

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-136

**FILED**

MAY -6 1968

SECURITIES & EXCHANGE COMMISSION

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of :  
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WILLIAM S. MARSHALL : (Private Proceedings)  
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Rule 2(e), Rules of Practice :  
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SUPPLEMENTAL INITIAL DECISION

(ON REMAND)

Washington, D.C.  
May 6, 1968

Sidney Ullman  
Hearing Examiner

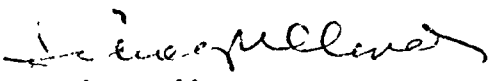
UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
May 7, 1968

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In the Matter of	:	(Private Proceedings)
WILLIAM S. MARSHALL	:	SUPPLEMENTAL INITIAL
Rule 2(e), Rules of Practice	:	DECISION
	:	ERRATUM

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Page 13, line 15 "advertising" should read "adverting".

  
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WILLIAM S. MARSHALL	:	(ON REMAND)
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Rule 2(e), Rules of Practice	:	(Private Proceedings)
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APPEARANCES: Ellwood L. Englander, Assistant General Counsel,  
David J. Meyerson and Roy Nerenberg, for the  
General Counsel

Donald E. Van Koughnet, Silver Spring, Maryland,  
Cromwell A. Anderson and Hervey Yancey, of  
Smathers & Thompson, Miami, Florida, Attorneys  
for Respondent.

BEFORE: Sidney Ullman, Hearing Examiner

## I. NATURE OF THE PROCEEDINGS

This supplemental initial decision is issued in compliance with an order of the Commission dated December 13, 1966, reopening the hearing and remanding the matter to me to give the parties an opportunity to supplement the record previously made, and directing that subsequent to the reopened hearing, normal post-hearing procedures be followed, including the issuance of a supplemental initial decision, unless waived.

The Commission's order was issued after oral argument by counsel for the parties on a petition filed by respondent for review of my initial decision of June 22, 1966 (hereafter "initial decision"), in which I expressed the view that respondent should be denied the privilege of appearing or practicing as an attorney before the Commission without obtaining its prior approval, with the added proviso that no application for approval should be submitted by him for a period of four years from the effective date of my order accompanying the initial decision. 1/

As stated in the initial decision, these private proceedings had been instituted by the Commission by order dated May 10, 1965 ("Order"), under Rule 2(e) of its Rules of Practice (17 CFR 201.(e)), to determine whether the respondent should be temporarily or permanently denied the privilege of continuing to appear and practice as an

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1/ The order also provided in part as follows:

"With the submission of any such application by respondent, I believe that the Commission should impose upon him the burden of affirmatively indicating that he is qualified to practice before it and that he has gained an understanding of and respect for the obligations to the Commission of an attorney practicing before it, including an open, frank, and cooperative attitude at all times and under all circumstances."

attorney before the Commission. 2/ The Order charged that in preparing and filing with the Commission a registration statement for the sale of shares of Yuscaran Mining Co., ("Yuscaran"), respondent had "knowingly included or permitted to be included, omitted or permitted to be omitted, misstated or permitted to be misstated relevant facts . . . which thereby created material deficiencies and made said registration statement false and misleading" with respect to matters which are discussed, infra. The proposed sanction in my initial decision was predicated in part on respondent's activity as an attorney in connection with the preparation and filing of the registration statement and in part on his refusal to testify at the hearing in this proceeding as a witness for and at the call of the General Counsel. 3/

Following the remand, the hearing was reopened in Washington, D.C., on January 16, 1967. The attorneys representing the General Counsel rested their case without the introduction of further evidence, and counsel for respondent indicated that extensive evidence would be presented on behalf of his client. The hearing was adjourned in order to

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2/ Rule 2(e) provides for the temporary or permanent suspension from appearing or practicing before the Commission of "any person who is found by the Commission after notice of and opportunity for hearing in the matter (1) not to possess the requisite qualifications to represent others, or (2) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct."

