ADMINISTRATIVE PROCEEDING
FILE NOS. 3-4748 and 3-4755
thru 4768

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :

MINERAL EXPLORATION COMPANY :

File Nos. 20-1924A5 thru 20-1924A16 :
(12 offering sheets)

:

INITIAL DECISION

Washington, D.C.
January 29, 1976

Ralph Hunter Tracy
Administrative Law Judge

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APPEARANCES: Richard M. Hewitt, Daniel R. Kirshbaum, David A. Watson of the Fort Regional Office of the Commission for the Division of Corporation Finance.

Khent H. Rowton of Vaughan, Gilliland, Cates & Rowton for Mineral Exploration Company.

BEFORE: Ralph Hunter Tracy, Administrative Law Judge

During the period from September 24, 1974 to July 31, 1975, Mineral Exploration Company (Mineral or Offeror), filed with the Commission 12 Offering Sheets for the purpose of obtaining exemptions from the registration requirements of the Securities Act of 1933 (Securities Act) pursuant to Section 3(b) thereof and Regulation B thereunder, with respect to public offerings of fractional undivided working interests in 12 properties. The unit price of these offerings ranged from $1,300 to $2,300,

The Commission on September 10, 1975, issued an order (Order) pursuant to Rule 334(a) of Regulation B temporarily suspending the exemption with respect to each of the 12 Offering Sheets. On September 26, 1975, Mineral requested a hearing, which was held on October 29, 1975, to determine whether permanent suspensions should be ordered.

Offeror was represented by counsel throughout the proceedings and proposed findings of fact and conclusions of law were filed by the parties. The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon observation of the witnesses.

OFFEROR

John Ransom Horne, Jr. (Horne) is president of Mineral a Texas corporation located in Arlington, Texas, and was the controlling person of Mineral at the time of the suspension of Regulation B as to these 12 offerings. Horne has been in the oil and gas business for approximately 23 years. During the period from 1970 to 1974, Horne controlled Kema Production Corporation (Kema), a Louisiana corporation, which

made approximately 5 offerings of fractional undivided working interests in oil and gas leases pursuant to Regulation B. Kema has not been active since 1974 and its operations were transferred to Horne personally.

Sierra Oil & Gas was formed by Horne as a Texas corporation about 1959 or 1960 and during the period 1971 through the middle of 1974, it made approximately 10 to 15 offerings of fractional undivided working interests in oil and gas leases pursuant to Regulation B.

Mineral is a Texas corporation owned by Horne which filed 12 offerings of fractional undivided working interests in oil and gas leases pursuant to Regulation B which became effective during the period from September 24, 1974 to July 31, 1975. On September 10, 1975, the Commission ordered the temporary suspension of the exemption as to each of the 12 offerings pursuant to Rule 334(a).

DEFICIENCIES IN THE REGULATION B FILINGS

Limitations on Offeror

This proceeding involves 12 Orders, one for each Offering Sheet, and the Order as to each Offering Sheet charges that no exemption is available for the respective offering under Regulation B according to Rule 306(a)(2)[1/] because Horne was permanently enjoined on November 14, 1974, by

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1/ Rule 306 provides, in pertinent part:

"(a) No exemption shall be available under this Regulation to any offeror, if such offeror or any officer, director, predecessor, or affiliate of such offeror as a result of any civil, criminal, or governmental or self-regulatory administrative proceeding, or examination commenced after January 1, 1973:

(ii) is subject to any order, judgment or decree of any court of competent jurisdiction entered within 5 years prior to the filing or use of any offering sheet, temporarily or permanently restraining or enjoining such offeror from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security, or arising out of such person's conduct as an underwriter, broker, dealer, or investment adviser; (Emphasis supplied)

the Supreme Court of New York, from offering or selling securities in violation of Article 23-A of the General Business Law of the State of New York.

On March 28, 1974, the Attorney General of New York instituted an injunctive action in the Supreme Court of New York against Sierra, Horne and two individual salesmen, alleging violations of Article 23-A of the General Business Law of the State of New York. The complaint alleged that all of the defendants were selling fractional undivided working interests in New York without being registered as broker-dealers in that State. On November 12, 1974, the New York Supreme Court permanently enjoined Horne, by consent, from offering or selling securities within New York "without complying with Article 23-A of the General Business Law." The Court further restrained and enjoined Horne "from further violating the provisions of Article 23-A of the General Business Law." Sierra and the two salesmen were also enjoined. In addition, Horne and Sierra were fined $750 and the two salesmen were fined $2,000.

