ADMINISTRATIVE PROCEEDING
FILE NO. 3-1888

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
DARRELL G. HAFEN, d/b/a WESTERN SECURITIES CO.
(801-5383)

INITIAL DECISION

David J. Markun
Hearing Examiner

Washington, D.C.
December 5, 1969

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APPEARANCES:

John M. High, Denver Regional Office, and Delano S. Findlay, Salt Lake City Branch Office (Joseph F. Krys, Denver, and John M. High on the Brief) for the Division of Trading and Markets

Darrell G. Hafen, pro se, for the respondent

BEFORE: David J. Markun, Hearing Examiner

THE PROCEEDING

This public proceeding was instituted by an order of the Commission dated February 17, 1969, under Section 203(d) and Section 203(e) of the Investment Advisers Act of 1940 ("Investment Advisers Act")[1/] to determine, ultimately, whether the application of Darrell G. Hafen, doing business as Western Securities Co. ("respondent"), for registration as an investment adviser under Section 203(c) of the Investment Advisers Act should be approved or denied. The proceeding to deny registration was initiated in the light of certain charges against the respondent made by the Commission's Division of Trading and Markets ("Division").

The charges alleged in the order for proceeding are that respondent in submitting his application for registration wilfully made various false and misleading statements of material facts and omitted to state material facts required to be stated therein[2/] and that he committed various violations of the anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act") and Rule 10b-5 thereunder.[3/]

1/ Section 203(d), as here pertinent, authorizes the Commission to deny registration, after notice and opportunity for hearing, upon a finding of the existence of any of certain specified grounds together with a finding that denial would be in the public interest.

Section 203(e) provides that the commencement of a denial proceeding operates to postpone the effective date of registration for up to ninety days and that the Commission may, after notice and opportunity for hearing, postpone the effective date of a registration beyond ninety days and until final determination of the denial question.

2/ Section 203(d)(1)/(3)(A) of the Investment Advisers Act makes such an act or omission, if proved, ground for denial of registration.

3/ Section 203(d)(1)/(3)(D) of the Investment Advisers Act makes such a violation, if proved, ground for denial of registration.

The Commission's order for a proceeding provided that there be determined first the question whether postponement of the effective date of the respondent's registration as an investment adviser in the public interest be ordered beyond the statutory postponement for ninety days and until final determination of the question whether registration is to be granted or denied.[4/]

The evidentiary hearing on the question of an interim postponement of the respondent's registration was held at Salt Lake City, Utah, on April 29th and 30th, 1969, the respondent appearing pro se.[4a/] At the close of that hearing the respondent entered into a stipulation waiving post-hearing procedures as respects the issue of interim postponement and the Commission subsequently, in accordance with the stipulation, entered findings and an order dated May 9, 1969, postponing the effective date of respondent's registration until final determination of the denial issue.

Under the hearing examiner's order of May 19, 1969, the hearing reconvened on September 8, 1969, for the purpose of taking additional evidence on the remaining issues presented by the order for proceeding.

Respondent again appeared pro se but after brief preliminaries he quit the hearing before the Division's remaining evidence was taken, Respondent having asserted that he would not participate further in a hearing where due process was being denied him.[5/]

4/ See note (1) above.

4a/ Schedule D of the respondent's application for registration on Form ADV indicates that respondent holds a Bachelor of Science degree in banking and finance from the University of Utah and that he has studied law for two years.

5/ Respondent's contention in this regard is discussed below under the heading "Respondent's contentions."

At the hearing on September 8, 1969, the Division moved to amend the order for proceeding to add an additional alleged violation. (Hearing Examiner's Exhibit 2). This motion was denied but evidence relating to the proposed additional charge was taken and received to the extent that it might be relevant to the question of sanctions that might be imposed in the public interest.[5a/]

By order of September 10, 1969, the hearing examiner notified the parties of the dates upon which their proposed findings, conclusions, and supporting briefs would be due.

The Division filed such documents and the respondent filed a four page document entitled "Answers to Proposed Findings, Conclusions, and Brief of the Denver office."[6/]

The findings and conclusions herein are based upon the record and upon observation of the various witnesses.

FINDINGS OF FACT AND LAW

The respondent

The respondent, Darrell G. Hafen, doing business as Western Securities Co., on January 21, 1969, filed an application on Form ADV for registration by the Commission as an investment adviser pursuant to Section 203(c) of the Investment Advisers Act. Western Securities

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5a/ This evidence has not been considered in reaching the conclusions made herein as a public-interest factor. See footnote 13, below, and text thereto.

