UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-7640

GABE HAMMON, et al.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of an Order of the
Securities and Exchange Commission

ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

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QUESTION PRESENTED

Where an investment advisory firm, wholly owned and operated by its president and having no other employees, consistently violated registration, reporting and recordkeeping requirements under the federal securities laws; had been disciplined by the Securities and Exchange Commission in an earlier proceeding for such violations; and had falsely informed the Commission that it had taken and would continue to take remedial steps to comply with these requirements, but failed to do so in derogation of a Commission order settling the earlier proceeding; did the Commission abuse its discretion in revoking the firm's registration as an

investment adviser and barring its president from associating with any investment advisory firm in a supervisory or proprietary capacity?

COUNTERSTATEMENT OF THE CASE

A. Preliminary Statement

This is a petition for review of an order issued by the Securities and Exchange Commission on September 24, 1985, revoking the registration of petitioner Hammon Capital Management Corporation ("HCMC") as an investment adviser and barring its president and sole employee and shareholder, petitioner Gabe Hammon, from associating with any investment advisory firm in a supervisory or proprietary capacity. 1/ The order represents the culmination of a protracted and ultimately fruitless effort by the Commission, encompassing two administrative proceedings, to obtain petitioners' compliance with the basic registration, reporting and recordkeeping requirements of the Investment Advisers Act of 1940 (the "Act").

In the first proceeding, the Commission found, after an administrative trial, that Mr. Hammon and HCMC had failed to maintain records and file reports required under the Act. While a petition for judicial review of that order was pending, petitioners submitted an offer of settlement under which they would retain an accounting firm to maintain the required records. The Commission accepted that offer.

1/ For the convenience of the Court, copies of the Commission's opinions and orders entered in the two administrative proceedings are attached to this brief.

This second proceeding was brought when the Commission discovered that petitioners had continued to violate registration and reporting requirements. In addition, the Commission found, petitioners had not only violated the terms of their settlement offer, but had actively deceived the Commission as to their intentions of complying with that offer. As a result, the Commission, after a second administrative trial, revoked HCMC's registration as an investment adviser and barred Mr. Hammon from being associated with an investment adviser in a supervisory or proprietary capacity. Because Mr. Hammon's violations related only to his managerial duties, the Commission specifically tailored the sanctions to permit him to continue to give investment advice in the employ and under the supervision of another registered adviser.

Petitioners challenge the order entered in the second administrative proceeding, arguing principally that the sanctions are too severe. These sanctions reflect petitioners' continuing refusal to comply with significant regulatory requirements. Moreover, the Act contemplates that investment advisory professionals adhere to standards commensurate with "the delicate fiduciary nature of an investment advisory relationship." SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191 (1963). Thus, their sanctions also reflect the fact that they deceived the Commission in the settlement of the first proceeding and then did not comply with terms of the settlement order. Under these circumstances, the Commission acted well within its discretion in imposing these sanctions.

B. Jurisdiction and Timeliness of Appeal

The Commission proceeding that resulted in the order on review was brought pursuant to Section 203(e)(4) and 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-3(e)(4) and 80b-3(f). The jurisdiction of this Court is based upon Section 213(a) of the Act, 15 U.S.C. 80b-13(a). This petition was filed within the sixty-day period required by the statute.

C. Statement of Facts

Mr. Hammon is the president, sole employee and sole shareholder of HCMC, a California corporation located in San Rafael, California (Ex. 107, R. 386-87, 391; Tr. 277, R. 880; Br. (R. 93, E.M. 14)). 2/ HCMC has been registered as an investment adviser with the Commission since January 1974 (Ex. 107, R. 391) and received a California investment adviser's certificate in February 1974 (Ex. 103, R. 374).

1. The Prior Administrative Proceeding

a. The Commission orders a 90-day suspension and bar.

