(2) FILE COPY

S. Gross

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

FILED

APR 5 1961

D M & F SECTION
SECURITIES & EXCHANGE COMMISSION

In the Matter of

Ben Hur Gold, Inc.
P. O. Box 2853
Boise, Idaho

File No. 24S-1664

RECOMMENDED DECISION

SIDNEY GROSS
Hearing Examiner

Washington, D. C.
April 5, 1961

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
Ben Hur Gold, Inc. P. O. Box 2853 Boise, Idaho	:	RECOMMENDED DECISION
File No. 24S-1664	:	

BEFORE: SIDNEY GROSS, HEARING EXAMINER

APPEARANCES: Donald J. Stocking, Esq.
for the Division of Corporation Finance

Ben Hur Gold, Inc., in person, by
Earl C. Heffner, Esq., its President

These are public proceedings, pursuant to Section 3(b) of the Securities Act of 1933, as amended ("Securities Act"), and Rule 261 of Regulation A promulgated thereunder, [1/] arising out of an order entered by the Securities and Exchange Commission ("Commission") on April 16, 1959, temporarily suspending an exemption from registration with respect to an offering of stock by Ben Hur Gold, Inc. ("Respondent").

Pursuant to the Commission's notice and order for hearing dated November 25, 1960 ("Order") a public hearing was held in Boise, Idaho, on December 2, 1960, to determine whether Respondent's notification and offering circular filed in connection with the offering fails to comply with the terms and conditions of Regulation A, whether the offering circular contains untrue and misleading statements and omits material facts and whether the order of April 16, 1959 should be vacated or an order entered permanently suspending the exemption.

1/ Regulation A, adopted under Section 3(b) of the Act, as here applicable, provides for an exemption from regulation when an issuer offers securities with an aggregate public offering price not exceeding $300,000 provided, among other things, that the issuer files with the Commission a notification and an offering circular containing certain minimum information.

Rule 261 provides in pertinent part for the issuance of an order temporarily suspending an exemption if the Commission has reason to believe that (1) no exemption is available under Regulation A for the securities purported to be offered, or the terms and conditions of the regulation have not been complied with; or (2) the offering circular contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading. The rule further provides that where a hearing is requested, the Commission will, after notice of and opportunity for such hearing, either vacate the order or enter an order permanently suspending the exemption.

Respondent was not represented by counsel. Earl Cedric Heffner, Respondent's President, appeared on its behalf. Heffner was Respondent's sole witness. Ellsworth Y. Dougherty, a mining engineer employed by the Commission, was the only witness for the Division of Corporation Finance ("Division").

Respondent has asserted a right to withdraw the notification[2/] and has challenged the Commission's failure to accord it an opportunity to achieve compliance.[3/]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Ben Hur Gold, Inc. was organized under the laws of the State of Idaho on January 15, 1959 by Earl C. Heffner, William C. Cooper, and Edith M. States, sister of Heffner, with an authorized capital stock of 1,000,000 non-assessable common shares having a par value of 10¢ per share. Heffner was the principal promoter and organizer of Respondent.

2. Since its organization Respondent's officers and directors were Heffner, President and Director; Cooper, Vice President and Director; States, Secretary-Treasurer and Director; W. Alexander Hutton, Director and Engineering Consultant.[4/]

3. Good Hope Mines, Inc. was organized in 1943 and remained in existence until 1951. Good Hope Placer, Inc. was organized some time

---

2/ Rule 255(e) of Regulation A.

3/ Section 9(b) of the Administrative Procedure Act, 5 U.S.C.1008.

4/ Heffner testified that Respondent dispensed with Hutton's services after the issuance of the temporary suspension order which challenged the statements in the offering circular relating to Hutton's background and experience.

subsequent to 1943, and remained in existence until 1951. Both companies ceased to function because of a fire which destroyed their records. Both companies were controlled by Heffner at all times.

4. Good Hope Mines, Inc. and Good Hope Placer, Inc. effected a merger which resulted in the creation of Good Hope Investors, Inc. ("Investors") in or about 1952, as a result of which Investors acquired all the assets and assumed all the liabilities of Good Hope Mines, Inc. and Good Hope Placer, Inc. At all times Investors was controlled by Heffner who owned 1,400,000 of its shares constituting about 16% of its outstanding stock.