6/ The document was received as respondent's "proposed findings, conclusions, and brief" under Rule 16 of the Commission's Rules of Practice by order of November 9, 1969. Respondent also earlier filed the following documents which have been treated as a part of his brief: a one-page letter from respondent to the hearing examiner dated October 10, 1969 and filed October 13, 1969; a two-page letter from respondent to the hearing examiner dated September 29, 1969 and filed September 30, 1969; a one-page letter from respondent to the hearing examiner filed September 22, 1969; a one-page document filed November 2, 1969, entitled "Answer to Reply of the Division of Trading and Markets to Respondent's Answering Brief," addressed to the hearing examiner.

Co. is the sole proprietorship under whose name respondent indicated he proposes to engage in business as an investment adviser.

Omissions and false statements in application for registration

The order for proceeding charges, and the record establishes, the following wilful and false and misleading statements of material facts and omissions to state material facts required to be stated in the respondent's application for registration as an investment adviser:

First, the respondent falsely answered in the negative to question 16(j) on Form ADV, Application for Registration as an Investment Adviser, dated November 20, 1968 and filed January 21, 1969, to the effect that no administrative order had been entered against him whereas in fact a Desist and Refrain Order had been issued against the respondent (and others) by the Division of Corporations of the State of California on July 5, 1966 in a proceeding entitled "In the Matter of April 15th Inc. et al," arising in part out of respondent's conduct as an investment adviser, a copy of which order had been served on respondent by mail.

Respondent urges in his brief (he did not testify at the hearing) that he was "unaware that the California situation involved an Administrative order", adding that "I was so angry with what those people did to an innocent person that I frequently threw their mail away."

It is concluded that this false answer by respondent was made deliberately by respondent and not as a result of unawareness.

Secondly, respondent omitted to state on Schedule D of Form ADV, as required by that form, that he had been employed formerly as a registered representative by Equity Securities Corporation at its Beverly Hills, California, office during the period December 7, 1966 to July 12, 1967.

The respondent states in his brief: [6a/] "...the former employment as a securities salesman was of such a short duration and there were so many things associated with that affair that I did not care to remember it . . . . . not because I wanted to hide anything from the Commission."

This omission by respondent, it is concluded, was intentional and not a result of forgetfulness.

Lastly, the respondent falsely represented on Form ADV the address of his "principal place of business" as 990 Kennecott Building, Salt Lake City, Utah, 84110, whereas in fact his oral month-to-month sublease of such office space had before October, 1968, been terminated "by mutual agreement" with the primary lessee for failure of the respondent to pay his rent.

As to this matter, respondent admits in his brief that he was "temporarily absent from the office" but asserts that he intended to "reoccupy the space when [his] license and a few other matters were straightened out." It would have been a simple matter to so state on the application.

In the light of the entire record in this proceeding, it is concluded that this false statement was made by respondent intentionally.

6a/ As already noted above, the respondent did not testify at the hearing.

The false statements and omissions found above all clearly involved "material" facts within the meaning of Section 203(d) of the Investment Advisers Act.[6b/] Information respecting a prior prohibitory order issued by a state regulatory agency in the securities field is obviously material. So is the disclosure of respondent's prior employment in the securities field, since the record of his prior employment therein would be clearly relevant to assessment of the merits of the application for registration. The statement of the respondent's business address, too, is "material".[6c/] This is so both because it is essential for the Commission to know the address in order to communicate with a registered investment adviser or an applicant for such registration and because an applicant's having or not having a suitable business address from which it proposes to conduct its business could well be a factor in evaluating the application.

The false statements and omissions of material fact found above were all made or omitted wilfully by respondent since, as already

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6b/ The test of materiality is whether a reasonable man would attach importance to the fact or information in question in determining his choice of action in the transaction (or matter) in question. S.E.C. v. Texas Gulf Sulphur Co., 401 F. 2d 833, 849 (C.A. 2, 1968); Myzel v. Fields, 386 F. 26, 718, 734 and n. 7 (C.A. 8, 1967); Prosser, Torts, 554-555 (2d ed. 1955); Restatement, Torts §538(2)(a) (1938).