On October 12, 1978, Commission staff members visited HCMC's office, then located in Denver, and attempted to inspect its books

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2/ "R." refers to the record of the administrative proceeding. Other abbreviations used in this brief: "Tr." refers to the transcript of proceedings before the administrative law judge; "Ex." refers to exhibits submitted in that proceeding; "E.M." refers to the Emergency Motion filed by Mr. Hammon's former counsel in this proceeding on June 26, 1986, seeking leave to withdraw as counsel and asking that certain materials be treated as petitioners' "opening brief" (see infra, note 15); and "Br. (R. __)" or "Br. (E.M. __)" refers to that opening brief.

and records (Ex. 100, R. 348). Although Section 204 of the Act, 15 U.S.C. 80b-4, required petitioners to allow such an inspection, 3/ Mr. Hammon refused to let the staff look at the records (Ex. 100, R. 348). The Commission then filed suit in federal district court and obtained a temporary restraining order. 4/ Upon gaining access, the staff discovered that petitioners had failed to maintain numerous records required by the Act (Ex. 100, R. 349). 5/ The staff later discovered that petitioners also had failed to amend amend the firm's investment adviser registration 6/ to reflect the facts that HCMC had changed its address (see Tr. 199-200, R. 801-802; Tr. 296-97, R. 899-900) and that the State of California had suspended its state investment adviser certificate in 1978 (Ex. 103, R. 374, 377).

3/ Section 204 of the Act, 15 U.S.C. 80b-4, provides that investment adviser records "are subject at any time, or from time to time, to such reasonable periodic, special or other examinations by representatives of the Commission as the Commission deems necessary * * *."

4/ SEC v. Hammon Capital Management Corp., C.A. No. 78-1074 (D. Colo., October 17, 1978).

5/ In particular, HCMC failed to maintain: (a) a journal or journals showing cash receipts and disbursements; (b) general and auxiliary ledgers reflecting asset, liability, reserve, capital, income and expense accounts; (c) order memoranda given by registrant for the purchase and sale of securities; (d) bills relating to registrant's business; and (e) trial balances, financial statements, and internal audit workpapers relating to registrant's business. See Section 204 of the Act, 15 U.S.C. 80b-4, and Rule 204-2 thereunder, 17 C.F.R. 275.204-2.

6/ Section 203 of the Act, 15 U.S.C. 80b-3, and Rule 203-1, 17 C.F.R. 275.203-1, promulgated thereunder, mandate registration of investment advisers with the Commission on a prescribed form. Under Rule 204-1, 17 C.F.R. 275.204-1, investment advisers are required to file amendments to the registration form whenever the information on the form becomes inaccurate.

The Commission initiated administrative proceedings based on these violations (Ex. 100, R. 348-51). After a trial before an administrative law judge, the Commission, on January 8, 1981, ordered a 90-day suspension of HCMC's registration and a 90-day bar against Mr. Hammon from association with any investment adviser in a proprietary or supervisory capacity. 7/ The Commission observed that petitioners had "demonstrated an unwillingness to comply with important regulatory requirements," and concluded that the sanctions, which it termed "relatively lenient," were "necessary to impress upon [Mr. Hammon] the importance of future compliance with those requirements." In the Matter of Hammon Capital Management Corp., 21 SEC Docket at 1306 (Ex. 100, R. 366).

b. The Commission accepts petitioners' settlement offer and reduces the sanctions.

Petitioners sought judicial review of the Commission's order. 8/ While that petition was pending, petitioners informed the Commission that they had hired the accounting firm of Coopers & Lybrand "to design, implement and maintain an accounting system for the Company and its customers' records which is in accordance with the Investment Advisers Act of 1940, as amended" (Ex. 100, R. 369-71; Ex. 302,

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7/ In the Matter of Hammon Capital Management Corp., Investment Advisers Act of 1940 Release No. 744 (Jan. 8, 1981), 21 SEC Docket 1304 (Ex. 100, R. 364-66) (see Attachment A). The Commission's authority to suspend or bar investment advisers for violations of the Act or its regulations is set forth in Sections 203(e)(4) and 203(f) of the Act, 15 U.S.C. 80b-3(e)(4) and 80b-3(f).

8/ The Commission stayed imposition of the sanctions pending the Court's review. See 17 C.F.R. 200.30-8(a)(4).

