

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of)
)
JASON BAKER TUTTLE, SR.)
J.B.T. MANAGEMENT, INC.)
d/b/a TUTTLE INCORPORATED)
JASON BAKER TUTTLE, JR.)

SECURITIES & EXCHANGE COMM.
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INITIAL DECISION

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EXCHANGE COMMISSION

Washington, D.C.
January 8, 1990

Brenda P. Murray
Administrative Law Judge

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APPEARANCES: C. Gladwyn Goins and Denise M. O'Brien of the San Francisco Branch Office for the Securities and Exchange Commission, Division of Enforcement.

Jason Baker Tuttle, Sr., J.B.T. Management, Inc. d/b/a Tuttle Incorporated, and Jason Baker Tuttle, Jr., pro se.

BEFORE: Brenda P. Murray, Administrative Law Judge

BACKGROUND

This proceeding is unusual in that it appears to be the first time that the Commission will decide whether to grant or deny an investment adviser registration application where a person in control of the applicant is the subject of a pending proceeding in which the Division of Enforcement (Division) charges his conduct violated the Investment Advisers Act of 1940 (Advisers Act).

On September 22, 1989, J.B.T. Management, Inc. d/b/a/ Tuttle Incorporated (Tuttle Inc.) filed a Form ADV to register as an investment adviser. At the hearing the parties and I were unaware that applicant amended the application on October 20, 1989, and that this date is considered the filing date.

On December 1, 1989, this Commission initiated Administrative Proceeding No. 3-7289 to determine whether (1) the allegations of the Division are true that Tuttle Inc. willfully violated Section 207 of the Advisers Act because its Form ADV misrepresents the issues in Administrative Proceeding No. 3-7091 and omits material information about that proceeding, (2) the Commission should deny the application of Tuttle Inc. pursuant to Section 203 (c) (2), and (3) remedial action is appropriate

pursuant to Sections 203 (e) and 203 (f). 1/

A hearing was held on December 21, 1989 and simultaneous briefs were due on December 29, 1989.

FACTS

Tuttle Inc. was incorporated in Delaware on September 18, 1989. Jason Baker Tuttle, Jr. and Jason Baker Tuttle, Sr. are shareholders and president and chairman, respectively, of Tuttle Inc. Both are listed as persons who control the firm. 2/ Jason Baker Tuttle, Sr., age 50, graduated from the University of Utah and has been working in the securities industry for over 23 years. On June 27, 1989, this Commission initiated Administrative Proceeding No. 3-7091 to examine allegations that Jason Baker Tuttle, Sr., J. Baker Tuttle Corp., and Tuttle & Company willfully violated the Advisers Act of 1940. Jason Baker Tuttle, Sr. was president, chairman of the board, and sole shareholder of J. Baker Tuttle Corp. and sole officer, director, and shareholder

1/ As pertinent here Section 207 declares it unlawful for any person willfully to make an untrue statement of a material fact or to omit to state a material fact in a registration application filed pursuant to Section 203.

Section 203 (c) (2) provides that the Commission shall conclude a proceeding to determine whether to deny a registration application within 120 days of the filing of the application (February 20, 1990 in this situation), unless it extends the time for up to ninety days for good cause or for longer with applicant's consent.

2/ I take official notice of the Form ADV instructions which define control for the purpose of Form ADV as the power to direct or cause the direction of the management or policies of a company.

of Tuttle & Company during the times specified in the Commission's order. J. Baker Tuttle Corp. and Tuttle & Company are investment advisers registered with this Commission. The Division charges that respondents willfully violated the following provisions of the Advisers Act and regulations issued pursuant to that statute:

1. Section 207 by filing Forms ADV which contained untrue statements of material fact concerning, among other things, Tuttle Corp.'s practices with respect to advisory fees and billings.

2. Section 206 (1), (2) and (4) by accepting prepaid fees while not disclosing Tuttle Corp.'s insolvency, and failing to provide pro rata refunds of advance fees to clients who had cancelled their investment advisory service agreements.

3. Section 204 and Rule 204-1 by failing to amend Forms ADV to disclose that Tuttle Corp. accepted more than \$500 in fees per client, six or more months in advance, and failing to file with the Commission audited balance sheets.

4. Section 204 and Rule 204-2 by failing to make and keep true, accurate, and current books and records, failing to arrange for the preservation of Tuttle Corp.'s books and records, and failing to notify the Commission in writing of where the books and records were maintained.

5. Section 206 (1), (2), and (4) by accepting prepaid fees while not disclosing Tuttle & Company's insolvency.

6. Section 204 and Rule 204-1 by failing to amend promptly Form ADV to disclose that Tuttle & Company abruptly ceased doing business in November 1987.