5. Investors ceased to function in or about December, 1958, having liabilities of about $8,000, and, as an asset, a mining property in Idaho known as the Windfall mine.

6. Between 1943 and December 1952 Investors and its predecessors raised a total of approximately $300,000 through the public sale of their equity securities.

7. On March 12, 1959 Respondent filed with the Commission a notification and offering circular relating to an offering of 200,000 of its 10¢ par value stock at 10¢ per share for an aggregate offering of $20,000. The notification and offering circular were filed for the purpose of obtaining an exemption from the registration requirements of the Securities Act pursuant to the provisions of Section 3(b) thereof and Regulation A promulgated thereunder. The offering circular describes Heffner as principal underwriter for Respondent and the owner of 102,500 shares out of a total of 198,000 shares "outstanding as of the date of

this prospectus" or 598,000 shares "outstanding at the close of the sale of this offering if all shares are sold."

8. 17,500 of the Respondent's shares have been issued to Charlie Sayko. 180,500 shares have been allotted its officers, directors, and Investors. However, none of the said 180,500 shares or of the remaining authorized shares was ever issued.

9. At the time of the filing of the notification and offering circular Respondent had entered into contracts covering five mining properties referred to as Parker Placer, Ben Hur Quartz, Buffalo Quartz, Coy-Downing and Windfall. 5/

10. By order dated April 16, 1959, pursuant to Rule 261(a) of the General Rules and Regulations under the Securities Act, the Commission temporarily suspended the exemption under Regulation A.

11. Following issuance of the order of April 16, 1959, the promotion of Respondent was abandoned and it virtually ceased to function. The contract covering the Parker Placer, Ben Hur and Buffalo Quartz properties was declared forfeited. Heffner personally paid $500 for the Parker Placer property. Heffner and one, Lawrence Larmon, entered into a contract with Cooper and Garrett, dated July 1, 1960, for development

---

5/ The record includes an agreement dated 6/26/58 between William C. Cooper, Lawrence L. Garrett and their wives, as "owners" and Heffner and Charlie Sayko as "buyers" covering the first three properties. The record does not include an assignment of the agreement by the "buyers" to Respondent nor does it include any documentary evidence in respect of the agreements covering the Coy-Downing and Windfall properties. The only information relating thereto is found in Heffner's testimony which the Division apparently has accepted without objection in that respect.

of the Ben Hur and Buffalo properties, similar in terms to the contract of June 26, 1958. The Respondent's contracts covering the Coy-Downing and Windfall properties were abandoned. Respondent remains dormant and is being kept technically alive by Heffner solely because of the 17,500 shares held by Mr. Sayko.

Financial Statements

12. The financial statements in the offering circular (pp 19-22) purport to show Respondent's financial condition as of March 1, 1959. The list of "Cash paid for shares" totalling $8,059.99 admittedly is false. The record is clear that not more than about $1,000.00 in cash actually was paid to Respondent for shares.[6/] The $4,298.85 shown as cash paid by Heffner in fact represented his exploration costs over a period of years. The $100 items appearing as cash paid by Cooper and States were not cash payments. Rather, they were gifts from Heffner effected by deductions from his past expenditures on one or more mining properties. The $2,192.33 figure shown as paid by Investors represents an arbitrary increase by Heffner of the amount Investors actually paid[7/] since that amount "was just too ridiculously small." The offering circular repeats the same figures in the schedule "Cash was received as follows."

6/ Heffner himself furnished $311.14. He testified: "The only money that was paid in cash was money I put up personally. Well, wait a minute. The Good Hope, there was a little Good Hope money used. I read here a while ago that not over $1000 including the organization which I paid myself." - i.e., the $311.14.

7/ Probably the difference between approximately $1,000 and $311.14 - See footnote 6/

Moreover, the offering circular has presented the contracts covering the five mining properties as assets having a total value of $40,000. This figure represents Respondent's contingent royalty obligations under the agreements. Generally, such obligations do not necessarily have any relationship to the asset value of royalty agreements of this type. At the time of the filing of the notification and offering circular Respondent certainly had no indication that operation of these properties would be successful. Although identical sums totalling $40,000 appear in the offering circular as liabilities under the agreements, thus washing out the asset, the financial statements present to the investing public an appearance of substance and a pretense of potential which is wholly unjustified.