3/ Prior to the initial decision, the General Counsel had moved for an order striking the answer and declaring respondent to be in default because of his refusal to testify. By order dated October 13, 1965, I held, for reasons stated therein, that because of his refusal to testify, respondent should be precluded from adducing proof on the substantive issues alleged in the Order, but in other respects my order denied the motion.

afford respondent an opportunity to locate certain files and records essential to his case. Thereafter, it was resumed in Miami, Florida, in April 1967, at which point respondent was granted additional time to examine documents which, very shortly before, had been discovered in Commission file cabinets by one of the attorneys representing the General Counsel in the proceeding and had been turned over to respondent's counsel. Some or all of these documents had long before been delivered to the staff of the Commission either by respondent or by other counsel representing Yuscaran in connection with the investigation by the Commission's staff of the circumstances of the filing of the Yuscaran registration statement.

Eventually, the hearing was reconvened in Miami in June 1967, at which time respondent and other witnesses testified as to the asserted propriety of respondent's activity in the preparation and filing of the Yuscaran registration statement or in support of his reputation and his character. At the conclusion of respondent's case the hearing was adjourned to Washington, D.C., and on July 17, 1967, rebuttal evidence on behalf of the General Counsel was received. An employee of the Commission testified with regard to asserted misconduct of respondent several years earlier while he was an employee of the Commission, and with regard to a sanction of temporary disbarment from practice before the Commission which was imposed upon him for said conduct.

Although the Commission's order of December 13, 1966, remanding the proceedings calls for a "supplemental initial decision", because of the large volume of oral and documentary evidence received at the reopened proceedings and the consequent substantial change in the record, this decision for practical purposes might be better denominated an amended or substituted initial decision. It has been written as such, particularly to facilitate its reading and reference to it in future aspects of this matter. In addition, the initial decision of June 22, 1966 was based in part on respondent's refusal to testify at the hearing, a refusal which I deemed improper but which I believe no longer remains an issue in light of the remand and the extensive testimony by respondent which followed the remand. 4/

Following the conclusion of the reopened hearing, proposed findings of fact, conclusions of law and briefs in support thereof were filed by the General Counsel and by counsel for respondent, and a reply brief was thereafter filed by the General Counsel. The General Counsel urges that respondent should be permanently and unconditionally barred from appearing or practicing before the Commission. Counsel for respondent urges that his client acted properly and responsibly and that the charges should be found not proved and the proceedings dismissed. After review of the extensive record and careful observation of the witnesses, including respondent, and after evaluation

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4/ The Commission, in its order of remand, reserved decision on "the effect to be given to Marshall's refusal to testify . . . ." Although the refusal was not grounded on the 5th Amendment privilege and therefore is probably not supported by Spevack v. Klein, 385 U.S. 511 (1967), decided after the order of remand, I regard the refusal as mooted and have not adopted the contrary views urged by the General Counsel.

of their testimony in light of such observation, I make the following findings of fact and conclusions of law with respect to the charges in the Order as issued by the Commission and as amended during the hearing, in relation to respondent's activity in the preparation and filing of the Yuscaran registration statement. For the reasons expressed below, I conclude that respondent's activity was in several respects improper and that it requires me to issue the order of suspension from practice which follows these Findings and Conclusions.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Filing of the Registration Statement

From July 1954 to January 1956, respondent had served as Regional Administrator of the Commission for the Washington, D.C., area. In 1957 he became associated with the law firm then known as Smathers, Dyer and Thompson of Miami, Florida. In the summer of 1959 he had not been admitted to the Florida Bar, but because of his experience and expertise in the securities field he was consulted by Louis Schneiderman, a Florida attorney lacking expertise in that field, in connection with the proposed filing of a registration statement under the Securities Act of 1933 ("Securities Act") for a public offering of stock to be issued by Yuscaran.