6c/ Edwin Hawley, et al., 32 S.E.C. 375, 376 (1951),

found above, they were all made or omitted intentionally.[6d/]

Violations of anti-fraud provisions

The record also establishes three charged violations by respondent of the anti-fraud provisions of Section 10(b) of the Securities Exchange Act and of Rule 10b-5 thereunder:

First. In 1963 the respondent obtained $15,000 from an investor in St. George, Utah, upon respondent's representation that he would invest such funds in the common stock of Syntex Corporation, for the accounts of the investor's minor children.[7/] Instead, respondent purchased such securities in the name of Green and Sand Hollow Springs Water Company, a corporation of which respondent was President, and thereafter sold such securities and converted a large portion of the proceeds of the sale to his own use and benefit. After repeated demands for her money or the securities it was to have purchased, the investor was forced to the expense and burden of litigation to obtain a judgment, even though respondent does not contest the obligation. As of the time of the hearing in April, 1969, a substantial portion of

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6d/ "Wilfully" in the context of the securities statutes and Rules means intentionally committing the act which constitutes the violation. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts. Tager v. S.E.C., 344 F. 2d 5, 8 (C.A. 2, 1965); Gearhart & Otis, Inc. v. S.E.C., 348 F. 2d 798, 803 (C.A.D.C., 1965); Securities Forecaster Co., Inc., 39 S.E.C. 188, 191 (1959).

7/ The funds were from insurance benefits paid as a result of the accidental death of the investor's husband.

the judgment obtained by the investor remained unpaid.[8/]

The mails were used in connection with this violation to forward the investor's check to respondent and to send confirmations of purchase and sale to respondent. Also the facilities of a national stock exchange were used in connection with the purchase and sale of the Syntex stock.

Second. In September of 1968 the respondent issued worthless checks in the amounts of $4,200 and $840 to a Spokane, Washington, broker-dealer in purported payment for the purchase of shares of the common stocks of Ophir Gold Mines Company and Uranus Incorporated, and, prior to the dishonor and return of the worthless checks,[9/] respondent sold the "purchased" securities together with additional shares of Uranus Incorporated to the mentioned broker-dealer and retained the proceeds of the sale. Respondent has stated on the record that he owes the broker money and that restitution has not been made, though respondent purports to be uncertain of the exact sum owed.

8/ Respondent paid the investor $1,000 in January 1964 as part of her "profit" on the transaction, and on March 20, 1964 he paid her $5,500. In the period January through May, 1967, the investor received five (5) fifty-dollar payments but a 6th check for fifty dollars from respondent bounced. A few weeks before the hearing commenced on April 29, 1969, the respondent gave the investor a check for $10,000 which, however, was postdated June 1, 1969, and the record does not establish whether the check was subsequently honored or not. **Respondent's brief suggests that some portion of the sum due remains unpaid.**

9/ The checks were drawn on a Swiss bank, which circumstance resulted in a delay of about a month in checking out the dishonor.

The mails were used by the respondent to deliver securities to be sold and by the broker-dealer to send confirmations of purchase and sale to the respondent.

Third. In June of 1968 the respondent issued a worthless check in the amount of $499,994.88 drawn on a bank in Mexico in purported payment for shares of Mates Investment Fund, Inc., a registered investment company. The shares, though issued, were not delivered to respondent inasmuch as the check was dishonored.

The mails were used to send confirmation of purchase to the respondent. In addition, means of interstate commerce (telegraph) were used in connection with the purchase of the shares of the Fund.

The three fraudulent acts found and described above were all committed wilfully[9a/] by the respondent.

Respondent's contentions

Respondent contends that he was denied due process of law by virtue of the asserted failure of the hearing examiner to honor respondent's request for the issuance of 32 subpoenas to intended witnesses. This contention is without merit.

When the hearing resumed on September 8, 1969, after the issue of interim postponement had been resolved pursuant to stipulation, respondent renewed[10/] his request for the issuance of

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9a/ See footnote 6d above.

10/ Respondent first asked for issuance of the subpoenas in a letter of August 23, 1969, to the hearing examiner. The hearing examiner [In the absence of the hearing examiner assigned to the proceeding on annual leave, a substitute hearing examiner had been assigned to act on requests for subpoenas.] responded by letter of August 26, 1969, in which he invited attention to the provisions of Rule 14 of the Rules of Practice respecting fees and mileage and suggested that respondent obtain from the Commission's Regional Office in Salt Lake City the necessary subpoena forms, fill them out, and send them via air mail to the examiner for signature. Respondent made no response.

a total of 32 subpoenas to intended witnesses.[11/] In view of the fact that a number of the requested witnesses were as far removed from the site of the hearing as California and New York City and in light of the fact that respondent at the earlier hearing had indicated his financial situation was such that he could not emply counsel (R. 5), respondent was requested to state whether he was prepared to tender the necessary fees and mileage under Rule 14 of the Commission's Rules of Practice (R. 4*, 5*, 6*). Respondent declined to answer the question directly, insisting variously that he should not be required to tender fees and mileage in advance of the witness's testifying (R. 5,* 6*) and that, assuming he's unable to pay fees and mileage, constitutional consideration should require the Government to make the witnesses available without his payment of fees and mileage (R 6*).

