In the Matter of MARKETLINES, INC., 50 Broad Street, New York, New York, ELIZABETH SCHREIBER, doing business as COMMODITY TRADING ADVISORY SERVICE, 65 Stuart Street, Lynbrook, New York

Admin. Proc. File Nos. 801-3091, 801-3066

SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISORS ACT OF 1940, Section 203(d), Release No. 206

January 20, 1967

ACTION:

INVESTMENT ADVISER REGISTRATIONS
Grounds for Revocation
Deceptive Advertisements

Where registered investment adviser's advertisements, soliciting subscriptions to its market letters, presented highly optimistic picture of profits that would accrue to subscribers and failed to disclose risks inherent in purchase and sale of securities, implied that techniques for evaluating securities can be reduced to exact science and that it employed large staff of financial analysts, referred to use of timing devices for maximum trading profits without disclosing limitations of such devices, and offered "free" material although offer conditioned on purchase of trial subscription, held, advertisements deceptive and use constituted willful violations of anti-fraud provisions of Section 206 of Investment Advisers Act of 1940 and Rule 17 CFR 275.206(4)-1 thereunder.

Failure to Amend Applications for Registration

Where registered investment advisers failed to amend or promptly amend applications for registration to disclose adverse findings, made in Commission decision revoking investment adviser registration of and denying broker-dealer registration to another firm, with respect to officer and employee of one and sole proprietor and controlling person of other investment adviser, held, willful violations of Sections 203(d), 204 and 207 of Investment Advisers Act of 1940 and Rule 17 CFR 275.204-1 thereunder.

Practice and Procedure

Where, in course of informal preliminary inquiry over telephone by Commission investigator, sole proprietor of registered investment adviser made statements indicating that her husband was controlling person of such investment adviser, held, such statements properly admitted in evidence although investigator did not advise her that she was entitled to consult counsel and that any statements she made might be used against her.

Public Interest

Where one registered investment adviser used false and misleading advertising material, failed to amend or promptly amend application for registration to make required disclosures of previous violations of officer and employee, and acted as investment adviser in a State in violation of its laws, and other registered investment adviser failed to amend registration application to make required disclosure of previous violations of sole proprietor and controlling person, and latter had pleaded guilty to criminal charges involving securities, held, under all the circumstances, in public interest to revoke investment adviser registrations.

TEXT: FINDINGS, OPINION AND ORDER REVOKING INVESTMENT ADVISER REGISTRATIONS

Following hearings in these consolidated proceedings pursuant to Section 203(d) of the Investment Advisers Act of 1940 ("Advisers Act"), the hearing examiner filed an initial decision in which he found that Marketlines, Inc. ("Marketlines") and Elizabeth Schreiber, doing business as Commodity Trading Advisory Service ("Commodity"), registered investment advisers, aided and abetted by certain associated persons, willfully violated the Advisers Act, and he concluded that registrants' registrations should be revoked. We granted a petition for review filed by registrants and the associated persons, petitioners filed a supporting brief, and our Division of Trading and Markets ("Division") filed a brief in support of the initial decision. Our findings are based upon an independent review of the record. Fraudulent Advertisements by Marketlines

Between January 1, 1965 and July 15, 1965, when these proceedings were instituted, Marketlines, willfully aided and abetted by David S. Romanoff, president, treasurer, and sole stockholder, and Harold Schreiber, who was vice-president and secretary until January 11, 1965 and continued his association with Marketlines thereafter, willfully violated the anti-fraud provisions of Section 206 of the Advisers Act and Rule 17 CFR 275.206(4)-1 thereunder in that it published and distributed materially false and misleading advertisements of its market letters.

Marketlines' advertisement published on January 7, 1965 in a New York newspaper and soliciting subscriptions to its market letter, "The Penny Speculator," stated that "interest in LOW PRICED STOCKS is opening profit possibilities that will undoubtedly pave the way for many family fortunes in the years just ahead"; that Marketlines "has developed a completely unique advisory service"; that the "15 Points TOWARD PROFIT", which were items covered by the market letter, are "backed by the research and experience" of Marketlines' "financial scientists and chartists," and that the "tremendous value" of those points will be recognized by investors "who want to protect and enhance their capital." Virtually identical advertisements appeared in the same and other New York newspapers published on January 11 and 23, and March 7 and 13, 1965. n1 Another advertisement which appeared in the April 4, 1965 issue of a financial journal similarly referred to the market letter as "a unique advisory service devoted exclusively to the goal of capital gains," and to the "research and experience of Marketlines' financial analysts and chartists."

