

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 66801/ April 12, 2012

ADMINISTRATIVE PROCEEDING  
File No. 3-14720

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In the Matter of	:	
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ALCHEMY VENTURES, INC.,	:	
KM CAPITAL MANAGEMENT, LLC,	:	ORDER MAKING FINDINGS
ZANSHIN ENTERPRISES, LLC,	:	AND IMPOSING SANCTIONS BY
MARK H. ROGERS,	:	DEFAULT AS TO RESPONDENTS
STEVEN D. HOTOVEC,	:	KM CAPITAL MANAGEMENT, LLC
JOSHUA A. KLEIN,	:	AND JOSHUA A. KLEIN
YISROEL M. WACHS,	:	
FRANK K. MCDONALD, and	:	
DOUGLAS G. FREDERICK	:	

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On January 26, 2012, the Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP), pursuant to Sections 15(b)(4), 15(b)(6), and 21C of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that, from September 2009 to August 2010 (relevant period), Respondents KM Capital Management, LLC (KM Capital), and Joshua A. Klein (Klein) (collectively, Respondents) acted as unregistered brokers and, thus, violated Section 15(a) of the Exchange Act.<sup>1</sup>

On February 10, 2012, the Division of Enforcement (Division) filed a Submission of Records of Service of OIP on Certain Respondents (Submission). The Submission documents the Division's service of the OIP on Respondents by February 10, 2012. I held a prehearing conference on March 5, 2012, which Respondents did not attend. I found Respondents to be in default for failing to file an Answer to the OIP, due twenty days after service of the OIP, and for failing to participate in the prehearing conference. See OIP at 11; 17 C.F.R. §§ 201.155(a), .220(f), .221(f).

The Division filed a March 16, 2012, Motion for Findings and Sanctions Based on Entry of Default Against Respondents (Motion) and a Declaration of Steven D. Buchholz in Support of Division's Motion (Buchholz Declaration). The Motion requests Respondents be ordered to

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<sup>1</sup> The proceeding was stayed as to Respondents Douglas G. Frederick, Frank K. McDonald, and Zanshin Enterprises, LLC, on February 22, 2012, and as to Respondents Alchemy Ventures, Inc., Mark H. Rogers, and Steven D. Hotovec on April 10, 2012, pending the Commission's consideration of their offers of settlement. The proceeding is ongoing as to the remaining Respondent.

disgorge their ill-gotten profits and prejudgment interest, pay civil penalties, be censured, and be ordered to cease and desist from illegal activity. Respondents did not respond to the Motion.

Because Respondents are in default, I find the following allegations in the OIP to be true. See 17 C.F.R. § 201.155(a).

### **Findings of Fact**

KM Capital is a Pennsylvania limited liability company with its principal place of business in Philadelphia, Pennsylvania. KM Capital has never been registered with the Commission in any capacity. During the relevant period, Klein was a principal of, and associated with, KM Capital. Klein has never held securities licenses or been registered with the Commission in any capacity. Klein, age twenty-eight, is a resident of Philadelphia, Pennsylvania. OIP at 2.

During the relevant period, KM Capital, and through it, Klein, received sponsored market access<sup>2</sup> from registered broker-dealers and, for a transaction fee, extended that market access to traders. OIP at 2, 6. Respondents maintained a website and posted on internet message boards soliciting traders to trade through KM Capital. Id. at 6. As a result, approximately ten individuals traded as many as two million shares per month on U.S. exchanges through KM Capital's omnibus accounts. Id. at 2. Respondents participated in the order-taking and order-routing processes, extended credit to the traders, handled traders' funds and securities, and allocated traders' trades against the risk deposits they were required to maintain with Respondents. Id. at 6, 10.

KM Capital generated most of its profits from an individual Latvian trader. OIP at 6; Buchholz Declaration at 4-5. The trader entered into an independent contractor agreement with KM Capital, which held him responsible for 100% of his trading losses and required him to place a \$5,000 risk deposit. OIP at 6. KM Capital extended credit to the Latvian trader, but would terminate his trading access if his losses reduced his deposit balance to under \$1,000. Id. KM Capital charged the Latvian trader a commission of \$6.00 per thousand shares traded, compared to the \$0.90 to \$1.50 commissions KM Capital paid to its registered broker-dealers. Id. at 7. The Latvian trader is alleged to have used this trading access to profit from an account intrusion and market manipulation scheme. OIP at 1.<sup>3</sup>

Through this misconduct, Respondents received \$102,802.58 in trading profits and commissions. Motion at 9; Buchholz Declaration at 3. Specifically, KM Capital retained \$75,086.28 of the Latvian trader's (allegedly illegal) profits, and received \$27,716.30 in trader commissions. Motion at 5; Buchholz Declaration at 2-3.

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<sup>2</sup> Sponsored market access is a form of trading access whereby a broker-dealer permits a customer to enter orders into the public market without the orders first passing through the broker-dealer's trading system. OIP at 4.