Before the hearing examiner could finish advising the respondent on the rules requirements respecting the issuance of subpoenas (R. 7,* 8*) and before the examiner's intention (R. 29*) to ask respondent for an offer of proof as to what evidence respondent expected to introduce through the persons he was seeking to have subpoenaed could be carried out, the respondent walked out of the hearing room despite the examiner's request that he remain to be further advised. Thus the respondent's "walkout" precluded a ruling on his requests for the issuance of the subpoenas. The practical effect of his departure from

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11/ R. 3*. (Where a reference to the hearing transcript is followed by an asterisk (*) it indicates a reference to the hearing held on September 8, 1969. A reference without such asterisk is to the hearings transcripts April 29 and April 30, 1969.

the hearing was to abandon his requests for subpoenas.

Respondent also contends that his consent to the postponement order was given under duress. There is no evidence to suggest that there is any merit whatever to this claim. The stipulation [Hearing Examiner Exhibit No. 1] that served as the basis for the Commission's postponement order was accepted in open hearing by the Hearing Examiner after inquiry as to whether respondent agreed to the stipulation (R. 270-274). Moreover, the postponement question is not directly relevant to the remaining issue in this proceeding, i.e. the denial question.

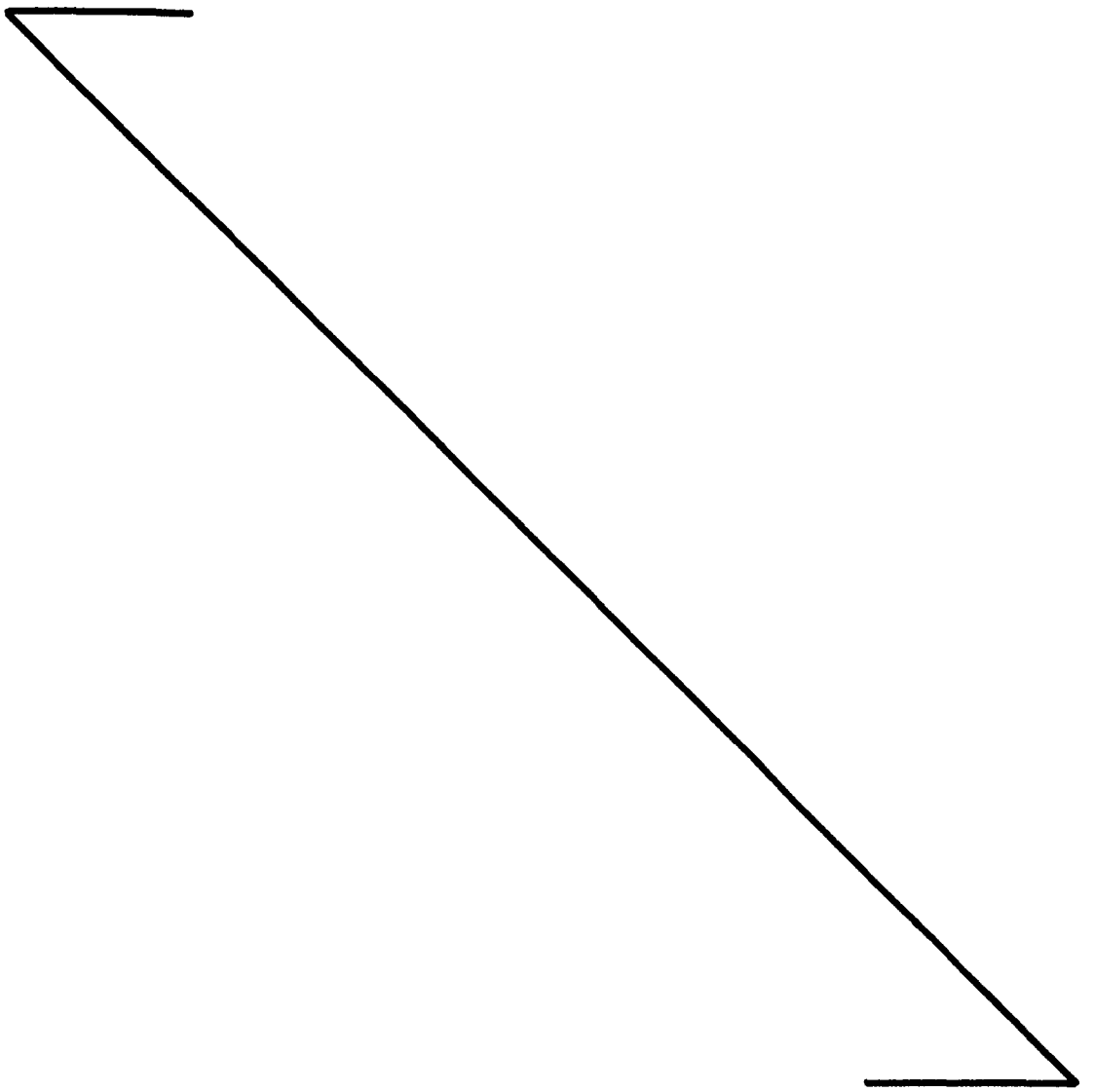
Conclusions

In general summary of the foregoing, the following conclusions of law are reached:

(1) Within the meaning of Section 203(d)(1)(A) and Section 203(d)(3)(A) of the Investment Advisers Act the respondent wilfully made, in his application for registration as an investment adviser under that act, false and misleading statements of material fact and omitted to state in that application material facts required to be stated therein, in the particular respects found above.[12/]

12/ The Division urges that the same acts and omissions that constitute a ground for denial of registration under Section 203(d) also constitute a violation of Section 207 of the Investment Advisers Act which violation, under Section 203(d)(3)(D) of the Investment Advisers Act, would be a ground for denial. No conclusion is made as to Section 207 since no violation of that section was charged in the order for proceeding.

(2) Within the meaning of Section 203(d)(1)(D) and Section 203(d)(3)(D) of the Investment Advisers Act the respondent wilfully violated the anti-fraud provisions of Section 10(b) of the Securities Exchange Act and of Rule 10b-5 thereunder, in the particular respects found above.



PUBLIC INTEREST

It is concluded that the false statements and omissions of material fact found above are of a sufficiently serious character that they would alone warrant denial of respondent's application in the public interest.[12a/]