R. 413-15). Petitioners also sent the staff a draft of an amended registration which was to be filed by HCMC, and a manual of record-keeping procedures prepared by Coopers & Lybrand for them (Ex. 100, R. 369-71).

Six months later, on January 30, 1982, petitioners submitted an offer of settlement to the Commission (Ex. 202, R. 406-409). The offer proposed that, if the Commission lifted its 90-day suspensions, HCMC would retain an accounting firm for a period of 18 months to maintain the records required by the Act and regulations, and HCMC would maintain a duplicate set of records. In addition, HCMC promised to retain a second accounting firm to conduct four unannounced compliance audits during the 18-month period in order to determine whether the first accounting firm was maintaining the required records and whether HCMC was keeping duplicate records.

Based upon these representations, the Commission accepted the offer. By order of April 30, 1982 (Attachment B), the Commission vacated the 90-day penalties, and instead censured both petitioners and ordered them to comply with the undertakings made in their offer of settlement. 9/

2. The Administrative Proceeding under Review

a. Petitioners continue to violate the registration and reporting requirements of the Act.

Notwithstanding petitioners' representations that they would remedy the deficiencies found by the Commission, they continued

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9/ In the Matter of Hammon Capital Management Corp., Investment Advisers Act of 1940 Release No. 801 (April 30, 1982), 25 SEC Docket 410 (Ex. 100, R. 367-68).

to ignore the registration and reporting requirements. Based on these on-going violations, the Commission authorized a second proceeding against HCMC and Hammon.

The record of the administrative proceeding established that petitioners had never amended their registration to show a current address, which by then was four years out of date, 10/ and that petitioners had also failed to file annual reports required by the Act. 11/ In addition, the record demonstrated that "Hammon has been consistently deceiving the Commission under the guise of cooperating" (R. 197). The law judge determined that petitioners had concealed material facts when they procured the Commission's acceptance of their offer settling the first proceeding. Although they had retained Coopers & Lybrand to maintain HCMC's records, the accounting firm stopped work after only one month because petitioners did not pay their bills (see Tr. 181, R. 783). In other words, Coopers & Lybrand had ceased working for petitioners six months before they submitted their settlement offer and nine months before the Commission accepted that offer. Petitioners had made no effort to inform the Commission or its staff of

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10/ HCMC filed its last registration amendment in December 1978 (Ex. 102, R. 373). The address listed on that amendment was out of date as of April 1979 (Tr. 199-200, R. 801-02).

11/ Section 204 of the Act, 15 U.S.C. 80b-4, and Rule 204-1(c), 17 C.F.R. 275.204-1(c), require registered investment advisers to file annual reports within 90 days of the end of their fiscal year. In the annual report, the adviser is required to update information contained in his registration form, including such information as his current business address. See Form ADV-S, 5 Fed. Sec. L. Rep. (CCH) ¶ 57,131.

this development. 12/ Nor had they attempted to retain another accounting firm to perform the tasks required by the Commission's April 30, 1982 order (see Tr. 303-04, R. 906-07). Nonetheless, petitioners continued to conduct their investment advisory business, and even falsely represented to at least one brokerage firm at which they opened an account that they "maintain the records required" by the Act. 13/

Under the circumstances, the law judge ordered that HCMC's registration as an investment adviser be revoked and that Hammon be barred from association with any investment advisor (R. 209).

12/ The Commission's staff uncovered Hammon's deceit on January 11, 1983, when it telephoned Coopers & Lybrand to ask about its progress. The answer: HCMC was no longer a client of the firm because it had not paid invoices for the minimal work already performed (Ex. A, R. 565-66). Coopers & Lybrand noted that HCMC's records were stored in a "footlocker" in a "complete state of disarray" (Tr. 192-93, R. 794-95).