Schneiderman contemplated the formation of Yuscaran as a corporation which would have as its principal asset a 99-year lease on certain mining properties in Honduras. This lease was to be assigned to Yuscaran by a limited partnership, Bobak-Davis and Associates, Ltd. ("Bobak-Davis"), the principal members of which, David Kornberg, Jr.,



Joseph Bobak, and Emanuel Davis, were the promoters of the corporation to be formed and were to be its officers.

Respondent met with Messrs. Schneiderman and Kornberg and with a Dr. Tumarkin, a substantial investor in Bobak-Davis, on July 14, 1959. He discussed the matter with a senior partner of his firm and thereafter undertook the proposed filing of the issue for an agreed fee of \$10,000 to be paid to the law firm. Mr. Schneiderman incorporated Yuscaran in August 1959, and on May 6, 1960, some eight or nine months later, respondent filed with the Commission a Form S-3 registration statement for the sale of 1,000,000 shares of common stock at \$1.00 per share. It is this registration statement, and the false and inaccurate representations and the deficiencies in it and in documents accompanying it, which constitute the basis for the claim of the General Counsel that respondent should be denied the privilege of further practice before the Commission.

On behalf of respondent it is urged that he was misled and deceived by the falsehoods of his clients, Bobak and Kornberg; that he had intended at the time of the filing to request from the staff of the Commission a conference concerning certain questionable aspects of the filing and a waiver of a deficiency which he recognized; and that at all times he acted in a proper professional manner in connection with this engagement.

B. Deficiencies in the Filing

(1) The Section 5 Violation

Very early in the course of the respondent's discussions in July 1959 with Kornberg and Dr. Tumarkin concerning the preparation of the

registration statement, he learned of prior transactions by the promoters of the mining venture in the sale of partnership interests by Bobak-Davis and in pre-incorporation activity of Yuscaran in the sale of shares and debentures to many members of the public. He admittedly recognized that these transactions probably had violated Section 5 of the Securities Act which, as relevant here, prohibits the sale of securities in interstate commerce unless a registration statement is in effect. But, as discussed below, respondent closed his eyes to what he called a "probable violation", which I find he should have recognized as an evident violation; and he closed his mind to information which might have disclosed yet additional reason for recognizing a violation, by failing or refusing to inquire or ascertain whether other members of the public had been offered (but did not accept) interests in the mining venture. Almost ten months later, in May 1960, he filed a registration statement in which he asserted an exemption from the requirements for registration of those earlier transactions, knowing that the exemption was improperly asserted and that the basis for the asserted exemption was information which was being inaccurately, incompletely, and unfairly stated in the registration statement then being filed for the sale of one million additional shares of Yuscaran.

On September 21, 1959, the lease on the mining property in Honduras was assigned by the partnership to Yuscaran in consideration of the issuance of securities by the corporation. 5/ The registration statement filed in May 1960 covered this at Item 15, Part II, which calls for a disclosure of "Recent Sales of Unregistered Securities", by stating that 15,900,000 unregistered

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5/ One or more agreements between the partnership and Yuscaran also provided for the payment by the assignee corporation to the assignor partnership of 3% of the annual profits from the mining venture.

shares and \$94,099 of debentures had previously been issued by the company. In connection with the claim of exemption from registration authorized by Section 4(1) of the Securities Act (now Section 4(2)), which provides an exemption for private offerings, or "transactions by an issuer not involving any public offering", it was stated with respect to the above securities that:

" . . . The securities issued are held by a total of four (4) persons. These persons have all taken these securities for investment. Since the principals of the partnership are also the promoters and incorporators of Yuscaran Mining Company, they, as well as the Dafts 6/ are well-informed regarding the details of Yuscaran's mining activities."

Respondent knew that although the promoters and incorporators of Yuscaran may have been "well-informed", nevertheless many of the 15,900,000 shares and yet additional shares were beneficially owned by and were to be either transferred or issued to a large number of investors who had not taken their securities for investment and who were obviously not well-informed regarding Yuscaran or its mining activities, and he knew that the exemption from registration for these securities had been lost and was not in fact available. 7/ He knew that although

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6/ The mining property had been owned by the deceased husband of Gloria Daft. 600,000 shares of the 15,900,000 shares were issued to her in trust for three minor Daft children.

