ADMINISTRATIVE PROCEEDING
FILE NO. 3-2175

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	
IVY FUND, INC. 155 Berkeley Street Boston, Massachusetts	
AND	
STUDLEY, SHUPERT & CO., INC. OF BOSTON 155 Berkeley Street Boston, Massachusetts	INITIAL DECISION
(812-2469)	
Investment Company Act of 1940	

BEFORE: Sidney Gross, Hearing Examiner

APPEARANCES: Robert M. Gargill of Choate, Hall & Stewart for Ivy Fund, Inc.

Stanley B. Judd and Janice M. Revitz for the Division of Corporate Regulation

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INITIAL DECISION

Washington, D. C.
August 26, 1970

Sidney Gross
Hearing Examiner

This proceeding was instituted by the order of the Securities and Exchange Commission ("Commission") dated February 6, 1970, directing that a hearing be held on a joint application filed by Ivy Fund, Inc. ("the Fund") and the Fund's Investment adviser, Studley, Shupert & Co., Inc. of Boston ("the Adviser") pursuant to Section 17(b) of the Investment Company Act of 1940 ("the Act") for an order exempting from the provisions of Section 17(a) of the Act the proposed grant of a license more fully described below by the Fund to the Adviser, in consideration of the payment of the sum of $2,000. The license would authorize the Adviser (a) to use the name "Ivy" in a new name for itself and (b) to confer on other investment companies the right to use a name similar to "Ivy Fund."

Section 17(a) of the Act, as pertinent here, makes it unlawful for an affiliated person of a registered investment company to purchase any property[1/] from the company. By definition,[2/] the Adviser is an affiliated person of the Fund. But Section 17(b) of the Act authorizes the Commission to grant an exemption from the provisions of Section 17(a) and, in order to determine whether the Commission should exercise such authority in applicants' favor, the order for proceedings presents the following matters and questions for consideration:

> "(1) Whether the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned;

1/ The Fund's name constitutes property. Taussig v. Wellington Fund, Inc., 313 F. 2d 472, 479-480 (C.A. 3, 1963).

2/ Section 2(a)(3)(E) of the Act.

(2) Whether the proposed transaction is consistent with the policy of the registered investment company as recited in its registration statement and reports filed under the Act; and

(3) Whether the proposed transaction is consistent with the general purposes of the Act."

The Fund was represented by counsel.[3/] Proposed findings of fact, conclusions of law and briefs were filed on behalf of the Fund and the Division of Corporate Regulation ("Division"). The Fund also filed a reply brief.

On the basis of the record in this proceeding including the testimony, documentary evidence, the proposed findings of fact, conclusions of law and briefs and observation of the witnesses, the Hearing Examiner makes the following findings and conclusions:

The Fund is registered as an open-end, diversified investment company under the Act. It was organized in 1960 as Commonwealth Fund for Growth Inc. At its inception the Fund was a front end load fund. However, the front end load was removed in 1966. The Fund adopted its present name in March 1967.

The Adviser was originally organized as a partnership in 1929. It was incorporated in 1938 as Studley, Shupert & Co., Inc. Its principals were Messrs. Studley and Shupert. In 1963 the corporation decided to open a branch in Philadelphia under Shupert's management and incorporated the branch under the name Studley,

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3/ No appearance was made on behalf of the Adviser either by counsel or pro se although Barron P. Lambert ("Lambert"), its Executive Vice-President and a member of the Fund's Board of Directors testified on behalf of Applicants.

Shupert & Co., Inc. of Philadelphia. The Boston office was renamed Studley, Shupert & Co., Inc., of Boston.

Studley owned over 95% of the stock of the Adviser. He agreed to sell all his shares in March, 1966, to the then second level of management. The new management wished to create a new image for the company. Although it decided in 1966, "that it was vital that we change its name somehow," it was not until early 1969, when it became apparent that the Fund was achieving considerable success, that the Adviser decided it would be to its advantage to "in some way identify with what we were doing" and, accordingly, that it would be desirable to change its name to "Ivy Management Corporation or some such use of the name Ivy." In fact, the Adviser's telephone operators had been instructed, more than a year prior to the hearing, to answer "Ivy Fund" instead of "Studley," since people calling to obtain prices or Fund shareholders calling to check on their accounts were confused by the name "Studley" - "they didn't know what we were talking about."