Shortly after the staff discovered that Coopers & Lybrand had long since stopped working for petitioners, Mr. Hammon telephoned the staff to tell them "that he hadn't been doing any business so he couldn't keep any records" (Tr. 25, R. 626, telephone conversation of February 16, 1983). He again contacted the staff on April 7, 1983, and stated that he had engaged in no securities transactions on behalf of any clients since the Commission's April 30, 1982 order and, as a result, he had no records showing any securities transactions (Tr. 18, R. 621). Those statements were false. In fact, Hammon handled securities transactions for his investment advisory clients throughout this period, including accounts at four different brokerage firms between May 1982 and May 1983 (see Ex. 400, R. 416; Ex. 503, R. 462-67; Ex. 601, R. 476-84; Ex. 605, R. 493-98; Ex. 702, R. 530-637; Tr. 50-57, R. 651-58).

13/ See February 7, 1983 letter to Hambrecht & Quist, a San Francisco brokerage firm (Ex. 600, R. 475).

b. The Commission issues its opinion and order sanctioning petitioners.

Petitioners appealed to the Commission from the law judge's decision (R. 213). On September 24, 1985, the Commission issued its opinion and order (Attachment C). 14/ The Commission found that petitioners had failed to file the amended registration form and required annual reports. Based on its review of the history of both proceedings, the Commission concluded that petitioners had "amply demonstrated that they are unable or unwilling to comply with recordkeeping and reporting requirements, requirements that are necessary for the surveillance of registrant's operations and, therefore, the protection of registrant's clients" (R. 339). According to the Commission's opinion:

> We showed leniency in our first administrative proceeding by giving respondents the opportunity to put their house in order. However, that course of action proved a complete failure. Under the circumstances, we have determined that the public interest now requires the imposition of severe sanctions (Order at 6, R. 339).

14/ The Commission was delayed in reaching its decision after petitioners' counsel withdrew "due to irreconcilable differences between this firm and its former clients" (R. 286). When the petitioners asked that oral argument be postponed for several months while they sought new legal counsel (R. 312-315), the Commission complied and set oral argument for November 29, 1984 (R. 324). In the Commission's letter to Mr. Hammon informing him of that schedule, it stated that no further extensions of time would be granted (R. 323). The Commission also noted that Mr. Hammon had failed to appear for the oral argument scheduled in the first administrative proceeding and urged Mr. Hammon not to repeat that incident. Nevertheless, Mr. Hammon both asked for another extension of time (which the Commission denied) and failed to appear for the oral argument (R. 327-30).

As a result, the Commission revoked HCMC's registration as an investment adviser and barred Mr. Hammon from associating with any investment adviser in a supervisory or proprietary capacity (but permitting Mr. Hammon to work as an employee of another investment adviser) (R. 341).

On November 18, 1985, HCMC and Hammon petitioned this Court for review of the Commission's order. 15/

STANDARD FOR REVIEW

Section 213(a) of the Act, 15 U.S.C. 80b-13(a), provides that when a court of appeals reviews an order of the Commission, its "findings * * * as to the facts, if supported by substantial evidence, shall be conclusive." See Pierce v. SEC, 239 F.2d 160, 162 (9th Cir. 1956) (interpreting identical provision in Section 25(a)(4) of the Securities Exchange Act of 1934, 15 U.S.C.

15/ Petitioners' opening brief was originally due to be filed on February 18, 1986. Petitioners were granted four extensions of time, with the Court twice ordering the Clerk of the Court to dismiss automatically the petition for review if petitioners failed to file their opening brief on time. The final deadline was to have been July 15, 1986. On June 26, petitioners' attorney, Kenneth Robin, sought leave to withdraw in view of his client's "barrage of personal and professional attacks" on him (E.M. 9). This Court, by order filed June 30, granted Mr. Robin's motion for leave to withdraw and granted his request to file, as the "opening brief" on behalf of the petitioners, three briefs filed in the administrative proceeding and eight pages of additional comments contained in the Emergency Motion. Subsequently, a new attorney, John Gulick, Jr., who stated that he represents Mr. Hammon in a malpractice action against Mr. Robin, asked for leave to file a supplemental opening brief. Emergency Motion for Order Permitting Petitioners to File a Supplemental Opening Brief, dated July 15, 1986. That request was granted on July 25, 1986.