On November 20, 1974, Mineral registered as a securities broker-dealer in New York and on January 28, 1975, Horne registered as a securities broker-dealer in New York.

It would appear that no exemption is available to Offeror under the provisions of Rule 306 because of the New York State injunction entered against its affiliate, Sierra, and its controlling person[2/] and president, Horne, on November 12, 1974. However, in its brief Offeror takes the position that Regulation B does not apply to any violation of state securities laws. It bases its position on Securities Act Release No. 5314, which,

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2/ An "affiliate" of any person is a person controlling, controlled by, or under common control of such person. See Regulation B, Rule 300(j).

it claims, takes the same position.

On October 11, 1972, the Commission adopted amendments to Regulation B, effective January 1, 1973, which were published in Securities Act Release No. 5314. The introductory portion of the release discusses the amended rules and contains the following language:

> Rule 306. This rule, which will operate prospectively, denies the exemption to an offeror where it has been involved in violations of the federal securities laws. Included in the rule is a relief provision where the Commission, upon a showing of good cause, may permit the use of the exemption. (Emphasis added)

The Offeror contends that the specific reference to "federal securities laws" excludes the application of Rule 306 to state securities laws. Furthermore, it is argued, Offeror knows of no other action by the SEC to remove a Regulation B exemption because of a state court injunction.

Rule 306 speaks for itself in clear and unambiguous language which is not voided or redefined by the introductory preface of Release 5314. Indeed, the record shows that Horne did not rely on this interpretation that the violation of a state law did not deny ~~denied~~ the exemption. He testified that he assumed the New York Supreme Court was a court of competent jurisdiction but he did not check the Regulation B requirements again after the injunction was issued because he was under the impression that he was in compliance due to his having registered as a broker-dealer in New York and, therefore, the injunction was no longer effective. Because Horne understood that the filing of the broker-dealer registration in New York cured the injunction he felt that it posed no problem to a Regulation B exemption and did not make any inquiry as to whether

or not the injunction needed to be disclosed in any offerings. He had no discussions with the New York counsel who represented him in the injunctive action as to its effect on the Regulation B filings and there is no indication of any effort to have the injunction vacated.

The argument advanced by Offeror does not exonerate it from responsibility. The exemption from the necessity of complying with the registration requirements is a conditional one based on compliance with express provisions and standards.[3/] The one claiming an exemption has the burden of proving its applicability.[4/] The limitation in Rule 306(a)(2) is mandatory and allows no discretion. Also, contrary to Offeror's belief that there is no precedent, the same limitation has been declared to be sufficient to deny an exemption in a parallel situation.[5/]

It is found that no exemption was available under Rule 306 of Regulation B for any of the 12 offerings subject to the Order.

Representations in Offering Sheets

The Orders charged also, that no exemption is available under Regulation B because the offering sheets used failed to comply with Rule 330 by failing to disclose the above-mentioned injunction against

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3/ Selevision Western, Inc., 37 S.E.C. 411, 415 (1956).

4/ U.S. v. Custer Channel Wing, 376 F.2d 675, cert. denied, 398 U.S. 850 (1967); SEC v. Ralston Purina Co., 346 U.S. 119 (1953).

5/ In Robert Shelly Productions, Ltd., Exchange Act Release No. 5603/ August 4, 1975, where a Regulation A suspension was consented to, it is stated: "The New York State Supreme Court issued an injunction against issuer after the filing of the notification. The injunction would have rendered the Regulation A exemption unavailable if it had been issued prior to such filing."

Horne and Sierra.[6/]

The position of Mineral is that the existence of the New York injunction was not "material" in the securities law sense. Offeror argues that the State of New York would not have issued a broker-dealer license to Horne and Mineral had there been any public interest that needed protecting arising from the facts in the State of New York. Offeror states that the question of materiality boils down to what a reasonable investor might consider important in making his investment decision and that it is Mineral's position that there is nothing material about an injunction for violating a technical provision of the New York broker-dealer statute which results in the immediate issuance of a license to conduct the very activity with respect to which the injunction was granted.[7/]

Offeror states that no cases have been found dealing with Rule 306(a)(2) so that perhaps a comparison with the way courts have handled similar questions concerning the suspension of broker-dealers under Section 15(b)(4)(C) of the Exchange Act will be helpful. In support of

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6/ Rule 330 provides, in pertinent part, that all statements contained in any offering sheet shall constitute continuing representations that the statements contained therein are substantially correct and that no material fact has been omitted, the inclusion of which would reasonably appear necessary, in the light of the circumstances, to make the information contained therein not misleading to the purchaser.

