

BEFORE THE SECURITIES COMMISSIONER
OF THE STATE OF DELAWARE

IN THE MATTER OF:)
)
ALLIED CAPITAL GROUP, INC.,)
FLOYD J. STUMPF,) Case No. 89-02-04
)
Respondents.)

OPINION AND ORDER

On June 6, 1989, the State moved to amend the summary order of suspension and notice of intent to revoke broker-dealer and agent registrations (hereinafter "notice of allegations") which were issued on April 6, 1989. The motion sought to add a new paragraph number 32 which would allege that, as set forth in the April 6 order in the paragraphs preceding number 32, respondent Stumpf violated 6 Del.C. §7316(a)(2) by willfully violating §7303 and §7316(a)(7) of the Delaware Securities Act.

On June 7, 1989, I wrote to counsel for both respondents Allied Capital Group, Inc., and Floyd J. Stumpf, directing them to respond to the State's motion on or before June 14, 1989. I stated in the letter that I intended to proceed as scheduled with the hearing on June 20 if at all possible. In a document dated June 7 and received by the Securities Division on June 13, 1989, counsel for respondent Floyd J. Stumpf answered with an objection to the State's motion and by moving to dismiss the summary order of suspension. Counsel for respondent Stumpf also requested a postponement of the hearing for 60 days.

Counsel's argument to dismiss the order of suspension is based upon 6 Del.C. §7316(e), which states that withdrawal of registration becomes effective 30 days after receipt of an application to withdraw unless a suspension or revocation proceeding is pending or is instituted within 30 days after the application was filed. Also, under §7316(e), a suspension or revocation proceeding based on §7316(a)(2) may be instituted up to one year after withdrawal became effective. Since Mr. Stumpf's registration with Allied Capital Group, Inc., was terminated on February 8, 1989, and the notice of allegations and order of suspension were issued on April 6, 1989, without referencing §7316(a)(2) or explicitly charging "willful" violations, counsel argues that the suspension order is in violation of §7316(e) and must be dismissed. Counsel also argues that the defect could not be cured because there is no statutory authority to amend "such orders of revocation."¹

On June 14, 1989, Mr. Wilson filed the State's response to Mr. Stumpf's motion. Attached to the State's response was a copy of the Securities Division's registration record of Mr. Stumpf, showing that his registration with Allied Capital Group, Inc., in Delaware terminated on February 8, 1989, and that his registration with Oppenheimer & Co., Inc., in Delaware terminated on March 28, 1989. Therefore, the State argued, the 30-day language in §7316(e) relied upon by Mr. Stumpf does not apply because Mr.

¹ I assume that counsel meant "suspension" rather than "revocation."

Stumpf was registered in Delaware within 30 days of the April 6 summary order of suspension. The State also argued that its motion to amend would not require additional preparation by respondent's counsel and that the request for a 60-day postponement should be denied.

With respect to the State's motion, the April 6, 1989 notice of allegations and suspension order shall be deemed to contain the proposed paragraph number 32 set forth in the State's motion. I find Mr. Stumpf's argument that the State and/or the Commissioner lack authority to amend charges and orders to be without merit. See 6 Del.C. §7316(c); 6 Del.C. §7325(b). No response was received from counsel for Allied Capital Group, Inc., which will be deemed to have no objection to the State's motion.

With respect to respondent Stumpf's motion to dismiss the summary order of suspension, it is denied. Since the State's motion to include an explicit charge under 6 Del.C. §7316(a)(2) has been granted, the predicate of respondent's argument for dismissal has been negated. Moreover, the State is correct in arguing that Mr. Stumpf's registration in Delaware continued to March 28, 1989, which was less than 30 days from the April 6, 1989 issuance of the notice of allegations and order of suspension. Certainly, Mr. Stumpf's registration in Delaware with Oppenheimer & Co., Inc., was subject to suspension because of his alleged actions in connection with his prior registration with Allied Capital Group, Inc. Therefore, I find that the 30-day language of §7316(e) does not invalidate the April 6 suspension order.

This brings me to the most difficult question, which is whether the hearing should be postponed because of the proximity of the State's motion and this order to the proposed hearing date of June 20. Despite some ambivalence, I am denying the request for a postponement.

Ordinarily, an amendment of serious charges--requested two weeks before a scheduled hearing and granted one week before--could be grounds for a postponement of the hearing. In this instance, however, there are certain factors that weigh against the granting of respondent's request. My view is that no new area has been opened up by the amendment that would require renewed investigation by counsel, and I do not think counsel was surprised by the content of the new allegations.