The facts relating to the Fund's growth since 1966 are pertinent. The total number of Fund shares outstanding in 1967 were 243,000; in 1968, 5,141,000; and in 1969, 7,762,000.[4/] In 1967 the Fund had 624 equity security holders; in 1968, 17,145; and in 1969, 29,829

4/ The figures have been adjusted to reflect a 5 for 2 stock split effective April 17, 1969.

who were located in virtually every state of the union and sixteen foreign countries. In 1967 shareholders redeemed 6,198 shares; in 1968, 8,372 shares; and in 1969, 2,315,447 shares. On December 31, 1968, the Fund's net asset value was approximately $63,000,000. This increased to about $65,000,000 as of December 31, 1969. Since the Fund changed its name to "Ivy" the trend in net assets has gone up about 89.6% in 1967, up about 38.5% in 1968, down 28% in 1969, and as of the date of the hearing it was down between 4% and 5% in 1970. It is also significant that the Fund was sold by word of mouth, without either advertising or a sales force.

The advisability of granting a license to use the name "Ivy" and to authorize its use by other investment companies was discussed at meetings of the Fund's Board of Directors held on January 3, 1969, and January 27, 1969. Four of the Board's seven members were not affiliated with the Adviser or with any funds served by the Adviser. At the meeting of January 3, 1969, the Adviser proposed that it pay to the Fund the sum of $500 for the license. No action was taken on the proposal at that time. The offer was increased to $2,000 at the January 27, 1970, meeting and the Board, including all four independent members, approved.[5/] At the stockholders' meeting held on April 9, 1969, the licensing proposal was approved by a vote of 1,391,781 to 113,565.

5/ The Board adopted the following resolution:

"RESOLVED: Subject to the entry by the Securities and Exchange Commission of an order under Section 17 (b) of the Investment (Continued)

The Adviser believes it would benefit by the change of its name for the reasons that the Fund has been successful and the name "Ivy" would have greater meaning and effectiveness to the Fund's stockholders; that the Fund has acquired a good reputation and the Adviser wants to identify with it; that if the Adviser changed its name to Ivy it would aid in a more favorable presentation for companies whose names are also Ivy. 6/

5/ (Continuation)
Company Act of 1940 exempting the following proposed transaction from Section 17(a) of said Act, that this corporation, in consideration of the payment to it of $2,000 by Studley, Shupert & Co., Inc., of Boston (the "Adviser"), grant to the Adviser (i) a license to use the word "Ivy" in a new name for the Adviser and in the name of any wholly or majority owned subsidiary of the Adviser and (ii) the right to confer, by sublicense or otherwise, names similar to the name "Ivy Fund, Inc." on other investment companies for which the Adviser now or hereafter performs investment advisory services; provided however that said license and right of conferral shall be terminable at the option of Ivy Fund, Inc. in the event that the Adviser ceases to be an investment adviser to Ivy Fund, Inc. and provided further that the right of any such other investment company to use a name similar to the name "Ivy Fund, Inc." shall be terminable at the option of Ivy Fund, Inc. in the event that the Adviser ceases to be an investment adviser to either Ivy Fund, Inc. or such other investment company."

6/ Lambert also stated the following as benefits of the proposed license to the Adviser:
(1) The change of name would relate the management company to the investment company which is better known;
(2) where the Adviser conferred the name "Ivy" on a new investment company, it would help to have better sales since it would be related by name to the Adviser;
(3) It would develop a family of services which was to some extent interrelated, the management company being the nucleous of the organization.

It is the stated intention of the Fund's Board of Directors to discontinue offering the Fund's shares when its net assets reach $100,000,000. The Adviser already has under consideration the use of a growth, no-load fund oriented toward convertible securities to replace the Fund when the Fund reaches its goal and wishes to confer upon the new company the name "Ivy" at the appropriate time. Adviser is the investment adviser to the Inventure Capital Corporation which is described by Lambert as a closed-end non-diversified management investment company whose stated objective is long-term capital appreciation. Adviser had intended to call it Ivy Capital Corporation. But the underwriting took place before the approval of the Commission could be obtained and they named it Inventure Capital Corporation. Lambert testified that since stockholders now relate to the name "Inventure," it is not the Adviser's intention to change that name and, as a director of Inventure, he would not recommend it.

