

ADMINISTRATIVE PROCEEDING
FILE NO. 3-4890

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

U.S. SECURITIES & EXCHANGE COMMISSION

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AUG 12 1976

ADMIN. PROCEEDINGS SEC.

In the Matter of :
RESEARCH AUTOMATION CORPORATION :
(24NY-7584) :
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INITIAL DECISION

August 12, 1976
Washington, D.C.

Irving Sommer
Administrative Law Judge

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SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
RESEARCH AUTOMATION CORPORATION : INITIAL DECISION
(24NY-7584) :
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APPEARANCES: Alexander Bienenstock and John B. Manning of the New York
Regional Office for the Division of Enforcement

Konstantinos Tserpes, President of Research Automation Corpo-
ration for the Issuer.

BEFORE: Irving Sommer, Administrative Law Judge

By Order of the Commission dated January 20, 1976 ("Order"), the exemption of Research Automation Corporation ("Research", or "Issuer") from the registration requirements of the Securities Act of 1933 ("Securities Act") provided under Regulation A of that Act was temporarily suspended. The Order charged that the United States District Court for the Southern District of New York issued an injunction against the Issuer after the filing of the notification, which would have rendered the Regulation A exemption unavailable if it had occurred prior to such filing.

The Order further charged that Research's notification and offering circular filed under Regulation A contained untrue statements of material facts and omitted to state material facts necessary in order to make the statements not misleading. In substance, the Order alleged that the notification failed to disclose that the Issuer is subject to an order of permanent injunction, and was misleading in its affirmative representation that no such permanent injunction had been issued and that there was a failure to disclose the injunctive order as a risk factor in the offering circular. The Order further alleged that the statement in the offering circular that the injunctive order was reversed when on appeal it was affirmed with respect to the Issuer and reversed only with respect to the corporate president was false and misleading. Additionally, the Order alleged that by reason of the foregoing activities the offering was made in violation of Section 17 of the Securities Act.

Research filed an answer denying the allegations, and a hearing was held pursuant to its request to determine whether to vacate the Order or

to enter an order permanently suspending the Regulation A exemption. Research was represented at the hearing by its president, K. M. Tserpes. Proposed findings of fact and conclusions of law and briefs in support were filed by the parties. The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record.

Securities Act of 1933 and General Rules and Regulations thereunder

Section 17(a), as amended, provides:

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly -

- (1) to employ any device, scheme, or artifice to defraud, or
- (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Rule 252(c)(4) of Regulation A provides:

No exemption under this regulation shall be available for the securities of any issuer if such issuer, any of its predecessors or any affiliated issuer -

- (4) is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years prior to the filing of such notification, temporarily or permanently restraining or enjoining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of securities.

Rule 261(a) of Regulation A provides, in pertinent part:

The Commission may, at any time after the filing of a notification, enter an order temporarily suspending the exemption, if it has reason to believe that -

- (1) no exemption is available under this regulation for the securities purported to be offered hereunder or any of the terms or conditions of this regulation have not been complied with, including failure to file any report as required by Rule 260;
- (2) the notification, the offering circular or any other sales literature contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading;
- (3) the offering is being made or would be made in violation of Section 17 of the Act;
- (4) any event has occurred after the filing of the notification which would have rendered the exemption hereunder unavailable if it had occurred prior to such filing.

Rule 261(c) of Regulation A provides:

The Commission may at any time after notice of an opportunity for hearing, enter an order permanently suspending the exemption for any reason upon which it could have entered a temporary suspension order under paragraph (a) of this rule. Any such order shall remain in effect until vacated by the Commission.

Issuer

Research Automation Corporation was incorporated in February 1965 under the laws of the State of New York for the purpose of designing, developing and manufacturing machinery for use in various industrial operations. The company's principal office is in New York City, New York.

On March 10, 1972 Research filed a notification and offering circular pursuant to Regulation A under the Securities Act for the purpose of obtaining an exemption from the registration requirements of that Act for a proposed offering of 76,000 shares of its common stock at \$6 per share. Subsequent amendments increased the proposed offering to 90,000 shares at \$5.50 per share on a "best efforts" basis.

Injunctive Order

The record discloses that on August 17, 1972 the Commission instituted an action against the respondent and a number of its officers (Konstantinos M. Tserpes, Basil Martos and Athan Hamos) for injunctive relief against alleged violations of Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder. A preliminary injunction was granted by the district court on default. The respondents appealed to the U.S. Circuit Court of Appeals for the Second Circuit, at which time the Commission moved to remand the action to the district court for findings of fact, and at the same time withdrew its charges of violations of Section 5 of the Securities Act. Settlement negotiations did not come to fruition, and the Commission noticed the taking of a deposition of Mr. Tserpes personally, and of Research by Tserpes, as President. Because of alleged improper conduct by Tserpes at the taking of the deposition, the Commission moved in the district court for an order striking the answers of both Research and Tserpes, and for the entry of a judgment of default. The motion was referred to a United States Magistrate who after a hearing, recommended that the motion to strike be granted, and that a default judgment be entered against Research and Tserpes. The district court granted the Commission's motion, striking the answers of Research and Tserpes, and entered a default judgment against them. The respondents appealed, and on July 23, 1975 the U.S. Court of Appeals for the Second Circuit reversed the default judgment against Tserpes but affirmed the judgment (Order of Permanent Injunction) against Research without prejudice

to its right to move for reopening of this judgment upon a proper showing. To date, Research has not moved to reopen.