<sup>3</sup> The Latvian trader is the subject of a civil enforcement action in SEC v. Nagaicevs, No. CV-12-0413 EDL (N.D. Cal. filed Jan. 26, 2012). Motion at 3; Buchholz Declaration at 1.

## Conclusions of Law

Respondents violated Section 15(a) of the Exchange Act by acting as unregistered brokers. Section 15(a)(1) makes it unlawful for any broker, using means of interstate commerce, to effect any transaction in any security unless they are registered with the Commission. 15 U.S.C. § 78o(a)(1). “Broker” is defined as “any person engaged in the business of effecting transactions in securities for the account of others.” 15 U.S.C. § 78c(a)(4). Scierter is not a required element for a Section 15(a) violation. See SEC v. Nat’l Executive Planners, Ltd., 503 F. Supp 1066, 1073 (M.D.N.C. 1980). “Engaged in the business of effecting transactions in securities” is satisfied where respondent actively solicited securities and participated “at key points in the chain of distribution.” SEC v. Gagnon, No. 10-cv-11891, 2012 WL 994892, (E.D. Mich. Mar. 22, 2012) (quoting Mass. Fin. Servs., Inc. v. Securities Investor Protection Corp., 411 F. Supp. 411, 415 (D. Mass. 1976)).

Of the factors used to determine whether a person qualifies as a broker under Section 15(a), relevant here are whether a person (1) receives transaction-based compensation; and (2) actively finds investors. See S.E.C. v. Hansen, No. 83 Civ. 3692, 1984 WL 2413, \*10 (S.D.N.Y. April 6, 1984); S.E.C. v. Margolin, No. 92 Civ. 6307 (PKL), 1992 WL 279735 (S.D.N.Y. Sept. 30, 1992) (“receiving transaction-based compensation, advertising for clients, and possessing client funds and securities,” was evidence of brokerage activity).

Respondents acted as brokers because they extended market access to traders trading securities for their own accounts. Respondents advertised for traders, extended credit to the traders, and received transaction-based compensation. Respondents also required the traders to post a deposit and bear their trading losses. Thus, the traders traded for their own accounts, not as employees or agents of KM Capital. By engaging in the business of effecting transactions in securities for the account of others, Respondents acted as brokers. And by not registering as such with the Commission, Respondents violated Section 15(a) of the Exchange Act.

## Sanctions

The Division requests that I: (1) order Respondents to cease and desist from violating Section 15(a); (2) censure Respondents; (3) order Respondents to pay disgorgement, jointly and severally, in the amount of \$102,802.58 and prejudgment interest of \$5,603.98; and (4) order KM Capital to pay a civil penalty of \$150,000 and Klein a civil penalty of \$50,000. Motion at 1-2. I grant the Division’s requests.

### A. Cease and Desist

Section 21C of the Exchange Act provides that the Commission may order a person found to be violating or to have violated a provision of the Exchange Act to cease and desist from such violations. 15 U.S.C. § 78u-3(a). While some likelihood of future violation must be present, the required showing is “significantly less than that required for an injunction.” KPMG Peat Marwick LLP, Exchange Act Release No. 43862 (Jan. 19, 2001), 54 S.E.C. 1135, 1183-91. Indeed, absent evidence to the contrary, a single past violation ordinarily suffices to establish a risk of future violations. Id. at 1191. Along with the risk of future violation, the Commission considers its traditional public interest factors. Id. at 1192.

Respondents' conduct of providing direct access to the U.S. securities markets to anyone solicited over the internet was egregious, continued for nearly a year, and was performed with at least a reckless state of mind. Respondents have not made assurances against future violations, have not recognized the wrongful nature of their conduct, and seemingly have the opportunity to commit future violations. Therefore, a cease-and-desist order is appropriate.

#### B. Censure

Section 15(b)(4) of the Exchange Act provides that the Commission shall censure any broker or dealer or person associated with a broker or dealer (including unregistered brokers that are required to register with the Commission) if the Commission finds a censure is in the public interest and finds a willful violation of any provision of the Exchange Act. 15 U.S.C. § 780(b)(4)(D); see Vladislav Steven Zubkis, Exchange Act Release No. 52876 (Dec. 2, 2005), 86 SEC Docket 2618, 2627, recon. denied, Exchange Act Release No. 53651 (Apr. 13, 2006), 87 SEC Docket 2584 (noting that Exchange Act Section 15(b) applies to persons acting as a broker or dealer).

Respondents' egregious, ongoing, and reckless conduct violated Section 15(a) of the Exchange Act, and they have not expressed remorse or provided assurances against future violations. Therefore, a censure is appropriate and in the public interest.