These advertisements, in presenting a highly optimistic picture of the profits that would accrue to subscribers to the market letter, were materially misleading in failing to disclose the risks inherent in the purchase and sale of securities and were obviously designed to whet the speculative appetite of unsophisticated investors and thereby induce them to subscribe. As we stated in Spear and Staff, Incorporated:

"In appraising advertisements . . . we do not look only to the effect that they might have had on careful and analytical persons. We look also to their possible impact on those unskilled and unsophisticated in investment matters." n2 The reference to "financial scientists" was highly misleading in implying that techniques for evaluating securities can be reduced to an exact science. Further, the reference to the research and experience of the firm's personnel implied that the firm employed a large staff of financial analysts when in fact such staff consisted of Schreiber and Romanoff, with the latter principally providing editorial comment and review. n3

Moreover, the above newspaper advertisements stated that the market letter brought to its subscribers such features as the "use of timing devices for maximum trading profits." Since the advertisements did not disclose the limitations of such devices and the difficulties with respect to their use, they were expressly prohibited by Rule 17 CFR 275. 206(4)-1(a)(3) under Section 206 of the Advisers Act.

Marketlines also prepared and mailed an advertising brochure promoting "The Penny Speculator" and another market letter called "Marketlines." The envelope proclaimed: "AN INVITATION TO READ AN EXTRAORDINARY NEW CONCEPT IN MARKET PROFITS."; "CAN YOU STRIKE IT RICH?"; and "MARKETLINES - THE LETTER PROFESSIONALS READ." The enclosed brochure stated in large type, "Announcing The Most Revolutionary New Investment Service Concept To Come Along In

Years -- Giving You An Invaluable Double Opportunity for Stock Market Profits." These flamboyant statements were misleading in presenting the market letters as providing extraordinary and reliable profit-producing advice. While the text of the brochure, which was in very small print, tended to show that risks were involved in the purchase and sale of securities, in our opinion the misleading nature of the large-type statements was not thereby cured since they did their "damage through [their] initial effect on the prospective" subscriber. n4

Finally, the newspaper advertisements and the brochures offered "free" material with the purchase of a trial subscription. Such offer contravened subsection (a)(4) of Rule 206(4)-1 which states that it shall constitute a fraudulent or deceptive act or practice for an investment adviser to publish or distribute any advertisement which states that any material will be furnished free unless such material "actually is or will be furnished entirely free and without any condition or obligation, directly or indirectly."

Marketlines asserts that the acceptance of the advertisements for publication by leading New York newspapers is cogent evidence of their propriety, and that the advertisements conformed to prevailing standards of investment adviser advertising. But under the Advisers Act it is for this Commission and the courts, not commercial publications, to determine whether an investment adviser has violated the provisions of that Act. Moreover, we do not agree that Marketlines' advertisements are typical and our prior decisions imposing high standards in this area compel rejection of this defense. n5

Romanoff, as president of Marketlines, is clearly responsible for the violations found. Schreiber, the other principal officer until his resignation on January 11, 1965, and thereafter an employee, is also chargeable with responsibility for the newspaper advertisements. n6 Both while an officer and thereafter he participated with Romanoff and representatives of advertising agencies in the preparation of these newspaper advertisements. n7

Marketlines, aided and abetted by Romanoff and Harold Schreiber, and Commodity, aided and abetted by Harold Schreiber, willfully violated Sections 203(d), 204 and 207 of the Advisers Act and Rule 17 CFR 275.204-1 thereunder in that they failed to make or promptly make certain required disclosures in amendments to their applications for registration, which had become effective in January 1963 and October 1948, respectively.

Marketlines

Marketlines failed to amend its application for registration until March 24, 1965 to disclose our finding in Market Values, Inc., which was issued on December 31, 1964, n8 that Harold Schreiber caused materially false and misleading statements in Market Values' application for investment adviser registration. n9 We reject Marketlines' contention that the delay of less than three months was not unreasonable. The application for registration is a vital element in our regulation of investment advisers and a delay of such duration is inconsistent with the duty to keep filings current. n10

In addition, the amendment of March 24, 1965, failed to disclose that Stanley Chandler, a part-time employee of Marketlines and the sole employee of another company owned by Romanoff which rendered mailing services for Marketlines and shared the latter's offices rent-free, had as vice-president of Market Values also been found to have caused the false and misleading statements in that firm's application. These amendments further failed to disclose our findings that Schreiber aided and abetted violations of the Exchange Act. n11