7/ The injunction is not subject to collateral attack in this proceeding. Howat v. Kansas, 258 U.S. 181, 189-190 (1922); S.E.C. v. Jones, 85 F.2d 17 (2nd Cir. 1936); Swift & Co. v. U.S. 311 (1927).

its position that there is no public interest in suspending its Regulation B exemption Mineral relies on two cases. In Securities & Exchange Commission v. Otis & Co., 18 F. Supp. 100 (D.C. Ohio 1936), the defendant securities broker-dealer urged that the Court deny an injunction as prayed for by the Commission on the grounds that the Commission could revoke its license if it were enjoined. The Court did not conclude, as argued by Mineral, that a suspension of the broker-dealer was improper. In granting the Commission's request for injunction, the Court simply pointed out that the Commission must demonstrate that its actions are in the public interest. In Beck v. Securities and Exchange Commission, 413 F.2d 832 (6th Cir. 1969), also relied on by Offeror, the Court stated that the Commission's order which was under review failed to articulate the reasons for the proposed suspension and remanded the matter for further Commission consideration due to the absence of any public interest finding in the Commission's order.

In its reconsideration, In the Matter of Herbert Beck, 44 S.E.C. 100 (1969), the Commission fully discussed the public interest factors and again ordered the suspension of Beck.

Wholly apart from the public interest factor[8/] the failure to disclose the injunction was a material omission because the violation of a state securities law by an issuer of securities could reasonably appear necessary to an investor.[9/] Accordingly, it is found that no exemption was available under Rule 330 of Regulation B for any of

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8/ The record shows that 601 purchasers invested approximately $1,500,000 in these 12 offerings in a 10-month period.

9/ In Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), the Court said, at page 153: "All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of his decision.

the 12 offerings subject to the Order.

Other Matters

Offeror argues that the undersigned erred in admitting into evidence Cease and Desist Orders issued by 7 states against Horne, Sierra and Mineral. This argument is without substance. In Armstrong, Jones & Co., et al., 43 S.E.C. 889, 903 (1968), where it upheld the recognition of prior sanctions in determining public interest, the Commission said, at page 903, note 38:

> "In R.H. Johnson & Company, 36 S.E.C. 467, 487 (1955) aff'd per curiam 231 F.2d 523 cert. denied 352 U.S. 844, we took official notice of other disciplinary action against the respondent and on appeal, respondent unsuccessfully contended that in doing so we had improperly considered matter outside the record."

It should be noted that while the Cease and Desist Orders were admitted into the record they were considered irrelevant in making the determination herein. However, such evidence of prior sanctions could be relevant in connection with any future application for relief requested by Offeror pursuant to Rule 306(c).[10/]

In this connection it should be noted that on August 11, 1975, Horne filed an amended application on Form BD for registration of Sigma Securities, Inc., as a broker-dealer, wherein he disclosed the existence of Cease and Desist Orders against him in 5 states. Horne testified that he intends to make future offerings through this firm.

10/ Rule 306(a) of Regulation B, as amended, provides that no exemption shall be available to any offeror which is under an order of temporary suspension or which is and has been under an order of permanent suspension within 5 years prior to the filing or use of an offering sheet. However, Rule 306(c provides:

> (c) Notwithstanding the foregoing, this rule shall not apply to any offering if the Commission determines, upon filing of an application and showing of good cause, that it is not necessary in the public interest and for the protection of investors that the exemption be denied. Any such relief granted by the Commission may be either general or on a specific filing basis. Any such determination by the Commission shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the offeror or any other persons.

Conclusion

As previously stated, the obligation to comply with the terms and conditions of Regulation B rests with the one seeking to take advantage of it. It is clear that Mineral Exploration Company failed to comply with the terms and conditions of Regulation B. Therefore, it is concluded that the exemption provided by Regulation B should be permanently suspended, accordingly,

IT IS ORDERED, pursuant to Rule 336(b) of Regulation B under the Securities Act of 1933, as amended, that the exemption from registration with respect to each of the 12 offering sheets of Mineral Exploration Company be permanently suspended.

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 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. 11/

Ralph Hunter Tracy
Administrative Law Judge

Washington, D.C.
January 29, 1976

11/ To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the views herein they are accepted, and to the extent they are inconsistent therewith, they are rejected.