The record as presently constituted discloses that there is in effect an order of permanent injunction against Research issued on August 7, 1974 enjoining it from further violations of the anti-fraud provisions of Section 17(a) of the Securities Act, 15 U.S.C. Sec. 77Q(a), and of the Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. Sec. 78J(b) and Rule 10b-5 thereunder in connection with the offer, sale or purchase of securities of Research.

Had the permanent injunction been in existence at the time of the filing of the notification, under Rule 252(c)(4) no exemption under Regulation A would be available to Research. However, under Rule 261(a) of the General Rules and Regulations the Commission may enter an order temporarily suspending the exemption where any event has occurred after the filing which would have rendered the exemption unavailable if it had occurred prior to such filing.

Rule 261(c) further provides that the Commission may after a hearing, permanently suspend the Regulation A exemption for any reason it could have entered a temporary suspension.

It is concluded that the United States District Court for the Southern District of New York issued a permanent injunction against Research after the filing of the notification. Such injunction would have rendered the Regulation A exemption unavailable if it had been issued prior to such filing, and it can form the basis for a permanent suspension of its exemption.

False and Misleading Statements in Offering Circular

1. Deletion and Omission of "Risk Factors"

The amended offering circulars filed in February 1975 and May 1975 included the following statement with respect to "risk factors to be considered" (Item #18):

A complaint against the company and its officers filed by the S.E.C. under the Securities Laws on August 17, 1972 was partially dismissed on March 9, 1973 after remand from the Circuit Court of Appeals. Thereafter, on August 7, 1974, the S.E.C. and Judge Ryan issued an order, which the company is presently appealing.

In the amended offering circulars filed in September and December, 1975, the "risk factor" section was purged of any reference to court proceedings, and furthermore does not disclose that the Court of Appeals decision dated July 23, 1975 affirmed the permanent injunction issued previously by the District Court against the Issuer. The amended offering circulars dated September and December 1975 became materially false and misleading by reason of not only the total deletion of any reference to court proceedings instituted by the Commission, but the further omission of reference to the fact that the Court of Appeals had affirmed a permanent injunction against the Issuer.

2. "Litigation" Section of Offering Circular

The "litigation" section of the amended offering circulars filed in September and December 1975 included the following statement:

A complaint against the Company and its officers filed by the S.E.C. under the Securities Laws on August 17, 1972 was partially dismissed on March 9, 1973 after remand from the Circuit Court of Appeals. Thereafter on August 7, 1974 the S.E.C. and Judge Ryan issued an order, which the company is presently appealing. In the United States Court of Appeal Decision on July 23, 1975 the Judge's order was reversed.

This section of the amended offering circulars is materially false and misleading in (1) alleging that the previous court order was reversed, when in fact the court order was reversed as to Tserpes personally, but the Court of Appeals affirmed the permanent injunction against the Issuer, and (2) misrepresenting that there is an order outstanding which "the company is presently appealing", when in fact the decision of the U. S. Court of Appeals had become final, and a permanent injunction is in existence.

Failure to Comply with Terms and Conditions of Regulation A

Form I-A, notification under Regulation A item 5(b) requires, among other things, the disclosure of whether the Issuer is subject to any order, judgment or decree specified in Rule 252(c)(4) of Regulation A.

In its amended notification filed in September 1975 and December 1975, both subsequent to the July 1975 Court of Appeals decision affirming the permanent injunction against the Issuer, Research's response to said question was, "The issuer is not subject to any order, judgment or decree specified in Paragraph (c)(4) of that rule." In view of the decision of the U. S. Circuit Court of Appeals reported aforesaid, this response was materially false and misleading, and constitutes a failure to comply with the terms and conditions of Regulation A.

Section 17(a) of the Securities Act

As found above, the notification and offering circulars, as amended in September and December 1975 intended for use in Research's proposed

offering omits to state material facts and contains materially false and misleading statements concerning the existence of a permanent injunction against Research secured by the Commission arising out of this stock offering. The use of the notification and offering circulars, as amended in connection with the offer and sale of Research's stock therefore would operate as a fraud and deceit upon purchasers in violation of Section 17(a) of the Securities Act.

Conclusion

The arguments advanced by the Issuer are wholly without merit. The exemption under Regulation A is conditional and its availability dependent upon compliance with the specific provisions and standards laid down by the provisions of that regulation.^{1/} In view of the findings that a permanent injunction was issued against Research after the filing of the notification which would have rendered the Regulation A exemption unavailable if it had occurred prior to such filing, that the offering circular was false and misleading, that the terms and conditions of Regulation A were not complied with, and that the offering was made in violation of Section 17(a) of the Securities Act, it is concluded that the exemption of Regulation A should be permanently suspended.^{2/}

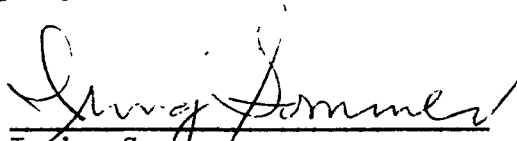
^{1/} See Tabby's International, Inc., Securities Act Release No. 5283 (July 21, 1972), Aff'd per curiam on Commission opinion, 479 F. 2d 1080 (C.A. 5 1973)

^{2/} All proposed findings and conclusions submitted by the parties have been considered, as have their contentions. To the extent such proposals and contentions are consistent with this initial decision, they are accepted.

Accordingly, IT IS ORDERED, pursuant to Rule 261 of Regulation A under the Securities Act of 1933, that the exemption of Research Automation Corporation, under Regulation A be, and it hereby is, permanently suspended.

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(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.


Irving Sommer
Administrative Law Judge

Washington, D.C.
August 12, 1976