It is apparent the realization of $100,000,000 of net asset value for the Fund is not imminent and that the Adviser has no intention of changing the name of any of the funds with which it is affiliated.[7/] It is equally clear, however, that the proposed agreement would give the Adviser the right to confer the name "Ivy" on any new

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7/ The Adviser has agreed that the proposed license would not be used to confer the name "Ivy" on any of the several Commonwealth Funds, Indenture of Trust plans in which it serves as investment adviser or on Competitive Capital Fund, Inc. with respect to which it acts as one of several investment advisers.

investment company it may serve as investment adviser.

The Division has stated that the issue in this case is whether applicants have shown that $2,000 is a fair and reasonable consideration for the proposed license. Division takes no position as to matters (2) and (3) of the order for proceedings, i.e., whether the proposed transaction is consistent with the policy of the Fund, and whether it is consistent with the general purposes of the act. Indeed, an examination of the Fund's policy and the general purposes of the Act would indicate that no issue exists as to those matters.

Applicants produced two witnesses, Roger Titus ("Titus"), Secretary of Ivy Fund since its inception and a member of its Board of Directors and Lambert. The hearing examiner credits their testimony. Division presented no witnesses, relying upon its cross-examination of applicants' witnesses and upon certain documentary evidence. Titus testified that the January 3, 1969, special meeting of the Board was called to consider the licensing proposal. The Adviser offered $500 for the license. The matter was "completely discussed." The discussions included the fact that the Fund did not do any advertising and therefore had not built up its name by use of its funds, that the Fund would probably discontinue sales in the near future and that as soon as the Adviser ceased to act in that capacity to the Fund the license could be withdrawn. Copies of the Commission's guidelines relating to property rights of an investment adviser in an investment company's name[8/] were presented to the Board. The independent directors, apparently unimpressed with the

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8/ Investment Company Act Release No. 5510 (October 8, 1968). Example No. 2b would indicate that such a license may be sold (continued)

amount of the offer for the license, wanted to think it over, and the matter was held in abeyance until the next meeting which was held on January 27, 1969.

Titus testified further that the matter was "rehashed" at the January 27, 1969, meeting. Mr. Lunn, one of the independent directors, said that in the light of all the discussion that had been had he felt that $2,000 would be a fair amount and the other directors went along. Mr. Patterson, another independent director, was not present. But before the resolution was passed Patterson was called on the telephone and after having been advised said that he approved. Asked whether any reasons were mentioned at the January 27, 1969, meeting in addition to those discussed at the January 3, 1969 meeting, Titus said the name was not carried as an asset on the books and "there were a lot of reasons and discussions as to the adequacy of the amount xxx".

Lambert attended the January 3 and January 27, 1969, Board meetings. He testified that the inside directors wanted the unaffiliated or independent directors to make the determination so that it would be a completely objective decision. He testified further that in reaching its conclusion to grant the license for $2,000, the Board took into consideration the number of shares the Fund sold, the total shares outstanding, the Fund's investment performance, and the amount of

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8/ (continued)
for cash or other property if the transaction is approved by the investment company's shareholders and the Commission pursuant to an application under Section 17 (b) of the Act exempting the transaction from Section 17(a).

redemptions for the years 1967 and 1968. Consideration was also given to the geographic distribution of the Fund's shares. Indeed, questions such as the number of shares sold in 1967 and 1968 and the number of the Fund's shareholders were normally part of the president's report to the Board and were discussed at every Board meeting.

In addition, the potential advantage of the license to the Adviser was also discussed.[9/] Lambert also testified: "The discussion became long and fairly strenuous because one of the outside directors initially felt that perhaps the derivative benefits to Studley, Shupert and Company made this something that was more in the interest of Studley, Shupert than in the interest of Ivy Fund shareholders". He testified further that the $2,000 figure was "kicked around" and the potential benefits to the Adviser and to the Fund were again discussed.

Division asserts that the Fund's Board made no attempt to determine the value of the proposed license to the Adviser; that in failing to do so it neglected to consider an essential factor in the determination of what would be a reasonable and fair consideration for the license, i.e., that the potential " 'derivative benefits' to the adviser were never enumerated, nor were they seriously evaluated by the board xxx"; and that applicants have not sustained the burden of proving that $2,000 is a fair and reasonable consideration for the license.

