice, hearings were held before the undersigned hearing examiner. Proposed findings of fact and conclusions of law and briefs in support thereof were filed solely by the Division of

Trading and Markets.

The following findings and conclusions are based on the record, the documents and exhibits therein and the hearing examiner's observation of the various witnesses:

1. The registrant, a New Jersey corporation, became registered as a broker-dealer pursuant to Section 15(b) of the Exchange Act on August 14, 1959 and at all times mentioned hereafter has been a member of the NASD.^{2/} Registrant maintained offices in New Jersey, New York, Pennsylvania and California. Sandkuhl has been and is president, director and owner of 10% or more of the common stock of the registrant. Marvita Sandkuhl was vice president from February 4, 1960 to August 22, 1962.

Net Capital Violations

2. The record discloses and registrant has not disputed that on June 7 and June 22, 1962 its aggregate indebtedness exceeded 2,000 per centum of its net capital as computed in accordance with the provisions of Rule 17 CFR 240.15c3-1 in the amounts \$27,528 and \$17,012 respectively. During the period June 7 through June 29, 1962 registrant effected transactions with customers using the mails or means and instruments of interstate commerce in connection therewith.

3. Shortly after December 10, 1962 registrant submitted a trial balance showing compliance with the net capital provisions and in fact approximately \$405 in excess of the requirements of the above-mentioned rule. The said trial balance was inaccurate and false in

^{2/} Registrant was suspended from membership in the NASD for one year commencing with October 14, 1963 for violations of Section 1 of Article III of the Rules of Fair Practice (NASD Manual p.B-304; September 1, 1964).

stating that registrant had in inventory approximately 6,576 shares of Brothers Chemical Co. common stock when in fact approximately 5,835 shares were missing and registrant had only 741 shares of the said stock in its physical possession. In addition, registrant had borrowed \$5,000 from a bank in California either in the latter part of November or early December 1962, which loan was not reflected in the trial balance as of December 10, 1962.^{3/} Adjusting the aforesaid trial balance at December 10, 1962 to reflect securities actually on hand and the \$5,000 loan resulted in a net capital deficiency of \$16,567. There is also some evidence in the record that the above-mentioned trial balance failed to reflect certain unpaid bills which, of course, would have increased registrant's net capital deficiency.^{4/}

4. During the period December 10, 1962 to at least January 24, 1963 registrant made use of the mails or means of interstate commerce to effect transactions with customers. Accordingly, the hearing examiner finds that during the periods mentioned above registrant willfully violated Section 15(c)(3) of the Exchange Act and Rule 17 CFR 240.15c3-1 promulgated thereunder.

^{3/} The evidence shows that registrant executed a corporate resolution authorizing the loan on November 26. The note appears to be dated November 28, 1962. In an affidavit submitted to the United States District Court in connection with securing a preliminary injunction it is stated that registrant borrowed the money on December 3, 1962.

^{4/} The record does not disclose the precise amount of unrecorded bills payable on December 10, 1962.

Violations of Section 15(c)(1) of the Exchange Act

5. The order for proceedings alleges that from approximately December 10, 1962 to January 30, 1963 registrant willfully violated Section 15(c)(1) of the Exchange Act and Rule 15c1-2 thereunder. As noted above, registrant was in violation of the net capital requirements of the Exchange Act during December 1962 and January 1963. On February 1, 1963 the United States District Court for the District of New Jersey appointed a firm of certified public accountants to make an examination of registrant's books and records. The accountant who performed such services prepared a report which states that registrant failed to maintain adequate books, that such books were not up to date nor did they balance and that no security record was kept from July 1962. A statement of registrant's financial condition as at March 22, 1963 included in the aforesaid report shows that registrant's liabilities exceeded its assets by about \$42,300. The accountant testified that registrant's financial condition from about December 10, 1962 was substantially the same as at March 22, 1963. The accountant further testified that his examination disclosed that during October through December a number of registrant's checks were returned by the bank because of insufficient funds.