Counsel argues that the inclusion of a reference to §7316 (a)(2) means that respondent Stumpf faces fraud charges and that without a postponement respondent will have insufficient time to adequately prepare a defense to such serious charges. However, §7316(a)(2) merely incorporates by reference violations of all other sections of the Delaware Securities Act as a basis for suspension or revocation. Rather than generally referencing §7316(a)(2), the April 6 notice of allegations specifically cited the other provisions that were violated--principally the anti-fraud provision, §7303, and the securities registration provision, §7304. The only element added by a reference to §7316(a)(2) is that of willfulness. Although that element is certainly material, in my view the April 6 notice of allegations and order of suspension strongly suggest, if they do not imply, that

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willful violations of the Delaware Securities Act are at issue. The gist of a fraud charge under the Securities Act is contained in §7303, and the April 6 notice repeatedly alleged §7303 violations. Frankly, I find it difficult to believe that counsel was unaware, until he received the State's motion to amend, that serious fraud charges were being made.

Also, in the securities context the element of willfulness adds little to an alleged violation because the term "willful" has generally been interpreted to mean an intent to commit the alleged act (i.e., with an alleged misrepresentation, to speak the words) rather than an intent to violate the law. Hinkle Northwest, Inc. v. SEC, 641 F.2d 1304, 1307 (9th Cir. 1981); Decker v. SEC, 631 F.2d 1380, 1386 (10th Cir. 1980); Nees v. SEC, 414 F.2d 211, 221 (9th Cir. 1969); Capital Fund, Inc. v. SEC, 348 F.2d 582, 588 (8th Cir. 1965); Tager v. SEC, 344 F.2d 5 (2nd Cir. 1965); Gearhart & Otis, Inc. v. SEC, 348 F.2d 798, 802 (D.C. Cir. 1965); Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949). See also 11C-Part 2 Business Organizations, SOWARDS & HIRSCH, BLUE SKY REGULATION §8.09[2] at 8-87 (1989) ("All that is needed is a showing that the person acted intentionally in the sense of knowing what he was doing").

The amended charges contain no new factual elements involving additional investors or purchases. Counsel has not asserted that he was surprised by the information in the amended paragraph and has not supported his claimed need for more time with any facts as to what has been undertaken and what remains to be done. The notice of allegations was issued on April 6, and respondent

has already had more than two months in which to prepare. One postponement has already been granted. My understanding from the Securities Division staff is that subpoenas have already been issued to the witnesses and the services of a court reporter have been secured. The hearing will proceed on June 20, 1989.

SO ORDERED.



RICHARD W. HUBBARD
Securities Commissioner

Dated: June 14, 1989

AFFIDAVIT OF MAILING

STATE OF DELAWARE
NEW CASTLE COUNTY

)
) SS:
)

Cynthia K. Evans, being first duly sworn, deposes and says that:

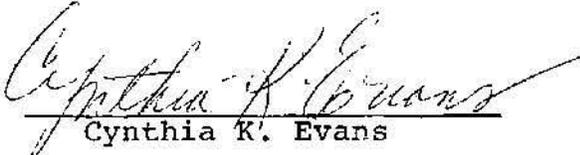
1. She is a secretary with the Department of Justice.

2. That on June 14, 1989 she caused to be delivered, by overnight mail through United Parcel Service (UPS), and sent by FAX machine, copies of the foregoing document to the below-listed individuals at the following addresses and telephone numbers:

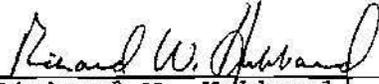
Mr. Harry Winderman, Esquire
Winderman, Selman and Claire
5355 Town Center Road
Suite 502
Boca Raton, FL 33486
FAX: 407-395-5012

Mr. James L. Schwartz, Esquire
4643 S. Ulster Street
Suite 1560
Denver, Colorado 80237
FAX: 303-771-6027 - Denver
312-726-6664 - Chicago

3. That on June 14, 1989 she caused to be hand delivered a copy of the foregoing document to Gregg E. Wilson, Esq., Deputy Attorney General, Department of Justice, State Office Building, 820 N. French Street, 8th Floor, Wilmington, Delaware, 19801.


Cynthia K. Evans

SWORN TO AND SUBSCRIBED before me on this 14th day of June, 1989.


Richard W. Hubbard
Deputy Attorney General

Pursuant to 29 Del.C. sec. 2508