9/ Asked what these advantages were, Lambert responded - "I think many intangible values. I think we have touched on many of these already." See page 5 infra.

But the uncontradicted testimony of the witnesses and the overall record do not support the Division's contentions. The Division has offered mainly evidence showing the rapid rise of the Fund, of which the Board obviously was aware. It is evident that the Fund's Board of Directors had before it the pertinent factors relative to the progress and success of the Fund, the intentions of the Adviser in respect of the use of the Fund's name and the potential advantages of the license to the Adviser. It is readily apparent that the Board, in fact, made a genuine and sincere attempt to determine the value of the license. In the face of the record, the Division's argument that the Board failed to evaluate the license and never considered the advantages to the licensee are groundless. Primarily, the evidence discloses that the Board considered the potential advantage to the Adviser even to the extent that one of the independent directors felt initially that the transaction might be more in the Adviser's interest than in that of the Fund. Further, the Division agrees with the applicants that the value of the license to the Adviser cannot be "scientifically" or "precisely" determined. In addition, the Fund's Board of Directors, a majority of whom were independent, made a value judgment in good faith based upon the pertinent and relevant information.[10/] Certainly, the Board's determination is rebuttable.[11/]

10/ By definition, "value" means "fair value as determined in good faith by the Board of Directors;" Section 2(a)(39) of the Act.

11/ The Aviation Corporation, 10 S.E.C. 26, 29-30 (1941)

However, the Division has failed to rebut it and, absent rebuttal, the determination is conclusive.[12/] Moreover, the minutes of the January 3, 1969 meeting establish that the Board had the benefit of the Commission's guideline memorandum.[13/] In the light of the foregoing, the Division's position that applicants have not sustained the burden of proof is untenable.

12/ "xxx courts of equity have refused to substitute their judgment for for the judgment of independent and disinterested directors who have honestly concluded that a disposition of corporate assets will result in a justifying benefit to the corporate transferor." Taussig v. Wellington Fund Supra

13/ "The Chairman stated that the Special Meeting had been called to consider the sale and/or transfer of the name "Ivy" to Studley Shupert & Co., Inc., of Boston, subject to the reservation of the use of the name by Ivy Fund, Inc., for its own purposes. Mr. Gargill then presented copies of the Securities Exchange Commission Release No. 5510 dated October 8, 1968, issued under the Investment Company Act of 1940, a copy of which has been made a part of the minutes of this meeting. He pointed out that this release covers the staff's views regarding the property rights of an investment company and its investment advisor in the company's name. He stated that at the present time there were two new funds which are being established by Studley Shupert & Co., Inc., of Boston. One is a closed-end fund which was organized in July of 1968, and filed November 22, 1968, with a proposed offering of Twenty-Five Million Dollars ($25,000,000) and which is to be a regulated fund which will be traded over-the-counter. It is planned to call this fund the "Ivy Capital Corp.". The other fund is to be called the "Ivy Convertible Securities Fund" and is to be an open-end fund and in that respect different from the Ivy Capital Fund in that it will have a continuous offering of shares."

It is concluded, therefore:

1. that the terms of the proposed license transaction, including the consideration to be paid therefor, are reasonable and fair and do not involve overreaching on the part of any person concerned;
2. that the proposed license transaction is consistent with the policy of the Fund as recited in its registration statement;
3. that the proposed license transaction is consistent with the general purposes of the Act.[14/]

Accordingly,

IT IS ORDERED that applicants' request that the grant by the Fund to the Adviser of the license described above be exempted from the provisions of Section 17 (a) of the Act be, and it hereby is, granted.

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 Rule 17 (b) of the Commission's Rules of Practice, a party may file a petition for Commission review of this

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14/ To the extent that the proposed findings and conclusions submitted to the hearing examiner are in accord with the view set forth herein they are accepted, and to the extent they are inconsistent therewith they are expressly rejected.

initial decision within 15 days after service thereof on him. Pursuant to Rule 17 (f) this initial decision shall become the final decision of the Commission as to each party unless he files a petition for review pursuant to Rule 17 (b) or 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 to review or the Commission takes action to review as to a party, this initial decision shall not become final as to that party.

SIDNEY GROSS
Hearing Examiner

Washington, D. C.
August 26, 1970