7. Section 204 and Rule 204-2 by failing to arrange for the preservation of the books and records of Tuttle & Company and by failing to notify the Commission in writing of their location.

I held a four day hearing in Administrative Proceeding No. 3-7091 in late August, and received the final brief on December 13, 1989.

Jason Baker Tuttle, Jr., age 22, graduated from Georgetown University with a Bachelor of Arts degree in 1989. Mr. Tuttle, Jr. worked with his father while he attended school. Jason Baker Tuttle, Jr. signed the Form ADV on behalf of Tuttle Inc. He answered yes to three inquiries relating to disciplinary actions involving the applicant, an advisory affiliate (includes a controlling person), an officer, director or person owning 10 percent or more of the applicant's securities. The questions asked whether such a person:

(Item 11 G) is now the subject of a proceeding that could result in a yes answer to questions about whether adverse findings were ever entered,

(Item 11 J) has been declared bankrupt, and

(Item 11 K) has failed in business, made a compromise with creditors, filed a bankruptcy petition or been declared bankrupt.

A yes answer on Item 11 requires submission of Schedule D for an individual and Schedule E for a corporation. These two schedules request the following details of any court or regulatory action:

- * the adviser, organization, and individuals named,
- * the title and date of the action,
- * the court or body taking the action, and
- * a description of the action

Applicant answered Schedule D for Jason Baker Tuttle, Sr., as follows:

Ch 11:7 Corp/Personal 1987-8 (J.Baker Tuttle Corp./Tuttle & Co.) Sec Adm. Hearing 8.39.89

Applicant originally submitted the same answer on Schedule E but in response to a notice from the Commission's Office of Applications and Reports Services that it must amend its answer to include a description of the action and the court or body taking the action it submitted the following response:

Ch 11:7 Corp/Personal 1987-8 (J.Baker Tuttle Corp./Tuttle & Co.) Sec Adm.Hearing 8.29.89

SEC Administrative Hearing (SF Branch No. 3-7091) of 8.29.89 relating to Chapter 7 Bankruptcy of J. Baker Tuttle Corp./Tuttle & Co.

ALLEGATIONS

The Division contends that the Commission should deny applicant's registration as an investment adviser because applicant has willfully violated Section 207 in that its Form ADV omits material facts and contains false and misleading information. Specifically, the Division charges that the Form ADV erroneously fails to state that in Administrative Proceeding No. 3-7091 Jason Baker Tuttle, Sr. is charged with violating the

Advisers Act and that the pending proceeding involves alleged violations of the antifraud, reporting, and recordkeeping provisions of the Advisers Act. The Division charges that applicant falsely asserts that the pending proceeding directly involves the bankruptcy of J. Baker Tuttle Corp./Tuttle & Co.

The Division alleges further that Messrs. Tuttle willfully aided and abetted applicant's violations of Section 207, and that the Commission should suspend the Tuttles for six months from practice subject to the Commission's jurisdiction for their egregious conduct. Respondents contend that:

1. this proceeding is an attempt by the Division of Enforcement through its offices in San Francisco and Miami to harass Jason Baker Tuttle, Sr.

2. they did everything they could to provide the Commission with the required information, and they assumed the information was sufficient when they heard nothing further after they modified their application at the request of the Office of Applications and Reports Services.

3. they should not have to describe the pending proceeding to conform to the Division's view of it, and they identified the proceeding, stated the date, described that it was brought by the SEC, identified it as an administrative proceeding, and described the bankruptcies which provide the background for the events leading to the allegations which are the subject of the pending proceeding.

FINDINGS AS TO SECTIONS 207 AND 203

It is well settled that the registration application is a basic and vital aspect of the Commission's ability to administer the provisions of the Advisers Act, and that applicants are required to supply complete and accurate information. Market Values, Inc., 42 S.E.C. 486, 489 (1964); Marketlines, Inc., 43 S.E.C. 267, 271, 274 (1967), aff'd 384 F.2d 264 (2nd Cir. 1967), cert. denied 390 U.S. 947 (1968); Jesse Rosenblum, d/b/a Harbine Financial Service, 47 S.E.C. 1064, 1067 (1984), aff'd without opinion (3rd Cir. 1985).

I find that applicant's two line answer on Schedule D for Jason Baker Tuttle, Sr. omits material information and contains misleading information about material facts. In response to Item 11 G applicant does not disclose that the Commission's order initiating Administrative Proceeding No. 3-7091 named Jason Baker Tuttle, Sr. as an alleged violator of the Advisers Act, it does not give the title, docket number, and date of the SEC order initiating that administrative proceeding, it does not describe the nature of the action, i. e., the charges at issue, and it does not disclose that the Division contends Jason Baker Tuttle, Sr. should be barred from practice as an investment adviser. In response to Item 11 J and K, applicant's answer fails to state that Jason Baker Tuttle, Sr. and his wife were the individuals who filed for personal bankruptcy, it does not give the title and dates (1987-8 is insufficient) of the several bankruptcy proceedings involving Mr. and Mrs. Tuttle, Sr., J. Baker Tuttle

Corp., and Tuttle & Company, and it does not identify the bankruptcy court or courts which acted in the several proceedings.