7/ Respondent testified on December 18, 1961, in a Commission investigation of the filing, that early in the course of his discussions with the promoters he went to "considerable pains to emphasize to these people that they may have lost their exemptions from registration, if they had had any at any time, because of the number of persons who were already participants in a 'widespread group'".

At the hearing in this matter he testified with regard to the first meeting with his clients:

"Well, it appeared to me that the people who had organized or were organizing Yuscaran may have been in violation of the '33 Securities Act . . . in that they may have sold some securities in violation of Section 5 of the Act." (Tr. 676).

His testimony regarding an asserted intention to discuss this matter with the Commission's staff is discussed, infra.

15,300,000 shares of the 15,900,000 shares were to be issued to Bobak-Davis as part consideration for the assignment of the mining lease, a substantial number of these shares were beneficially owned and would be received by a large number of uninformed persons who had not agreed to take the stock for investment. His denial of his knowledge is discussed below.

Item 15, of Part II also listed other persons to whom stock of Yuscaran had been "sold but unissued". But the list was misleading, inaccurate, and incomplete, for it did not include many other investors to whom stock had been sold and was to be issued, either for cash already paid or for the surrender of interests in Bobak-Davis. Lists of such persons had been prepared by Mr. Schneiderman and discussed with or reviewed by respondent. The evidence showed that much time and effort was expended by Mr. Schneiderman and by respondent to correct what was deemed an unfair or improper situation resulting from the fact that many investors had purchased partnership interests for differing considerations -- some of these purchases within a few days of others. 8/ In August 1959, shortly after the incorporation of Yuscaran, a form of "General Release" was prepared for the signature of one such group of investors. The release recited that the original certificate of limited partnership of Bobak-Davis had called for the formation of a corporation, that Bobak had promised the investors corporate stock in proportion to their investments and, after listing the number of corporate shares and debentures of Yuscaran to be received by each of the 13 signatories, it provided for the

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8/ Mr. Schneiderman testified that he was retained to integrate and coordinate the partnership with the corporation, and the sale of interests at differing considerations was a serious and troublesome problem.

release of Bobak and of Davis from any "right or rights the undersigned ever had . . . to modify, rescind or terminate the purchase agreements . . . ." 9/ Neither these persons nor the 900,000 shares of Yuscaran to which they were entitled are listed under Item 15, Part II, or elsewhere in the registration statement filed nine months later. And from another list prepared by Mr. Schneiderman and labeled "Partners and Stockholders" it would appear that yet additional persons not named in Item 15, Part II as persons who either had received or were to receive shares had made their investments for differing considerations. 10/ No attempt was made by or on behalf of respondent to ascertain the extent of the "knowledgeability" of any of these people on any of the lists, and I conclude that their lack of knowledgeability was either known or assumed by respondent.

In December 1959, long prior to the filing, respondent had prepared and sent to Kornberg a form of investment letter with instructions to duplicate it and transmit letters for signature by each of the many persons who had invested money in the partnership and corporation. Respondent had no basis for believing that these

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9/ It may well be that the methods of Bobak and Davis in merchandising the interests in their venture should, of themselves, have suggested to respondent the need for very careful and close examination of the entire corporate operation and its background, entirely apart from the matter of the Section 5 violation, and that he should have been alerted to certain aspects of deceit he asserts was being practiced on him by Bobak and Kornberg. The General Release recited that shares in the limited partnership were sold in certain instances "for different considerations . . . within a few days of one another."