Accordingly, the Hearing Examiner finds that the financial statements made part of the offering circular contain untrue statements of material facts in respect of cash paid to Respondent for its shares and include materially false and misleading statements in respect of the value of Respondent's contracts.[8/]

Information and Financial Data re Predecessor

13. The Division contends that Investors is a predecessor of Respondent. The notification and offering circular describes Investors as an affiliate. It reports no predecessors. Respondent objects to the Division's position.

By definition, "A 'predecessor' of an issuer is (i) a person, the major portion of whose assets have been acquired directly or indirectly by the issuer, or (ii) a person from which the issuer acquired, directly

---

8/ Order, Paragraph C 12.

or indirectly, the major portion of its assets."[9/]

When Respondent was organized Investors' assets consisted of the Windfall mine and the cash it paid to Respondent.[10/] It is clear that Respondent obtained only a contract to work the mine and that Investors retained title thereto. In the absence of evidence of the value of the Windfall property the Hearing Examiner has no basis for a finding that the approximately $700 acquired by Respondent from Investors constituted the major portion of Investors' assets. The Hearing Examiner finds therefore that Investors does not fall within the terms of item (i) of the definition. Moreover, in addition to the $311.14 paid by Heffner and without regard to the value, if any, of the mining contracts, the offering circular lists as assets "Un-recovered development" and other items, the total of which exceeds the approximately $700 paid by Investors. The record discloses no explanation of these items. Since assets may take forms other than cash, the Hearing Examiner does not find the presence of these assets necessarily inconsistent with the fact that not more than $1000 in cash was received by Respondent. It follows that the record does not support a finding that Investors' $700 payment constituted a major portion of Respondent's assets and that Investors does not fall within item (ii) of the definition. The Hearing Examiner finds, therefore, that Investors is not a "predecessor" of Respondent.

However, the offering circular states that Investors is an

9/ Rule 251 of the General Rules and Regulations under the Securities Act.

10/ See Footnotes 6 and 7.

affiliate. Schedule I of Regulation A sets forth the information required to be included in the offering circular. Section 9(c) of Schedule I requires a statement of the interests of the Respondent's officers, directors, and controllers in Respondent's affiliate. The offering circular discloses Heffner's stock ownership in Investors, i.e., 1,400,000 shares representing about 16% of Investors stock. The offering circular fails to disclose, however, that Investors is a dormant corporation having $8,000 in liabilities and a single unvalued asset. The investing public is entitled to be advised of the financial condition of an affiliate in which the promoter and controller of the issuer, the single person guiding its destiny, is also the person controlling the affiliate. The Hearing Examiner finds that the failure of the offering circular to disclose the affiliate's dormant status and financial condition constitutes a material deficiency. 11/

Personnel

14. The offering circular (p. 5) describes the Respondent's officers and directors, generally, as people of "long and varied active experience in their various capacities." It indicates that the technical "Know How" requirements of their jobs would eliminate any member of the

---

11/ Order, Paragraph B1, C3 and 13.

Board of Directors not having proper preparatory experience. Heffner, now 63 years of age, is said to be familiar with all phases of and problems relating to Respondent's business "from the organization and Management of the Company down to digging the first 10-foot location hole on a new prospect," having been actively engaged in development, financing and management for the past 20 years.

The offering circular, however, omitted certain pertinent data relating to Heffner's background and experience. His testimony discloses that he had no formal education beyond the eighth grade of school and that he completed a correspondence course in salesmanship. Until the late 1930's, when he first became associated with mining, he had engaged in all types of selling, worked as a logger and in the shipyards and formed a life insurance company. He organized his first mining company, Good Hope Mines, Inc. in the fall of 1943. Since that time, through the sale of stock of Good Hope Mines, Inc., Good Hope Placer, Inc. and Investors, he has caused these companies to raise about $300,000 from the investing public and has expended that sum in attempting to develop at least the approximately 10 different mines referred to in the record without once having achieved success in mining commercial ore or even in the construction of a workable mill.