I find that applicant's similar but expanded answer on Schedule E omits material information and contains misleading information about material facts. The format of the answer makes it difficult to interpret but viewed in the most responsive manner it does not provide the required information. I interpret "Ch 11:7 Corp/Personal" to mean a bankruptcy proceeding but the answer does not state which bankruptcy court or courts took or are taking action, it does not identify all the organizations and individuals named in either the bankruptcy proceedings or the administrative action pending before this Commission, it gives the number of the latter proceeding but not the date it was instituted, the charges at issue, or that the Division contends Jason Baker Tuttle, Sr. should be barred from practice as an investment adviser, and it does not state the title and dates (1987-8 is insufficient) of the several bankruptcy proceedings involving Mr. and Mrs. Tuttle, Sr., J. Baker Tuttle Corp., and Tuttle & Company.

Finally, applicant's description of "Ch 11:7 Corp/Personal 1987-8..." on both schedules and the added description on Schedule E to "SEC Administrative Hearing (SF Branch No. 3-7091) of 8.29.89 relating to Chapter 7 Bankruptcy of J. Baker Tuttle Corp./Tuttle & Co." are materially misleading. The order instituting Administrative Proceeding No. 3-7091 states that it

will determine whether the Division's allegations of illegal fraudulent conduct and reporting and recordkeeping failures are true. Those allegations and the sections of the statute and rules involved are set out above. Applicant's description with its emphasis on bankruptcy proceedings conveys a false impression as to applicant's status at the time of the filing vis-a-vis this Commission, the federal agency in charge of supervising the activities of investment advisers.

Respondents are wrong that requiring them to describe the pending action by stating the issues set out in the Commission's order would cause them to reflect the Division's position. The Division's position is that the allegations are true. The respondents' position is that they are false. I reject respondents' reasoning that they did not describe the pending allegations because they could be rendered groundless by the forthcoming decision (Respondents' Answer, p.3). Respondents' failure to mention on Form ADV that the pending proceeding involves allegations of illegal investment adviser conduct against a person in control of the applicant, and their description of the pending administrative action as related to the bankruptcy of J. Baker Tuttle Corp./Tuttle & Co. amounts to the omission of a material fact and the making of an untrue statement about a material fact.

The omitted information is material because there is a substantial likelihood that a reasonable person would consider it

important in deciding whether or not to retain the applicant, a company controlled by Mr. Jason Baker Tuttle, Sr.

I find that respondents' conduct was willful for several reasons. I reject respondents' claim that Form ADV is vague, confusing, and misleading. The questions which elicited the false and misleading responses and to which respondents omitted material facts are clear and unambiguous. Mr. Tuttle Sr. and Mr. Tuttle Jr. are college graduates, and they acknowledge answering the questions carefully. Mr. Tuttle Sr. has filed similar forms and amendments to them in the past. The case law holds that to commit a willful act a person need not know that he or she was violating the statute, but only that he or she intended to perform the act that constitutes the violation. Tager v. S.E.C., 344 F.2d 5, 8 (2d Cir. 1965). An applicant is required to comply with the statute; respondents cannot blame the Commission's staff for their actions. See Jesse Rosenblum, d/b/a Harbine Financial Service, 47 S.E.C. 1065, 1070 (1984), aff'd without opinion (3rd Cir. 1985) and cited cases.

For all the reasons stated above, I make the first determination which the Commission set down for hearing in the affirmative and find that applicant willfully violated Section 207 of the Advisers Act. I find further that Messrs. Tuttle willfully aided and abetted applicant's violation. As noted previously, Mr. Jason Baker Tuttle, Jr. signed the Form ADV, both Tutttles control the applicant, and from their conduct at the hearing and the joint answer filed in this proceeding their

positions on the issues are the same. I find that Messrs. Tuttle have aided and abetted in the Section 207 violation in that there has been a securities act violation by a primary party, both Tuttle knew of the violation, and they both gave substantial assistance to achieving the violation. IIT, an International Investment Trust v. Cornfeld, 619 F.2d 909, 922 (2d Cir. 1980).