Marketlines asserts that since Schreiber had resigned as an officer eleven days after issuance of the Market Values decision and thereafter served only as an employee, it was not required to disclose our findings with respect to him. Even aside from any requirement of disclosure within the eleven-day period, the application calls for such disclosure with respect to controlled persons or employees as well as officers. Nor does the fact that our staff was unable to serve Chandler with

the order for proceedings in Market Values make our findings therein as to him a nullity nor justify the failure to disclose them. We appropriately made such findings pursuant to Section 203(d) of the Advisers Act insofar as they were relevant to the issues relating to Market Values. n12

We further find no substance to Marketlines' contention that any violations with respect to non-disclosure of our findings in Market Values were not willful. n13 Romanoff knew, at least when Schreiber resigned, that his resignation was due to the fact that he was the subject of Commission proceedings and that a decision had been issued. Examination of that decision would also have disclosed our findings against Chandler. n14 Schreiber's knowledge and participation are of course obvious.

Commodity

A supplement to Commodity's application for registration, filed in November 1962, failed to disclose that Harold Schreiber exercised a controlling influence over the management or policies of Commodity, and was not amended to disclose our findings in the Market Values case with respect to him as well as the finding that Elizabeth Schreiber, as secretary-treasurer of Market Values, had together with her husband aided and abetted in Market Values' violations of the Exchange Act.

The record shows that Schreiber in fact ran Commodity. Mrs. Schreiber stated in the November 1962 supplement that she had been operating an antique gallery since March 1962, and she subsequently admitted that her husband was the controlling person in Commodity. A staff investigator in the Section of Investment Adviser Inspections telephoned Elizabeth Schreiber in April 1965 and, in answer to the question whether she was registered as an investment adviser, stated, "that's my husband," and when asked whether Commodity was active replied, "I imagine it is. If you want to know anything about it, you'll have to call my husband." She also referred him to her husband when he asked whether she could tell him anything about the "service."

Commodity now contends for the first time that the admission of this telephone conversation in evidence was unfair and violated due process because the investigator did not warn Mrs. Schreiber that she was entitled to consult counsel and that any statements she made might be used against her. The Division argues that under the circumstances it was not necessary for the investigator to so advise Mrs. Schreiber and we agree. n15 We also reject the contention that the failure to disclose our findings in Market Values, particularly since Mrs. Schreiber could not have considered that case to be unknown to us, did not in and of itself justify a finding of willfulness. n16

Commodity also argued that the investigator's testimony was inadmissible because it did not appear that he warned Mrs. Schreiber that he was conducting an investigation. However, no objection was raised as to the admissibility of the investigator's testimony at the hearings and the investigator was not questioned, either on direct or cross-examination, concerning any statements he may have made to Mrs. Schreiber as to his identity or the purpose of his call, and Mrs. Schreiber did not testify. Under these circumstances, we do not think it proper to assume, as Commodity's argument would have us do, that the investigator did not identify himself to Mrs. Schreiber merely because he did not affirmatively advert to that question in testifying, in connection with the substantive issues in the case, to his conversation with her concerning Commodity. In any event, cf. Hoffa v. U.S., 35 U.S.L. Week 4058, 4061 (U.S. December 12, 1966), which held that the admission of a criminal defendant's statement to an associate who was a paid government informer did not in itself violate the due process clause. Cf. also Lewis v. U.S., 35 U.S.L. Week 4072 (U.S. December 12, 1966).

Petitioners contend that the consolidation of these proceedings against Marketlines and Commodity was prejudicial by creating an atmosphere of guilt by association. However, since as we have seen these proceedings involved common questions of law and fact, they were properly consolidated under Rule 17 CFR 201.10 of our Rules of Practice. n17 Moreover, no showing of prejudice has been made. The hearing examiner is not only legally trained and judicially oriented, but his evaluation of the evidence applicable to each registrant has also been reviewed by us. Under these

circumstances, we fail to see any basis for respondents' fear that the examiner or this Commission could be influenced to find "guilt by association." n18

Petitioners assert there was no substantial showing of harm to the public to warrant revocation of registrants' investment adviser registrations, and at most the violations were merely technical. We cannot agree with petitioners. As we stated in Spear & Staff, Incorporated:

"Registrants' sensational advertisements featuring the get-rich-quick theme were incompatible with responsible methods of obtaining clients for investment advisory services. Advertisements of this kind have a substantial adverse effect on the public interest. Not only do they tend to mislead and deceive investors, they also tend to debase the standards of the investment advisory industry by creating a competitive environment that tempts advisers to vie with each other in making unsupportable claims to prophetic insight." n19

We further note that in 1950 Romanoff, who was an attorney, was convicted in New York of conspiracy, second degree forgery, grand larceny, and concealment of stolen property, and was disbarred in that state. n20 There is no substance to Marketlines' contention that such background should be disregarded in determining the extent of any sanction to be imposed merely because Romanoff's conviction and disbarment occurred about 13 years before Marketlines filed its application for registration. n21 We further note that the Illinois bar order against Marketlines, previously mentioned, was based upon its findings that, in violation of the State's registration provisions, Marketlines acted as an investment adviser in Illinois both prior to filing an application for registration and after Romanoff had failed to obtain a passing grade on that State's investment adviser examination.

On the basis of the foregoing, we agree with the hearing examiner that Marketlines' registration as an investment adviser should be revoked.

With respect to Commodity, its violations were limited to the non-disclosure of material information in the supplement to its application for registration. However, the disclosure of the true principals in a firm is especially crucial to the efficiency of the regulatory scheme, and the failure to disclose them defeats the purpose of the registration provisions. n22 This is not the first time that Harold Schreiber's controlling interest in an investment adviser has been concealed. As we have noted, his controlling interest in Market Values also was not disclosed in that firm's application for investment adviser registration. In addition, he together with his wife aided and abetted that firm's willful violations of the Exchange Act in connection with the statement of financial interest in its application for broker-dealer registration. Their conduct here evidences a persistent disregard of applicable regulatory safeguards. Moreover, we have found Harold Schreiber an aider and abettor of Marketlines' willful violations of the anti-fraud and registration provisions of the Advisers Act. Finally, we note that he has pleaded guilty to criminal charges of conspiracy to violate and substantive violations of registration and anti-fraud provisions of the Securities Act of 1933 in the offer and sale of a security. n23

Under all the circumstances, we conclude, as did the hearing examiner, that it is appropriate in the public interest to revoke Commodity's investment adviser registration, rather than grant its request for withdrawal of such registration.

Accordingly, IT IS ORDERED that the registrations as investment advisers of Marketlines, Inc. and Elizabeth Schreiber, doing business as Commodity Trading Advisory Service, be, and they hereby are, revoked.

By the Commission (Chairman COHEN and Commissioners WOODSIDE, OWENS, BUDGE and WHEAT).

Footnotes

n1 In the March 13, 1965 advertisement, the word "analysts" was substituted for "scientists."

n2 Investment Advisers Act Release No. 188, p. 5 (March 25, 1965). See also Private Investment Fund for Governmental Personnel, Inc., 37 S.E.C. 484, 487 (1957).

n3 In this connection we note that Romanoff failed to pass an examination to qualify as an investment adviser in the State of Illinois.

n4 The Private Investment Fund for Governmental Personnel, Inc., supra, 37 S.E.C. at 490; see also Spear & Staff, Incorporated, supra, p. 6; Del Consolidated Industries, Inc., Securities Act Release No. 4795, pp. 2-3 (July 26, 1965).

n5 See Spear & Staff, Incorporated, supra; Paul K. Peers, Inc., Investment Advisers Act Release No. 187 (March 22, 1965); Anne Caseley Robin, Investment Advisers Act Release No. 149 (September 10, 1963).

n6 The hearing examiner found that Schreiber, after resigning, continued to exercise a controlling influence over Marketlines. We do not reach this issue.

n7 The record shows that 75,000 to 100,000 brochures were circulated from the end of January to March 1965, but it does not appear whether Schreiber participated in preparing or circulating them. Failure to Amend Applications for Registration

n8 Investment Advisers Act Release No. 181.

n9 We found that Market Values, for the purpose of concealing the identity of Harold Schreiber in order to protect his then employment with an exchange member, did not list his name as a controlling person in its application and falsely stated therein that Mrs. Schreiber (her maiden name was used) was the beneficial owner of a substantial interest in Market Values, which in fact was beneficially owned by her husband, and that the application also falsely stated that Market Values was not engaged in any business other than that of investment adviser although it rented out mailing lists. We held that Market Values thereby willfully violated Sections 203(c) and 207 of the Advisers Act.