78y(a)(4)). A court of appeals can set aside the sanctions imposed by the Commission only if the court determines that the Commission abused its discretion by ordering a remedy "unwarranted in law or * * * without justification in fact." Hinkle Northwest, Inc. v. SEC, 641 F.2d 1304, 1310 (9th Cir. 1981); Sartain v. SEC, 601 F.2d 1366, 1374 (9th Cir. 1979), quoting American Power & Light Co. v. SEC, 329 U.S. 90, 112-13 (1946). See also, Butz v. Glover Livestock Comm'n Co., Inc., 411 U.S. 182, 185 (1973).

SUMMARY OF ARGUMENT

Petitioners do not claim that they have maintained the records or filed the amended registration forms and annual reports required under the Act. Nor do they contend that they complied with the Commission's April 30, 1982 order requiring them to hire two accounting firms to maintain their records. Instead, their only arguments are that the violations were not "willful," that the sanctions are too severe, and that the Commission staff and the administrative law judge committed various procedural errors.

The record establishes that petitioners not only have been continuously in willful violation of the Act, but they have shown bad faith and dishonesty in their dealings with the Commission as to their intentions to comply. These are not technical violations. The maintenance of adequate books and records and the filing of accurate reports go to the very essence of the regulatory scheme, enabling the Commission to monitor the activities of investment advisers, who are charged with "delicate fiduciary" responsibilities. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180,

191 (1963). The Commission, therefore, did not abuse its discretion in entering the order sanctioning petitioners.

ARGUMENT 16/

I. THE PETITIONERS WILLFULLY VIOLATED REGISTRATION AND REPORTING PROVISIONS OF THE ACT AND DECEIVED THE COMMISSION CONCERNING THEIR COMPLIANCE WITH THE COMMISSION'S PRIOR ORDER.

The record here is uncontroverted that petitioners failed to file the appropriate registration amendments and annual reports, failed to comply with the Act's recordkeeping requirements, and completely disregarded their obligations under the April 30, 1982 order. Nevertheless, petitioners argue that their failures were not "willful" because they lacked the financial resources to comply with the Act's requirements and with the Commission's April 30, 1982 order (Br. (R. 95, E.M. 15)). They claim, therefore, that the Commission should not have severely sanctioned them for their violations.

16/ Pursuant to this Court's June 30 order (see supra, note 15), the petitioners' "opening brief" totals 173 pages, consisting of three briefs filed in the administrative proceeding and eight pages of additional "comments" made in the Emergency Motion of June 26, 1985. These materials, filed by three different attorneys, contain arguments that are often confusing and contradictory. For instance, the "brief" at R. 90 and 216 claims that the first proceeding involving the petitioners is "res judicata" and that the Commission acted improperly in basing its penalties in part on the facts surrounding that proceeding. The "brief" at E.M. 13, on the other hand, states that the first proceeding was "clearly relevant." Under these circumstances, this answering brief addresses what we believe are petitioners' principal arguments, in particular their most recent contentions as set forth in the Emergency Motion.

Petitioners are both legally and factually incorrect. As to the law, the plain language of Section 203(e)(4), 15 U.S.C. 80b-3(e)(4), requires the Commission to impose sanctions in the public interest both for "willful" violations and for violations that occur because the adviser is "unable to comply" with provisions of the Act. Thus, even if HCMC's claimed financial difficulties prevented petitioners from complying with the Act and the April 30, 1982 order, the imposition of sanctions would be permissible.

Moreover, conduct is considered "willful" in this context when a person "knows what he is doing" and "intentionally commit[s] the act which constitutes the violation." Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965). See also, Nees v. SEC, 414 F.2d 211, 221 (9th Cir. 1969); In the Matter of Jesse Rosenblum, Investment Advisers Act Rel. No. 913 (May 17, 1984), 30 SEC Docket 857, 860, aff'd, No. 84-3425 (3d Cir. March 25, 1985). In this case, there is no question that petitioners' violations were willful. Mr. Hammon testified that he knew that HCMC had a duty to comply with the registration, reporting and recordkeeping provisions of the Act and that he knowingly did not comply with these requirements (Tr. 338-39, R. 941-42; Tr. 345-46, R. 948-49). The record also establishes that Mr. Hammon was aware of the April 30, 1982 order as of the first week in May 1982 (Tr. 306-07, R. 909-10). Nonetheless, neither he nor HCMC paid Coopers & Lybrand, thereby ensuring that the firm would not maintain HCMC's books and records

(see Tr. 304, R. 907), and that he and HCMC would not comply with the April 30, 1982 order (see Br. (R. 95)).