William Alexander Hutton, now 86 years of age, is described in the offering circular as a mining engineer having more than 40 years of wide experience, who brings invaluable counsel to Respondent. The offering circular omits to state, however, that Hutton had never been in Idaho where all of Respondent's mining operators are located, had acted as a director on one of Heffner's unsuccessful operations, that Respondent

was not aware of any successful mining corporation with which Hutton had been associated and that Hutton had written a favorable report with regard to one of the properties of Investors which, as Heffner agreed, "turned out to be another bust."

The statements in the offering circular imputed expert qualifications to Respondent's personnel and implied past success in their mining ventures. The failure of the offering circular to disclose the omissions in the backgrounds of Heffner and Hutton, referred to above, constituted a failure to comply with the terms and conditions of Regulation A and rendered misleading the statements in the offering circular relating to their backgrounds. The Hearing Examiner finds that these omissions constitute material deficiencies in the offering circular.[12/]

Contracts re Mining Properties

15. The offering circular describes the Cooper-Garrett Contract covering the Ben Hur, Buffalo and Parker Placer mines as providing for the milling of 500 tons annually, the payment of $500 in cash prior to July 1, 1959 and "$25,000 * * * payable from a 15% Royalty; * * *." But the offering circular omits other provisions of the agreement which the Hearing Examiner deems significant and of major importance to an informed investment judgment. These include provisions that title to the property will not pass to Respondent until payment of the $25,000; that Respondent will open and extend certain tunnels in the Ben Hur Mine; that upon failure to carry out the terms of the agreement "owners" may declare a default and keep all payments theretofore made as liquidated

---

12/ Order, Paragraph C 1 & 2. Cf. Matter of Profile Mines, Inc., 38 SEC 533 (Aug 8, 1959).

damages; that upon transfer of this agreement by "buyers" to other "buyers" the "owners" shall be paid $25,500 in full. It is noted that the agreement was assigned by Heffner and Sayko to Respondent. $25,500, therefore, was already due from Respondent to "owners" although the provision apparently was not enforced.

In the light of the foregoing the Hearing Examiner finds that the failure of the offering circular to disclose the provisions cited above of the Cooper-Garrett agreement constitutes an omission to state material facts. Since the record contains no evidence of the terms of the Coy-Downing and Windfall agreements other than the offering circular, the Hearing Examiner cannot find that the offering circular does not adequately disclose the terms of those agreements.

The "Asset" portion of the financial statements in the offering circular lists the five mining properties under the subheading, "Contracts", and the narrative of the offering circular refers to "milling commitments" and other factors negating title in Respondent. The Hearing Examiner, therefore, finds no failure to disclose the nature of Respondent's title to the properties. Moreover, since the narrative portion of the offering circular specifically states the amount of royalties due under the contracts as to each property and the financial statements reflect liabilities in those amounts, the Hearing Examiner finds no failure to disclose the royalties payable on the properties.[13/]

13/ Order, Paragraph C 6.

Statements Re Mining Properties

16. The offering circular states that the Parker Placer property " * * * contains from 1,000 to 1,500 feet of Creek Bed Placer that we believe to be workable; * * *". In view of Heffner's testimony that he made no effort to ascertain the exact value of the placer but contemplated using it as a mill site, the Hearing Examiner finds that the foregoing quotation from the offering circular is without foundation and constitutes an untrue statement of material facts.[14/]

In respect of the Coy-Downing property the offering circular states that "Values are in Lode Gold with quite a lot of Silver in places; our preliminary assays indicate a fairly good grade of rock and widths are also quite good; what lies underneath and beyond is something we would all like to know." The Coy-Downing property is undeveloped. The only work done consisted of a bulldozer track - a hole in the hillside. Heffner described it as a "raw prospect." He said "it was an exploratory deal and nobody knew what was in the stuff. I didn't know, the owners didn't know * * *." It is apparent that there is no basis for the statement in the offering circular as to values in lode gold and silver. Nor does the last qualifying quoted portion eliminate the stigma of the preceding statements. Accordingly, the

---

14/ Order, Paragraph C 8.