Likewise, the violations of the anti-fraud provisions of Section 10(b) of the Securities Exchange Act and of Rule 10b-5 thereunder found above would, taken alone, clearly warrant denial of respondent's application in the public interest. The acts involved were taken deliberately in callous disregard of the property rights of others and full restitution has not been made.

Taken together, the foreoing misconduct and violations present so compelling a case for denial of the application for registration as an investment adviser that it is unnecessary to consider certain further evidence that was received into the record as bearing on sanctions.[13/]

12a/ Cf. Edwin Hawley, et al., 32 S.E.C. 375 (1951).

13/ On September 8, 1969, after respondent had walked out of the hearing, as noted above, and after the examiner had denied the Division's motion to amend the order for proceeding in order to add a charge, also as noted above, evidence was received respecting the subject matter of the proposed additional charge as bearing potentially on the question of sanctions. This evidence establishes that in April, 1969, about the time the hearing in this proceeding started, respondent issued a worthless check for $4,703.50 to a broker-dealer in Salt Lake City, Utah, in purported payment for the purchase of securities for respondent's account. These securities were not paid for and had to be sold by the broker-dealer at a loss to it of $440.75. In addition, other evidence received on September 8, 1969, establishes that in August, 1969, the respondent got himself appointed, among other things, as "exclusive adviser for investments "to the Shivwits Band of the Piute Indian Tribe even though he was then subject to the Commission's order postponing his application for registration as an investment adviser pending final determination of the denial proceeding. As noted in the text, the evidence mentioned in this footnote has not been considered on the question of the sanctions to be imposed in the public interest; nor has it been considered for any other purpose.

Accordingly, IT IS ORDERED that the application for registration as an investment adviser of Darrell G. Hafen, doing business as Western Securities Co. be, and the same hereby is, denied.

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice.

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen (15) days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c) determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party. 14/

David J. Markun
Hearing Examiner

Washington, D. C.
December 5, 1969

14/ To the extent that the proposed findings and conclusions submitted by the parties are in accordance with the views herein they are accepted, and to the extent they are inconsistent therewith they are rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the issues presented.