6. Registrant purchased and sold securities in December 1962 and January 1963. It is uncontroverted that registrant failed to disclose to its customers that it had a net capital deficit and that it was doing business in violation of the net capital rule. No disclosure was made

to such customers that during the said period registrant's liabilities exceeded its assets and that registrant was insolvent, nor was disclosure made to any of registrant's customers during the said period that registrant was unable to meet its obligations as they matured.

7. Moreover, on January 17, 1963 the United States District Court of the District of New Jersey entered an order restraining registrant from directly or indirectly transferring, selling, assigning, pledging or otherwise disposing of any of its assets pending determination of a motion for the appointment of a receiver. Such receiver was appointed by order of the Court on January 29, 1963. Notwithstanding the restraining order registrant sold at least three securities to two customers on January 24, 1963, settlement date January 30, 1963, and failed to disclose to such customers that its assets had been frozen by Court order.^{5/}

8. The Commission has held that a broker-dealer who engages in the securities business while insolvent in that it is unable to meet its current obligations, acts contrary to the implied representations that it is solvent and thereby violates the anti-fraud provisions of the Exchange Act.^{6/} The hearing examiner finds that registrant willfully

^{5/} One of such customers received a rumor that registrant was having some difficulties and called registrant to ascertain if it was in business and if the transaction was all right. Marvita Sandkuhl assured the customer that everything was "all right" and said nothing about the restraining order.

^{6/} Financial Equity Corporation, Securities Exchange Act Release No. 7326 (May 27, 1964); Guardian Investment Corporation, Securities Exchange Act Release No. 7284 (April 1, 1964).

violated Section 15(c)(1) of the Exchange Act and Rule 17 CFR 240.15c1-2 thereunder and that Sandkuhl, who effected one of the above-mentioned sales, aided and abetted such willful violation.

Record Keeping Violations

9. The order for proceedings alleges that from about July 31, 1962 registrant failed to make and keep current certain books and records relating to its business.^{7/} The evidence is undisputed that registrant's stock record book had not been posted beyond July 1962. Registrant's general ledger was not in balance since at least August 1962 and was not in balance in March 1963 when the above-mentioned Court appointed accountant made his examination of the books.

10. Sandkuhl admitted that in December of 1962 registrant's books and records were in such poor shape he was unable to determine precisely the amount of securities registrant physically had in its possession nor could he determine what securities were missing. Thus, it is clear from the record that from at least December 1962 registrant's books and records failed to disclose the firm position in certain securities, failed to reflect a \$5,000 demand note owing to the Bank of America in California, did not reflect certain unpaid bills and failed to reflect that certain taxes had not been paid to the States of New York, New Jersey, California, and the District of Columbia and failed to reflect unpaid Federal withholding and FICA taxes.

^{7/} Though there is some evidence that registrant failed to keep its books and records posted on a current basis during periods prior to July 31, 1962 no findings are made with respect thereto since they are not alleged in the order for proceedings.

11. Registrant also failed to comply with additional book-keeping requirements of the Commission's Rules, namely, the preparation of monthly trial balances and the maintenance of a current questionnaire or application for employment. Pursuant to the bookkeeping rules an appropriate employment form ^must be executed by each "associated person," of a broker or dealer which is required to be approved in writing by an authorized representative of such broker or dealer and contain certain information specified in the said rule.^{8/} The evidence shows that during November and December, 1962 two "associated persons," as that term is defined in the above-mentioned rules, were engaged in selling securities in one of registrant's offices and no application or questionnaire was on file nor approved.

12. The hearing examiner finds that registrant willfully violated Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-3 thereunder.

13. It is undisputed and the hearing examiner finds that on September 13, 1962, registrant, Sandkuhl and Marvita Sandkuhl consented to the entry of an order by the United States District Court for the District of New Jersey preliminarily enjoining them from further violating Section 15(c)(3) of the Exchange Act and Rule 17 CFR 240.15c3-1 thereunder. On January 29, 1963 on the basis of a supplemental complaint filed by the Commission, which alleged acts and practices

^{8/} See Rule 17a-3(a)(11) and (12) of the General Rules and Regulations under the Exchange Act.