Hearing Examiner finds that the statement in the offering circular quoted above in respect of the Coy-Downing property represents an untrue statement of material facts.[15/]

In addition, the offering circular states "* * * we assayed where and what we could" and that the small sized assay samples ranged in value up to $_____[16/] and owners samples and "table concentrate" went as high as $250. The record discloses that issuer had access to one or more assays with respect to each of the properties except Windfall and that these assays ranged from $6 a ton, admittedly low grade ore, to the $250 "table concentrate" referred to above. The failure of the offering circular to disclose these assays constitutes an omission to state material facts and the Hearing Examiner so finds.[17/]

Nor has the issuer adequately disclosed the results of work on its mining properties. The offering circular refers to only some of the work previously done on these mines but in no case does it furnish the result of such work, i.e., of the spot sampling done including the unfavorable report on the Ben Hur Mine by Blaine A. Hanks, a mining consultant, or that in most instances the mines were abandoned because they would not produce commercial ore. The Hearing Examiner finds the failure to disclose these results constitutes a material deficiency in the offering circular.[18/]

15/ Order, Paragraph C 9.

16/ No figure appears.

17/ Order, Paragraph C 10.

18/ Order, Paragraph C 7.

Justification for Mill

17. It is apparent from the history of these properties, some of which Heffner had worked many years ago, that they were not ore producing. Yet the stated purpose of the offering is the development of a mill and associated camp buildings to process "Gold Bearing Rock." Dougherty characterizes this program as "putting the cart before the horse." On the basis of the record the Hearing Examiner agrees. The implications in the offering circular that the mines are ready for development operations would, of course, appear to justify the mill. But these implications are not warranted by the facts. It follows that the proposed expenditure for the mill of 50% of the total net amount (excluding office and management expense) realizable by the Respondent from the contemplated offering is not justified.[19/] The Hearing Examiner so finds.

Section 17 of the Securities Act

18. Paragraph D of the Order alleges violation of Section 17 of the Securities Act by reason of statements made in the offering circular implying the existence of commercial quantities of ore and successful mining operations. There is little doubt that the implications are warranted by the language of the offering circular albeit unwarranted by the actual facts. Statements in the offering circular refer to Respondent's mining properties as "gold properties" (P. 6) and must have been intended for interpretation as mines producing gold ore in commercial quantities. The following are some additional statements of the same tenor:

19/ Order, C 11(b).

Parker Placer Property - " * * * We bought it originally for the Placer Gold it contains."

Ben Hur Property - "Values are Lode Gold with some Silver * * *";

Buffalo Property - "Values here are both Lode and Placer Gold with some Silver." And as to the aforesaid three properties " * * * the owners only worry is when we are going to get the Ben Hur Gold Mill started Milling. . ."

Coy-Downing Property - "Values are in Lode Gold with quite a lot of Silver in places; * * *"

Windfall Property - "Values here are mixed, Lead-Zinc-Silver-Gold * * *."

To the Hearing Examiner's mind Daugherty's testimony sums up admirably the effect of these statements. Having seen the Windfall property, having discussed the remaining properties[20/] with Heffner and having heard Heffner's testimony Dougherty said, "[They] imply that there is ore available to make all things possible and feasible and attractive to an investor. A fundamental deception is that there was no evidence of available ore."

However, the finding of a violation of Section 17[21/] of the Securities Act requires something more. This section is predicated upon

---

20/ Dougherty did not see these properties because of Heffner's request to delay inspection until he could open the mines. They never were opened.

21/ This Section, as pertinent here, declares it unlawful to use the mails or any means or instruments of transportation or communication in interstate commerce in the offer or sale of securities through the employment of any device, scheme or artifice to defraud or by means of any untrue statements or omissions of material facts.

the use of the mails or other instrumentalities of transport or communication in interstate commerce. The record discloses the issuance of Respondent's shares to one stockholder - 17,500 shares to Charlie Sayko. But the record does not disclose how this ~~transportation~~ transaction was consummated. Certainly, there is no evidence that the mails or any other instrument of interstate commerce was utilized in this transaction or in any offer of the Respondent's securities. The Hearing Examiner is aware that Heffner intended to promote the sale of Respondent's stock by means of a mailing campaign and that he intended to make the first offering to the 2,000 stockholders of Investors. But the record is devoid of any indication that this intent was ever carried out. Accordingly, the Hearing Examiner finds no evidence of a violation of Section 17 of the Securities Act. 22/

Machinery

19. Heffner's testimony with respect to milling equipment referred to a crusher purchased for $407.00 and a ball-type mill purchased for $360.00. Heffner testified that a man named Sloper had paid for the $360.00 item. Shortly before the hearing Mr. Larson purchased the mill by a payment made directly to Sloper. 23/ In the absence of any evidence indicating a proprietary interest in the mill on Respondent's behalf the Hearing Examiner finds that the Respondent did not have title thereto.

