

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

In the Matter of	:	
	:	
ALCHEMY VENTURES, INC.,	:	
KM CAPITAL MANAGEMENT, LLC,	:	INITIAL DECISION
ZANSHIN ENTERPRISES, LLC,	:	AS TO KM CAPITAL
MARK H. ROGERS,	:	MANAGEMENT, LLC,
STEVEN D. HOTOVEC,	:	AND JOSHUA A. KLEIN
JOSHUA A. KLEIN,	:	November 28, 2012
YISROEL M. WACHS,	:	
FRANK K. MCDONALD, and	:	
DOUGLAS G. FREDERICK	:	

APPEARANCES: Lloyd A. Farnham, Susan F. LaMarca, and Steven D. Buchholz for the
Division of Enforcement, Securities and Exchange Commission

BEFORE: Cameron Elliot, Administrative Law Judge

Summary

This Initial Decision finds that KM Capital Management, LLC (KM Capital), and Joshua A. Klein (Klein) (collectively, Respondents) violated Section 15(a) of the Securities Exchange Act of 1934 (Exchange Act) by acting as unregistered brokers; orders Respondents to cease and desist from violating Section 15(a) of the Exchange Act; censures Respondents; orders Respondents to disgorge, jointly and severally, \$102,802.58 plus prejudgment interest of \$5,603.98 and post-judgment interest; and orders KM Capital to pay a civil penalty of \$150,000 and Klein to pay a civil penalty of \$50,000.

Procedural History

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 Exchange Act. The OIP alleges

that, from September 2009 to August 2010 (relevant period), Respondents acted as unregistered brokers and, thus, violated Section 15(a) of the Exchange Act.¹

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 requested Respondents be ordered to 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.

I issued an Order Making Findings and Imposing Sanctions by Default as to Respondents (Default Order) on April 12, 2012, pursuant to Rule 155(a) of the Commission's Rules of Practice. Exchange Act Release No. 66801, 103 SEC Docket 53096. For the reasons stated in an Order dated November 27, 2012, I granted the Division's Motion for Issuance of Initial Decision as to Respondents. See Admin. Proceedings Rulings Release No. 732. This Initial Decision makes the same findings and conclusions and imposes the same sanctions as the Default Order.²

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.

¹ The Commission accepted Offers of Settlement from Alchemy Ventures, Inc., Zanshin Enterprises, LLC, Mark H. Rogers, Steven D. Hotovec, Yisroel M. Wachs, Frank K. McDonald, and Douglas G. Frederick (Offers of Settlement). See Exchange Act Release No. 67889 (Sept. 19, 2012); Exchange Act Release No. 67206 (June 15, 2012), 103 SEC Docket 55241; Exchange Act Release No. 67029 (May 18, 2012), 103 SEC Docket 54398; Exchange Act Release No. 67028 (May 18, 2012), 103 SEC Docket 54392.

² This Initial Decision does not, however, order that the disgorgement and civil penalties be used to create a Fair Fund, since the Commission did not order the creation of a Fair Fund in the Offers of Settlement.

During the relevant period, KM Capital, and through it, Klein, received sponsored market access³ from registered broker-dealers and, for a transaction fee, extended that market access to traders. Id. 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. Id. 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. Id. at 1.⁴

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.

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). Scierer is not a required element for a Section 15(a) violation. See SEC v. Nat'l Exec. 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, at *11 (E.D. Mich. Mar. 22, 2012) (quoting Mass. Fin. Servs., Inc. v. Securities Investor Protection Corp., 411 F. Supp. 411, 415 (D. Mass. 1976)).

³ 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.

⁴ 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.

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 SEC v. Hansen, No. 83 Civ. 3692, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984); SEC v. Margolin, No. 92 Civ. 6307 (PKL), 1992 WL 279735, at *5 (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. Because Klein is found to have violated Section 15(a), I need not reach the issue of whether he is secondarily liable for violating that provision.

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 and also order post-judgment interest nunc pro tunc.

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. § 78o(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, prejudgment interest of \$5,603.98, and post-judgment interest from April 12, 2012, the date the Default Order was issued. 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. § 78u-2(c).

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.

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, prejudgment interest of \$5,603.98, and post-judgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600(b). Pursuant to 17 C.F.R. § 201.600(a), post-judgment interest is due from April 12, 2012, through the last day of the month preceding the month in which payment is made.

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.

Payment of the disgorgement and civil money penalties shall be made on the first day following the day this Initial Decision 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.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. See 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice. 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occurs, the Initial Decision shall not become final as to that party.

SO ORDERED.

Cameron Elliot
Administrative Law Judge