10/ Mr. Schneiderman also prepared "Amendments to Certificate of Limited Partnership" in August 1959, including therein several other persons not included in any of the above-mentioned lists. It was contemplated that shares of Yuscaran would also be received by these persons, who were not shown to be knowledgeable.

persons had agreed or would agree to take their stock for investment. 11/

Whether respondent's preparation of the form investment letter to be duplicated and sent to the stockholders for their signature was an effort to correct or to conceal the Section 5 violation or whether, as respondent asserts, it was done merely to impress upon the promoters and stockholders the importance of not increasing the number of persons already involved with the unregistered stock, is of significance only as it reflects on respondent's motive. Assuming the truth of his assertion, nevertheless the fact is that some, if not all of the stockholders, had not taken the stock for investment and did not intend to hold it for a period of time, and the proposed letter could serve no prophylactic purpose in December 1959. In Securities Act Release No. 5563, August 12, 1967, the Commission reiterated a well-recognized position:

"Counsel and their issuer and underwriter clients cannot base a claim to exemption from registration under the Securities Act upon the mere acceptance at face value of representations by purchasers that they take for investment and disclaim responsibility for investigation and consideration of all relevant facts pertinent to a determination that the transactions do not involve a public offering." And see United States v. Custer Channel Wing Corporation, 247 F. Supp. 481 (1965), aff'd 376 F.2d 675 (1967).

At the time of the filing, respondent recognized the significance of Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119 (1953), a landmark decision which defines the scope of the private offering exemption and limits it to situations where the particular class of persons affected do not need the protection of the Act. The case holds that

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11/ For example, Dr. Tumarkin testified at the hearing that he had intended to distribute his stock, when received, amongst several members of his family, and that he would not sign the form investment letter which he received.

where the exemption question turns on the knowledge of the offerees they must have access to the kind of information which registration would disclose. 12/ Yet the evidence is clear that respondent made no effort to ascertain whether offers had been made to persons who for one reason or another did not accept the offers and who were lacking the kind of information which registration would have disclosed. I find that the above-quoted language of the registration statement concerning the knowledgeability of four persons was designed to conceal material facts regarding investors and their lack of information, and that the language failed to disclose, and in fact obscured significant and material transactions which respondent knew must be made known if the registration statement was to serve its function of furnishing to the Commission and to potential investors full and accurate disclosure.

In sum, I conclude that respondent knew that the 15,900,000 shares of stock were owned by more than four persons; that he knew or assumed the fact that a great number of investors in Yuscaran were not well-informed concerning the operations and finances of Bobak-Davis or Yuscaran; that the investors - both those who purchased limited partnership interests in Bobak-Davis and agreed to exchange those interests for Yuscaran securities and those who subscribed for corporate stock and debentures for cash - had neither represented nor intended that they were purchasing for investment only; that he knew that inquiry and reliable information regarding offers to persons who did not participate in the offering of interests in the mining venture were essential to any evaluation

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12/ Cf. Gilligan, Will & Co., 38 S.E.C. 388 (1959), aff'd 267 F.2d 461 (C.A. 2, 1959), cert. den. 361 U.S. 896; Securities Act Release No. 4552 (November 6, 1962); Northeast Telecommunications, Inc., 41 S.E.C. 579 (1963); Securities and Exchange Commission v. Sunbeam Gold Mines, Co., (C.A. 9, 1938) 95 F.2d 699.

of the possible violation of Section 5 and to any discussion of that matter with the staff of the Commission; 13/ and that he recognized or closed his eyes and mind to the fact that the violation of Section 5 was not merely "probable" but actually had occurred.

The post-hearing documents do not discuss the partnership interests as securities, vel non, as defined in Section 2(1) of the Securities Act, a matter on which there can be no question in view of the inclusiveness of the definition. Nor do the documents debate the significance, vel non, of a distinction, in respect of the Section 5 violation, between the predecessor partnership and the successor corporation as the issuer of securities. Accordingly, the lack of such significance is not here discussed beyond reference to the analysis at I Loss, SECURITIES REGULATION, 456 et seq. (2d ed. 1961), on "Preorganization Certificates or Subscriptions", and the cases cited therein advertising to the Section 5 requirement that such interests or securities be registered, at the risk of the issuer being subject to injunctive action as well as incurring civil and criminal liabilities for sales without registration.