n10 Cf. Peoples Securities Company, 39 S.E.C. 641, 644-45 (1960), aff'd 289 F.2d 268 (C.A. 5, 1961); Justin Federman Stone, Investment Advisers Act Release No. 153, p. 6 (November 26, 1963).

n11 We found that Market Values' statement of financial condition, which was filed as a supplement to its application for broker-dealer registration and which was sworn to by Schreiber, materially overstated the applicant's assets, in willful violation of Section 15(b) of the Exchange Act and Rule 17 CFR 240.15b-8 thereunder. We revoked Market Values' investment adviser registration, denied its application for broker-dealer registration, and found Schreiber a cause of such denial. An appeal from this decision was dismissed upon default in February 1966.

n12 Our findings as to Chandler were without prejudice to an application by him to reopen the record to contest them. Investment Advisers Act Release No. 181, p. 3, n. 4. No such application has been filed.

n13 See Tager v. S.E.C., 344 F.2d 5, 8 (C.A. 2, 1965): "It has been uniformly held that 'willfully' in this context 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."

n14 The hearing examiner further concluded that Marketlines failed to amend its application to disclose that on April 29, 1964, it had been prohibited by Illinois' Secretary of State from acting as an investment adviser in that State, which prohibition had been affirmed by the Illinois State courts. See Marketlines, Inc. v. Chamberlain, 63 Ill. App. 2d 274, 211 N.E. 2d 399 (1965). The application form called for disclosure of orders "of any court" enjoining the applicant from acting as an investment adviser. Even if the failure to disclose the Illinois order is a violation because of the affirmance of that order in the courts, given the fact that the language of the form does not expressly deal with such a situation, we do not attach any weight to such failure in assessing the sanction to be imposed.

n15 Miranda v. Arizona, 384 U.S. 436 (1966), a criminal case cited by the respondents, does not require a contrary conclusion. Even assuming that the constitutional necessity for the procedural safeguards against self-incrimination attaches in the context of administrative proceedings, that case expressly limits it to situations where the defendant makes inculpatory statements while in custody, i.e., where the "questioning [is] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" (at p. 444). Mrs. Schreiber was not "in custody" or deprived of her "freedom of action" in answering the questions of the investigator over the telephone and her answers were clearly voluntary.

n16 See, e.g., Morris J. Reiter, Securities Exchange Act Release No. 6849 (July 13, 1962), which held that failure to amend a registration application to disclose an injunction was willful even though this Commission, being the complainant in the injunction action, was aware of it. As we there noted the requirements pertaining to registration applications are designed to make available to the public by an inspection of the application significant facts bearing on the registrant's background. Consolidation of Proceedings

n17 See Siltronics, Inc., Securities Exchange Act Release No. 7150, p. 6 (September 30, 1963).

n18 Cf. Clinton Engines Corporation, Securities Act Release No. 4585, p. 3 (March 4, 1963); J.A. Winston & Co., Inc., Securities Exchange Act Release No. 7337, pp. 11-12 (June 8, 1964). See also Donnelly Garment Co. v. N.L.R.B., 123 F.2d 215, 224 (C.A. 8, 1942): "One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received." Public Interest

n19 Supra, at p. 8 of cited Release; see also Special Study of Securities Markets of the S.E.C., H.R. Doc. No. 95, Pt. 1, 88th Cong., 1st Sess. (1963), pp. 367-8. And, as we have observed above, the application for registration is a basic and vital part of our administration of the Act.

n20 App. Div., First Dept. (October 20, 1950).

n21 We reject Marketlines' contention that it was prejudiced by the introduction of Romanoff's conviction in evidence before rather than after the substantive question of liability was decided by the hearing examiner. Apart from the fragmentation of the proceedings which would result from postponing evidence relevant on the public interest other than evidence of the violations themselves which is also relevant on that issue, Marketlines' position ignores the facts that hearing examiners are sophisticated enough to distinguish the issues before them and that their conclusions are subject to review by us.

n22 Financial Counsellors, Inc., Securities Exchange Act Release No. 7371, p. 5 (July 17, 1964), aff'd 339 F.2d 196 (C.A. 2, 1964); L. H. Feigin, 40 S.E.C. 594, 597 (1961); Jefferson Associates, Inc., 39 S.E.C. 271, 273 (1959).

n23 U.S. v. Hayutin, 64 Cr. 254 (S.D.N.Y., 1966).