Further, even if petitioners' financial condition were relevant, the record establishes that petitioners could afford to pay Coopers & Lybrand's fees. During 1981 and 1982, HCMC received $92,943 in advisory fees from one client alone (Br. (R. 78g); Ex. 707, R. 560); in 1982, HCMC managed fourteen accounts (see Ex. 400, R. 416). Mr. Hammon boasted to his clients of HCMC's financial successes, claiming that it was purchasing a 737 airplane (Ex. 705, R. 544-46) and was leasing the top-floor of the "Bank of America World Headquarters" for its "new employees" (Ex. 704, R. 540-43). 17/

Moreover, HCMC was able to meet its other obligations during this period. In 1981, HCMC spent $60,000 for legal fees and other expenses in connection with the defense of an action by a former client (Tr. 299, R. 902). In addition, petitioners paid huge hotel bills and travel expenses for clients to consult with Mr. Hammon in San Francisco (where Mr. Hammon lived) and in London (Tr. 46-49, R. 647-50). 18/

Even if HCMC could not afford to pay Coopers & Lybrand, Mr. Hammon admitted at the administrative hearing that he personally

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17/ The petitioners argue (Br. (R. 88-89)) that their failure to pay Coopers & Lybrand was somehow excused by the failure of the brokerage firm that was handling HCMC's accounts, The First Boston Corp., to pay petitioners monies it allegedly owed them. Petitioners, however, failed to pay Coopers & Lybrand four months before that dispute developed (see Tr. 181, R. 783; Tr. 247, R. 850).

18/ The clients waited in London for nine days, but Mr. Hammon, who had offered to meet them there, never arrived (Tr. 47-49, R. 648-50).

could afford to do so (Tr. 313, R. 916). Indeed, he claimed to his clients that he was "a millionaire in his own right and that figure went from ten million to twenty million * * *" (Tr. 59-60, R. 600-01). Mr. Hammon submitted the offer to settle the initial proceeding both "individually and as President of Hammon Capital Management Corporation" (Ex. 202, R. 407). Thus, he was expressly obligated by his own undertakings to spend a small portion of his asserted vast wealth in order to comply with the Commission's order.

II. THE COMMISSION ACTED WITHIN ITS DISCRETION IN IMPOSING THESE SANCTIONS.

While conceding that they failed to comply with the Act's registration, reporting and recordkeeping provisions (see Br. (R. 73, 85, 91-92)), petitioners contend that the sanctions imposed by the Commission are too severe. The Commission, however, has broad discretion in meting out disciplinary sanctions "to protect the public interest." Pierce v. SEC, 239 F.2d at 163. See also Sorrell v. SEC, 679 F.2d 1323, 1327 (9th Cir. 1982) (the Commission "has broad power to determine appropriate sanctions"). "What will protect the public must involve, of necessity, an exercise of discretionary determination." Pierce v. SEC, 239 F.2d at 163.

The Commission did not abuse its discretion in this case. The registration provision that petitioners violated is "crucial to the operation of the Act." Marketlines, Inc. v. SEC, 384 F.2d 264, 267 (2d Cir. 1969). 19/ It is, therefore, "essential to the

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19/ The registration form requires investment advisers to provide such important basic information as a current address (where

(footnote continued)

public interest that the information required by the application form be supplied completely and accurately." In the Matter of Justin Federman Stone, 41 SEC 717, 723 (1963).