Section 203 (c) (2) (B) directs that the Commission shall deny an application to register as an investment adviser if it finds that the applicant has not provided the information requested, or if it finds that if applicant were registered its registration would be subject to suspension or revocation under Section 203 (e). As pertinent here the latter section empowers the Commission to revoke or suspend an outstanding registration if such is found to be in the public interest and the investment adviser or associated person has willfully made or caused to be made in a registration application any false or misleading statement of a material fact or has omitted to state in any application a material fact which is required to be stated. My finding of a section 207 violation satisfies the requirements of this section when it is accompanied by a public interest finding. I find here that the public interest criteria of Section 203 (e) are satisfied by applicant's indifference to the needs of its potential customers and to regulatory requirements. The case law describes an investment adviser as a fiduciary in whom clients must be able to put their trust, and as an occupation which can cause havoc unless engaged in by those with appropriate

background and standards. Joseph P. D'Angelo, 46 S.E.C. 736, 737 (1976), aff'd without opinion 559 F.2d 1202 (2nd Cir. 1977) and Marketlines, Inc. v. S.E.C., 43 S.E.C. 267 (1967), aff'd 384 F.2d 264, 267 (2d Cir. 1967), cert. denied 390 U.S. 947 (1968).

Respondents who are both college graduates with experience in the securities industry spent by their own admission a great deal of time filling out the Form ADV at issue. Their claim that they answered only what was asked and that the Commission's files contain the entire record which is accessible both to the SEC and any member of the public shows no concern or appreciation for the public interest, and is contrary to the Commission's position that registration applications are designed to make available to the public by an inspection of the registration application significant facts bearing on the registrant's background in the securities business. Morris J. Reiter, 41 S.E.C. 137, 142 (1962).

For the reasons stated, I make the second determination which the Commission set down for hearing in the affirmative and find that the Commission should deny the application of Tuttle Inc.

The final issue is whether or not the Commission should impose sanctions pursuant to Sections 203 (e) and (f). 3/ The

3/ As pertinent to this proceeding, Section 203 (e) and (f) provide that the Commission shall sanction any investment adviser or person associated or seeking to become associated with an investment adviser if the Commission finds after hearing that such sanction is in the public interest and that the investment adviser or any associated person has
(continued...)

Division advocates a six month suspension of Jason Baker Tuttle, Sr. and Jason Baker Tuttle, Jr. because of the serious violations committed and to prevent a recurrence of these problems. This is the only situation of which the Division is aware where the principal of an investment adviser whose registered entities' conduct is being litigated attempted to register a new investment adviser without disclosing the true nature of the pending case. (Division's Brief, p. 5).

The case law recites many elements to be considered in determining whether sanctions are appropriate. They include such factors as the seriousness of the violations, the time over which they occurred, respondents' prior disciplinary history, respondents' dedication to compliance, the probability of future misconduct, and the deterrent effect on others. Applying these criteria to this situation reveals that the Tuttle's aided and abetted in a serious illegality which occurred in connection with a single registration application. The infraction occurred after the Tuttle's had been notified the information was insufficient and after they carefully formulated the answers. In addition, when Mr. Tuttle, Jr. signed the Form ADV he swore that the information and statements contained therein were current, true and complete. There is no evidence of any disciplinary findings

3/ (...continued)

willfully made or caused to be in a registration application any false or misleading statement of material fact or has omitted to state any material fact which was required to be stated.

against either individual. Mr. Tuttle, Sr. is a named respondent in Administrative Proceeding No. 3-7091 which is pending and in which the Division alleges he violated the Advisers Act and should be barred from acting as or associating with any investment adviser, broker, dealer, investment company or municipal securities dealer. There have been no efforts at rehabilitation and the probability of recurrence is high because the Tutttles adamantly defend their actions as proper.


Weighing all these considerations, I grant the Division's request for sanctions. I find this sanction necessary to convince the Tutttles that their conduct was plainly illegal. It is illogical to maintain as they do that their disagreements with Division personnel and the claims of harassment set out in their answer had any relevance to the conduct which resulted in the violations described in this decision.

ORDER

IT IS ORDERED that the application of J.B.T. Management d/b/a Tuttle Incorporated is denied and Jason Baker Tuttle, Sr. and Jason Baker Tuttle, Jr. are suspended from being associated with any investment adviser for a period of six months.

This order shall become effective in accordance with and subject to the provisions of Rule 17 (f) of the Commission's Rules of Practice. Pursuant to that rule, this initial decision

shall become the final decision of the Commission as to each party who has not, on or before Tuesday, January 16, 1990, filed a petition for review, unless the Commission determines on its own initiative to review this initial decision. If a party timely files a petition for review, or the Commission takes action as to review as to a party, the initial decision shall not become final with respect to that party.


Brenda P. Murray
Administrative Law Judge

Washington, D.C.
January 8, 1990