#### C. Disgorgement

Section 21B(e) of the Exchange Act authorizes the Commission to order disgorgement of ill-gotten gains. 15 U.S.C. § 78u-2(e). The amount to be disgorged need only be a "reasonable approximation of the profits causally connected to the violation." SEC v. First Pac. Bancorp, 142 F.3d 1186, 1192 n.6 (9th Cir. 1998). Also, "[w]here two or more individuals or entities collaborate or have a close relationship in engaging in the violations of the securities laws, they may be held jointly and severally liable for the disgorgement of illegally obtained proceeds." SEC v. J. T. Wallenbrock & Assocs., 440 F.3d 1109, 1117 (9th Cir. 2006).

Respondents shall be ordered to disgorge \$102,802.58 of illegally obtained profits, and prejudgment interest of \$5,603.98. See 17 C.F.R. § 201.600. Because of the close relationship between Respondents – Klein was one of the two principals directing KM Capital's actions – Respondents shall be jointly and severally liable for the disgorgement amount.

#### D. Civil Penalty

Section 21B of the Exchange Act provides that the Commission, in administrative proceedings, may impose a civil penalty if a respondent willfully violated any provision of the Exchange Act and such penalty is in the public interest. 15 U.S.C. § 78u-2(a).

Where a respondent's misconduct involves deliberate or reckless disregard of a regulatory requirement, the Commission may impose a "Second Tier" penalty of up to \$75,000 for a natural person or \$375,000 for any other person, for each act or omission. 15 U.S.C. § 78u-2(b)(2) (as modified for inflation by the Civil Monetary Penalty Inflation Adjustments-2009, Rule 1004, Table IV, 17 C.F.R. § 201.1004). Within any particular tier, the Commission has the discretion to set the

amount of the penalty. See PHLO Corp., Exchange Act Release No. 55562 (Mar. 30, 2007), 90 S.E.C. Docket 1089, 1113.

In determining whether a penalty is in the public interest, the Commission may consider (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, (2) the resulting harm to other persons, (3) any unjust enrichment and prior restitution, (4) the respondent's prior regulatory record, (5) the need to deter the respondent and other persons, and (6) such other matters as justice may require. 15 U.S.C. §§ 80b-3(i), 80a-9(d).

Civil penalties of \$150,000 on KM Capital and \$50,000 on Klein are appropriate. Respondents recklessly disregarded the broker registration requirements and extended direct access to U.S. securities markets to individuals responding to Respondents' internet solicitations. While Respondents have not directly caused harm to others, and will be ordered to make restitution, the need to deter others from acting as unregistered broker-dealers is strong and effectively achieved through civil penalties. See SEC v. Lipson, 129 F. Supp. 2d 1148, 1159 (N.D. Ill. Jan. 11 2001) (noting that disgorgement, without civil penalties, provides no deterrent, as it merely places offender in their original position). Thus, Respondents willfully violated the Exchange Act by recklessly discarding a regulatory requirement, and it is in the public interest to penalize their misconduct.

There is a possibility that any judgment in SEC v. Nagaicevs, No. CV-12-0413 EDL (N.D. Cal. filed Jan. 26, 2012), may be inconsistent with this Default Order. Therefore, out of an abundance of caution, the disgorgement and civil penalties shall be used to create a Fair Fund for the benefit of the harmed investors, which may include payment of all or some of the monetary sanction in this proceeding into the registry of the Northern District of California. See 17 C.F.R. §§ 201.1100, .1101. The disposition of the Fair Fund shall be set forth in a plan of distribution prepared by the Division. Id.

### **Order**

IT IS ORDERED that, pursuant to Section 21C of the Exchange Act, KM Capital Management, LLC, and Joshua A. Klein shall CEASE AND DESIST from committing or causing any violations or future violations of Section 15(a) of the Exchange Act.

IT IS FURTHER ORDERED that, pursuant to Section 15(b)(4) of the Exchange Act, KM Capital Management, LLC, and Joshua A. Klein are CENSURED.

IT IS FURTHER ORDERED that, pursuant to Section 21B(e) of the Exchange Act, KM Capital Management, LLC, and Joshua A. Klein shall DISGORGE, jointly and severally, \$102,802.58 of illegally obtained profits, and prejudgment interest of \$5,603.98.

IT IS FURTHER ORDERED that, pursuant to Section 21B of the Exchange Act, KM Capital Management, LLC, shall PAY A CIVIL MONEY PENALTY in the amount of \$150,000, and Joshua A. Klein shall PAY A CIVIL MONEY PENALTY in the amount of \$50,000.

IT IS FURTHER ORDERED, pursuant to Rule 1100 of the Commission's Rules of Practice, the disgorgement and civil penalties shall be used to create a FAIR FUND for the benefit of harmed

investors, to be set forth in the Division of Enforcement's plan of distribution. See 17 C.F.R. §§ 201.1100, .1101.

Payment of the civil money penalty shall be made on the first day following the day this Default Order becomes final. Payment shall be made by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying Respondent and Administrative Proceeding No. 3-14720, shall be delivered to: Office of Financial Management, Accounts Receivable, 100 F Street, N.E., Mail Stop 6042, Washington, DC 20549. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

SO ORDERED.

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Cameron Elliot  
Administrative Law Judge