The recordkeeping requirements, which petitioners also violated, are likewise essential. The requirement "that books be kept current * * * [is] important and [is] a keystone of the surveillance of registrants" with which the Commission is charged "in the interest of affording protection to investors." In the Matter of Olds & Company, 37 SEC 23, 26 (1956). As Congress expressly recognized when it amended the Act to add the recordkeeping provisions in 1960, in the absence of investment advisory records, the Commission "has no adequate means of determining whether investment advisers are engaging in fraudulent or deceptive practices in connection with their business." H.R. Rep. No. 2179, 86th Cong., 2d Sess. 3 (1960). The Commission properly noted the importance of the provisions of the Act violated by petitioners and the on-going nature of their violations when it issued the order at issue here (see R. 339).

Contrary to petitioners' contention (Br. (R. 93-95, E.M. 12)), nothing in the Act requires fraud as a prerequisite to the imposition of the sanctions here at issue. This Court has affirmed virtually identical sanctions against a broker-dealer that failed

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19/ (Continued)

the Commission and the investing public can reach the adviser), the education and business background and disciplinary history of individual representatives, and the disciplinary history of the advisory firm. See generally Rule 204-1, 17 C.F.R. 275.204-1, and Form ADV adopted pursuant thereto.

to comply with recordkeeping and reporting requirements of the Securities Exchange Act of 1934, with no showing of fraud. General Securities Corp. v. SEC, 583 F.2d 1108 (9th Cir. 1978). See also, In the Matter of Frank DeFelice, Ph.D. & Associates, Inc. (August 31, 1981), 23 SEC Docket 732, 736, aff'd, No. 79-1736 (4th Cir. Feb. 16, 1982). Moreover, in the context of a remedial proceeding by the Commission, it is "legally irrelevant" whether clients were misled or whether they made or lost money. Berko v. SEC, 316 F.2d 137, 143 (2d Cir. 1963); Hughes v. SEC, 174 F.2d 969, 974 (D.C. Cir. 1949). 20/

Petitioners have not only violated essential regulations, but they have shown a lack of integrity and bad faith in their dealings with the Commission. Such conduct was properly considered by the Commission in determining the sanctions. As the Supreme Court observed in SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186-87 (1963), the "highest ethical standards" must prevail in this industry. After all, as the courts have recognized, the investment advisory profession is "an occupation which can cause havoc unless engaged in by those with appropriate background and standards." Marketlines, Inc. v. SEC, 384 F.2d at

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20/ Although petitioners argue (Br. (R. 93-96, E.M. 12)) that the sanctions here are disproportionate to Commission orders in other proceedings, "a sanction within the authority of an administrative agency is not rendered invalid merely because it varies from that applied in other cases." General Securities Corp., 583 F.2d at 1110, citing Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973). In any event, in light of the record here, the sanctions imposed in this case are not disproportionate.

267. As a fiduciary, an investment adviser has an "affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts' * * *." Capital Gains, 373 U.S. at 194 (citations omitted). Plainly, Mr. Hammon's outright deceit with respect to Coopers & Lybrand's work reflected adversely on his character and honesty.

Petitioners also argue that the sanctions are tantamount to "economic capital punishment." 21/ To the contrary, the sanction imposed on Mr. Hammon reflects a carefully considered judgment that he is a menace to the investing public if unsupervised but that he can continue to work as an investment adviser if supervised.

The violations related to HCMC's corporate and Mr. Hammon's proprietary obligations. As a result, the Commission determined to revoke the registration of HCMC. The Commission is empowered by law to revoke completely and permanently the registration of a person subject to its regulatory authority. See Sections 203(e)(4) and 203(f) of the Act, 15 U.S.C. 80b-3(e)(4) and 80b-3(f). Revocation was fully justified in this case since HCMC was wholly-owned and solely-operated by Mr. Hammon, who has proven himself over a six-year period to be incapable of operating an investment advisory business in accordance with statutory and regulatory requirements.

21/ Emergency Motion for Order Permitting Petitioners to File a Supplemental Opening Brief, dated July 15, 1986, at 3.