22/ Order, Paragraph D.

23/ Heffner testified he "had paid some" to Sloper. Larson's purchase of the mill related to a prior arrangement between Heffner and Larson after the Respondent was abandoned.

Heffner's testimony regarding the purchase of the $407 item is not clear. The offering circular records Miss States as owner of a 1/2 interest in a conditional sales contract covering this item and states "Cost for 1/2 interest - $153.50" (probably an arithmetical error). Since the offering circular referred only to Miss States' interest in the crusher it left the plain inference that Respondent had title to the remaining 1/2 interest. This inference is buttressed by the asset " Paid on equipment - $512.67," which remains unexplained in the record and appears to be consistent with the acquisition of some interest in some equipment apart from any sums which may have been paid to Sloper. As owner of a 1/2 interest in the crusher Respondent was obligated to disclose in its offering circular information relating to the type, condition and capacity of its milling machinery.[24/] The Hearing Examiner finds that the omission of such information constitutes a material deficiency in the offering circular.

The record is devoid of any reference to mining equipment in relation to Respondent. Accordingly, the Hearing Examiner finds no failure of compliance in respect of those allegations of the Order which relate to mining equipment.[25/]

Miscellaneous

The Order alleges[26/] Respondent's failure to set forth the information required by Item 9 of Form 1-A under Regulation A in respect of

---

24/ Order, Paragraph C 11(a).

25/ Order, Paragraphs C 4 and 5.

26/ Order, Paragraph B 2. The Division abandoned the allegation alleging a prior injunction against Respondent's predecessor by a court of competent jurisdiction.

Respondent's predecessor. This term relates to the issuance or sale of unregistered securities of the issuer, its predecessors or affiliates. As found above, Investors is not a predecessor of Respondent. Nor is there any indication in the record of any other company or person related to the Respondent who might be so described. The Hearing Examiner, therefore, finds no failure of compliance in respect of this allegation.

The notification does not include any copies of the governing instruments defining the rights of holders of shares offered. Accordingly, the Hearing Examiner finds that the notification fails to comply with the requirement of Item 11(a) of Form 1-A under Regulation A. 27/

Inasmuch as Respondent's stock had not been issued for public distribution before the instant offering, there is no established market for the stock. Moreover, Heffner admitted that the offering price of 10¢ per share was an arbitrary figure and had no relation to the stock's book value. Examination of Respondent's financial statements, as set forth in the offering circular, also disclose that the offering price is substantially in excess of the net asset value of the shares. Obviously, such information is of considerable importance to an informed investor judgment and the Hearing Examiner finds that its omission from the offering circular constitutes a material deficiency. 28/

27/ Order, Paragraph B 3.

28/ Order, Paragraph C 14. See Columbia General Investment Corp., 38 SEC 202, 209 (March 5, 1958).

WITHDRAWAL OF NOTIFICATION

Prior to the hearing Respondent sought permission to withdraw the notification. The Commission denied the request. Respondent renewed its application at the hearing.

Under Rule 255(e) of Regulation A[29/] a notification may not be withdrawn if it is subject to a suspension order when the application for withdrawal is made. Here the temporary suspension order preceded the request for withdrawal which was made on July 15, 1960. The Hearing Examiner, therefore, denies Respondent's application for withdrawal.

Moreover, the fact that the notification had become effective[30/], the existing stockholder interest[31/] and the sanction attendant suspension of the notification, i.e., the unavailability of the Regulation A exemption for 5 years under Rule 252(c) of Regulation A[32/], all distinguish this case from Jones v SEC, 298 U. S. 1 (1936) the leading case sustaining the absolute right of withdrawal.