similar to those found in the preceding paragraphs of this recommended decision, the above-mentioned persons were preliminarily enjoined by the same Court from violating certain provisions of the Exchange Act and Rules thereunder. On November 9, 1964 registrant, Sandkuhl and Marvita Sandkuhl were permanently enjoined by the above-mentioned Court from violating the net capital, record keeping and anti-fraud provisions of the Exchange Act and certain rules thereunder.^{9/}

Findings as to Sandkuhl, Marvita Sandkuhl and Handforth

14. As previously noted, Sandkuhl has been and is president, director and beneficial owner of more than 10% of the common stock of the registrant and Marvita Sandkuhl was vice president and director of registrant from 1960 to approximately August 22, 1962. Handforth was bookkeeper and cashier for registrant from about August 20, 1962 through January 1963. Apart from the title of president of registrant, the record discloses that Sandkuhl dominated and controlled registrant, actively managed its affairs since its inception and had supervisory responsibility over all of registrant's activities. Sandkuhl as

^{9/} The hearing examiner takes official notice of entry of the final order of permanent injunction by the United States District Court for the District of New Jersey (Civil Action No. 554-62). It is noted that the said order was entered after the close of the instant record. (See Litigation Release No. 3084, Nov. 18, 1964.)

It is also noted that on June 18, 1963 Marcelin and Kunz, with their consent, were permanently enjoined from further violating certain sections of the Exchange Act and rules thereunder by the above-mentioned Court.

president and controlling stockholder of registrant was under a duty to assure himself that the firm's business was carried on in compliance with applicable requirements.^{10/} The evidence shows Sandkuhl not only failed to carry out his obligation as a broker and dealer but when it was obvious he knew of such serious matters as securities missing from inventory never ceased doing business and consistently refused to institute a check^{of} registrant's security box until prodded by the Commission staff. Accordingly, the hearing examiner finds that Sandkuhl participated in and aided and abetted in all of registrant's willful violations set forth hereinabove.

15. Though the record does not clearly delineate the duties and responsibilities of Marvita Sandkuhl during her tenure of office, there is evidence that she continued to exercise certain responsible functions even after August of 1962. In December 1962 Marvita Sandkuhl went to registrant's California office to obtain securities kept in registrant's box at that office and other records and was given complete authority to close the branch office if she believed such action was necessary. We have also noted above that Marvita Sandkuhl assured at least one customer in January 1963, that a sale to such customer was all right when she knew or should have known of registrant's precarious

^{10/} C. Gilman Johnston, Securities Exchange Act Release No. 7390 (August 14, 1964).

financial condition and that she knew or should have known that a Court had restrained registrant from disposing of its assets. The record shows and the hearing examiner finds that Marvita Sandkuhl consented to the entry of a preliminary injunction by the U. S. District Court for the District of New Jersey on September 13, 1962, that on January 29, 1963 the same Court preliminarily enjoined^{ed} her from certain violations of the Exchange Act and the Rules thereunder and that on November 9, 1964 she was permanently enjoined by the same Court from further violating the net capital, bookkeeping and anti-fraud provisions of the Exchange Act promulgated thereunder and from aiding and abetting in any such violations by registrant.

16. Handforth, as noted above, was employed by registrant as bookkeeper and cashier. In such capacity, he was primarily responsible for the maintenance of registrant's books and records, a fact he readily admitted. Handforth also admitted that from the inception of his employment and thereafter the stock record book was not posted currently and that throughout the course of his employment no check was ever made of the securities purportedly in registrant's possession. Throughout the course of his employment Handforth was never able to bring the general ledger into balance. Despite his inability to balance the ledger or maintain the stock record book Handforth nevertheless continued working on registrant's books and records and prepared a trial balance as at December 10, 1962 without examining registrant's security box to assure himself that the securities he represented were in inventory were actually in registrant's possession. Throughout the entire period of

Handforth's employment he made no effort to determine the registrant's exact tax liability to the various states nor to the Federal Government, with the result that the December 10, 1962 trial balance failed to reflect taxes due and owing to the states of New Jersey, New York, the District of Columbia and to the Federal government for withholding and FICA taxes. The evidence is clear that throughout Handforth's employment ~~with~~ registrant's books were maintained in such poor condition that it was unable to determine with any degree of accuracy its assets or its liabilities. Since Handforth's prime responsibility was the maintenance of such books and records he cannot escape responsibility for the proper maintenance of such records in accordance with applicable requirements.^{11/} The hearing examiner finds that Handforth aided and abetted registrant's willful violation of the Commission's bookkeeping rules.