As to Mr. Hammon himself, the bar relates solely to his supervisory and proprietary activities. He may still work for another adviser, who will have the responsibility of assuring that the reports required under the Act are filed and the books and records properly maintained. Under the circumstances, the sanctions imposed upon Mr. Hammon were fair and appropriate. See General Securities Corp., 583 F.2d at 1110 (where this Court upheld as "appropriately tailored" the Commission's order barring an officer of a broker-dealer who had failed to maintain required records from serving in a supervisory or proprietary capacity, but permitting him to remain in the securities brokerage business as a salesman). See also, In the Matter of Frank DeFelice, Ph.D. & Associates, 23 SEC Docket at 735-37, aff'd, No. 79-1736 (4th Cir. Feb. 16, 1982).

III. PETITIONERS' OTHER ARGUMENTS ARE EQUALLY WITHOUT MERIT.

Petitioners' various submissions 22/ raise a host of other issues, none of which has any merit. For example, they argue that the law judge erred in refusing, six months after the hearing had concluded, to supplement the record with "new evidence." This evidence related to steps petitioners claimed to be taking to remedy HCMC's violations and deficiencies. As the Commission noted in its opinion, the law judge found that "these are just more promises of what [Hammon] has been going to do for the last six years" (Order at 3 n.8, R. 336).

22/ See supra, note 16.

Petitioners also sought unsuccessfully to introduce evidence related to a claim that the attorney who represented him in the administrative trial was ineffective due to drug abuse and personal bankruptcy problems. The law judge found, to the contrary, that petitioners' counsel "was an experienced attorney with previous administrative trial experience as a member of the Commission's San Francisco office" (R. 206) and that "[h]e presented evidence and crossexamined witnesses in a competent manner" (R. 206) (see also R. 336). 23/

Likewise, the Commission did not err in concluding that the petitioners were not entitled to file a so-called Wells Submission setting forth their arguments as to why the Commission should not bring the proceeding now on review. 24/ The Commission's staff has complete discretion in determining whether to permit the filing of a Wells Submission. Investment Advisers Act Rel. No.

23/ Even if the attorney had been ineffective, there is no constitutional or statutory right to effective assistance of counsel in a civil case. Watson v. Moss, 619 F.2d 775, 776 (8th Cir. 1980). Accord Mekdeci v. Merrell National Laboratories, 711 F.2d 1510, 1522 (11th Cir. 1983); United States v. White, 589 F.2d 1283, 1285 n.4 (5th Cir. 1979). See also, Nicholson v. Rushen, 767 F.2d 1426, 1427 (9th Cir. 1985). A client in a civil proceeding is generally bound by his counsel's action or inaction. Link v. Wabash Railroad Co., 370 U.S. 626, 634 n. 10 (1962). The Commission, moreover, should not be burdened with additional proceedings because of the conduct of an opposing litigant's freely chosen counsel. See id.

24/ See 17 C.F.R. 202.5(c). A Wells Submission is a filing with the Commission in which persons who are the subjects of a Commission investigation may state their position with respect to the subject matter of the investigation, so that their views may be considered by the Commission in conjunction with the staff's recommendation concerning an enforcement action.

336 (September 27, 1972), 2 Fed. Sec. L. Rep. (CCH) ¶ 4995; see SEC v. National Student Marketing Corp., 538 F.2d 404, 407 (D.C. Cir. 1976), cert. denied, 429 U.S. 1073 (1977). Moreover, as the Commission noted in its opinion, the petitioners' request to file a Wells Submission was made after formal proceedings had been instituted, when such a submission would serve no purpose. 25/

CONCLUSION

For the foregoing reasons, the Commission's order should be affirmed.

Respectfully submitted,

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25/ Petitioners also argued before the Commission that they were entitled to notice of third party subpoenas, based upon this Court's decision in Jerry T. O'Brien, Inc. v. SEC, 704 F.2d 1065 (1984). However, the intervening decision of the Supreme Court reversing O'Brien, ___ U.S. ___, 104 S. Ct. 2720 (1984), has resolved this issue in the Commission's favor.

STATEMENT OF RELATED CASES

The Commission is aware of no related cases.