29/ "A notification or any exhibit or other document filed as a part thereof may be withdrawn upon application unless the notification is subject to an order under Rule 261 at the time the application is filed or becomes subject to such an order within 15 days (Saturdays, Sundays and holidays excluded) thereafter; * * *"

30/ Resources Corporation International v S.E.C., 103 F 2d 929 (C.A.D.C.1939), Gob Shops of America, Inc., Security Act Release No. 4075 (May 6, 1959).

31/ Columbia General Investment Corporation v S.E.C., 265 F 2d 559 (C.A.5, 1959), Gob Shops of America, supra. There is no showing that Sayko is "able to fend for himself", Cf. S.E.C. v Ralston Purina Co., 346 U.S. 119, 125 (1953). The fact that Sayko is the only stockholder does not, therefore, exclude him as a proper subject of the official concern of the Commission.

32/ Comico Corporation, Securities Act Release No. 4050 (Apr. 27, 1959); The Surinam Corporation, Securities Act Release No. 4051 (April 28, 1959).

RIGHT TO ACHIEVE COMPLIANCE

During the course of the hearing the Division twice referred to a contention by Respondent that the Commission did not furnish it with a notice of the deficiencies of the notification and offering circular or accord it an opportunity to comply. On each occasion Respondent made no comment. Since Respondent was not represented by counsel the Hearing Examiner will construe its silence as agreement with the Division's statements on its behalf and will consider Respondent's rights in the circumstances.

The right to an opportunity to "demonstrate or achieve compliance with all lawful requirements" derives from Section 9(b) of the Administrative Procedure Act which requires, in pertinent part, that such opportunity be accorded before an agency institutes proceedings to revoke or suspend a "license"[33/], "except in cases of willfulness[34/] or those in which public health, interest or safety requires otherwise, * * *." It is apparent from the Hearing Examiner's Findings of Fact and Conclusions of Law herein, adverse to Respondent in respect of untrue statements

---

33/ The Commission has not found it necessary to decide whether a Regulation A exemption constitutes a "license" within the meaning of Section 9(b). Gob Shops of America, Inc., supra; Cf. Comico Corporation, supra; Universal Service Corporation, 36 S.E.C.595(1955).

34/ In Sterling Securities Company, 37 S.E.C. 837, 839 (1957) the Commissaw no basis for interpreting the words "willfulness" and "public interest" in the Administrative Procedure Act more narrowly than in the Securities Exchange Act of 1934. Hughes v S.E.C., 174 F 2d 969, 977 (C.A.D.C. 1949), an Exchange Act case, held that a finding of willfulness does not require a finding of intention to violate the law. It is sufficient that respondents knew what they were doing. See also Schwebel v Orrick, 153 F Supp. 701, 705 (D.C.D.C.1957) to the effect that the word "willfulness" as used in Section 9(b) "has been interpreted as meaning the intentional doing of the act charged."

and omissions of material facts in the notification and offering circular, that this case falls within the "wilfullness" and "public * * * interest * * *" exceptions of Section 9(b). The Hearing Examiner rules, therefore, that the Commission's failure to furnish Respondent with the notice and opportunity referred to above did not constitute a violation of Section 9(b).[35/]

RECOMMENDATION

The right to the benefits of the exemption under Regulation A is conditional upon compliance with the standards and requirements set by the Commission, which have, as their purpose, the disclosure to the public of all information pertinent to an informed investment judgment. The record, including the testimony of Heffner, Respondent's President, organizer, promoter and controller, demonstrates that the Respondent's notification and offering circular contained untrue statements of material facts, omitted to disclose material facts, otherwise failed

---

35/ Columbia General Investment Corporation, 38 S.E.C.202, 211(1958); Lewisohn Copper Corp., 38 S.E.C. 226, 239 (1958); Comico Corporation, supra; Sterling Securities Company, supra; Universal Service Corporation, supra.

to comply with the terms and conditions of Regulation A, and was prepared, in many respects, in utter disregard of the necessity for a truthful and accurate presentation of Respondent's financial and other data. The Hearing Examiner recommends, therefore, that an order be entered permanently suspending the exemption.[36/]

Respectfully submitted,

Sidney Cross
HEARING EXAMINER

36/ To the extent that the proposed findings and conclusions submitted by the Division are in accord with the views set forth herein they are sustained and to the extent they are inconsistent therewith they are expressly overruled.

Washington, D. C.
April 5, 1961