17. The hearing examiner finds that Sandkuhl, Marvita Sandkuhl and Handforth should each be named a cause of any order of revocation entered by the Commission.

Public Interest

18. The remaining questions are whether any remedial action

^{11/} Cf. Heft, Kahn & Infante, Securities Exchange Act Release No. 7020 (February 11, 1963).

is appropriate in the public interest under the Exchange Act and whether to permit registrant's request to withdraw its registration to become effective. Registrant, by conducting business in violation of the net capital requirements, improperly and willfully subjected its customers to undue financial risks. ^{12/} The said net capital violations as well as the bookkeeping and violations of the anti-fraud provisions of ^{13/} the Exchange Act were willful, as that term is used in the said Act. It is evident that registrant evinced a careless disregard of the requirements of the Exchange Act and the Rules thereunder. The evidence is clear that registrant made no effort prior to submitting the December 10, 1962 trial balance to bring its stock record book up to date or balance its general ledger or present any meaningful or accurate financial statement of its condition. Such conduct manifests a complete and total failure to understand and appreciate the high standards of conduct required of firms engaged in the securities business. The hearing examiner has also taken into consideration the fact that neither Sandkuhl nor Marvita Sandkuhl took the stand to testify in their own behalf or on registrant's behalf or produce evidence to controvert violations alleged. Such failure is of substantial significance in the light of the well settled principle that the failure of a party to testify in a non-criminal case, in explanation of suspicious facts and circumstances peculiarly within his knowledge, fairly warrants the inference

^{12/} D'Antoni vs. Securities & Exchange Commission 289 F 2(d) 276, Rehearing Denied, 290 F Supp. 688 (5th Cir.1961).

^{13/} Hughes v. S.E.C. 174 F. 2d 969, 977 (C.A.D.C. 1949); Shuck v. S.E.C. 264 F. 2d 358 (C.A.D.C. 1958).

that his testimony, if produced, would have been adverse.^{14/} Inability to obtain accurate information for the presentation of a financial statement is no excuse for submitting false financial data. Activities of such nature should not be permitted to continue nor should the public be subjected to the hazards of dealing with a firm conducting business in the manner in which registrant has been doing. Consideration is also given to the fact that a final injunction has been entered with respect to registrant which, of itself, provides sufficient basis for a finding that revocation is in the public interest.^{15/}

19. In light of the foregoing the hearing examiner finds that it is in the public interest to revoke registrant's registration as a broker-dealer, to expel registrant from the NASD and to deny its request to withdraw its registration statement.

RECOMMENDATIONS

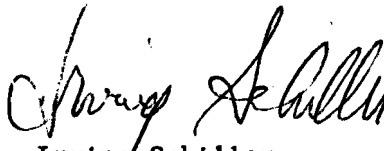
In view of the willful violations found, it is respectfully recommended that the Commission enter an order finding that it is in the public interest to revoke registrant's registration as a broker-dealer, expel it from membership in the NASD and deny its request to withdraw its registration. It is further recommended that the Commission find that Sandkuhl, Marvita Sandkuhl and Handforth violated or aided and abetted in registrant's willful violations of the Exchange Act and the

^{14/} In the Matter of N. Sims Organ & Co., Inc., Securities Exchange Act Release No. 6495, aff'd 293 F. 2nd 1958 (C.A.2, 1961).

^{15/} Kimball Securities, Inc. 39 S.E.C. 921 (1960).

Rules thereunder, as set forth above, and that each of such individuals be named a cause of any order of revocation or expulsion entered with respect to registrant. ^{16/}

Respectfully submitted,


Irving Schiller
Hearing Examiner

Washington, D. C.
December 28, 1964

^{16/} To the extent that proposed findings and conclusions submitted by the Division of Trading and Markets are in accord with the views set forth herein they are sustained and to the extent they are inconsistent therewith they are expressly overruled.