Respondent testified at the hearing that he believed the 15,300,000 shares of Yuscaran stock issued as part consideration for the

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13/ As early as 1935 the Commission warned, with regard to the private offering exemption, that "the number of offerees and their relationship to each other and to the issuer . . . does not mean the number of actual purchasers, but the number of persons to whom the security in question is offered for sale" and that any attempt to dispose of a security should be regarded as an offer. Securities Act Release No. 285, January 24, 1935. Similar language has been used by the courts and by the Commission in a host of decisions which emphasize also the importance of the knowledgeability of the offerees and purchasers and of their relationship to the issuer. Respondent's testimony indicates that he was aware of these criteria.



assignment of the lease were to be held by the partnership rather than distributed to the limited partners in proportion to their investments. This testimony conflicts with the testimony of Dr. Tumarkin at the hearing and of Kornberg in an earlier deposition, both of whom expected to receive stock certificates evidencing their investments; 14/ it conflicts with the testimony of respondent at page 46 of the transcript of the investigation of December 18, 1961, referred to in the margin at footnote 7; 15/ it conflicts with the fact that respondent prepared the form of investment letter to be duplicated and sent by Kornberg to the individual limited partners for eventual return to the corporation; 16/ it

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14/ Kornberg testified: ". . . as I understand it as an investor I expected to get as much interest in Yuscaran as I did in Bobak-Davis and so did every other investor."

15/ Respondent testified, regarding the investment letter: ". . .and I felt that the harm had been done in contacting these people and accepting their money and the fact that these people wanted to have securities as evidence of their payment, I felt, was little additional injury to what injury had already been done."

16/ The proposed findings of the parties submitted after the remand and in connection with the instant decision are in agreement that the promoters were concerned with pressure from persons who had purchased securities or contributed money and that respondent prepared a form investment letter which provided that stock certificates would be issued by the corporation upon receipt of the signed letters.

I note that respondent's proposed findings submitted prior to the initial decision of June 22, 1966 agreed with a portion of proposed finding 29 of the General Counsel submitted at that time, that

"Respondent was aware of this plan to have the partnership distribute the 15,300,000 shares of Yuscaran stock it had received to the limited partners."

conflicts with the language of that form letter which acknowledges the receipt of a stock certificate; and it conflicts with the entire plan or pattern which was developed for the transfer of individual partnership interests into investments in the corporate securities. 17/

(2) The Absence of Certification

Respondent testified that early in the course of his engagement he impressed upon his clients the importance of their producing all available information concerning the Bobak-Davis operation in order that the registration statement might be complete and accurate. But he was advised by the clients that the books and records of Bobak-Davis could not be taken out of Honduras. The registration statement was filed without the certification of financial statements in the prospectus, as required by the Commission's Form S-3, and the report of the accountant which was included in the prospectus referred to the "limited examination . . . necessitated by the fact that certain records and documents pertinent to our examination were understood to be in Honduras and, therefore, not readily available".

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17/ Because I find that the shares were to be delivered to the individuals rather than remain with the partnership entity, it follows that respondent should have recognized the partnership as an underwriter of the stock issue and that it should have been named as such in the registration statement. Respondent admitted in testimony that if this were the understanding

" . . . the partnership would have been an underwriter and as an underwriter that fact would have to be disclosed in the registration statement."  
Cf. Section 2(11) of the Securities Act, defining the term underwriter.

However, no charge was asserted in the Order based on this deficiency; moreover, it is a part of the basic inadequacy of the registration statement discussed above. Accordingly, I have not considered it a factor in evaluating respondent's conduct even though the issue was briefed by counsel for the parties.

Respondent asserts that even at the time of the filing on May 6, 1960, some ten months after his first meeting with his clients, he remained of the opinion that the necessary records might be produced and the required certified financials be made a part of the filing, an opinion which suggests, at the least, an excess of optimism. There was no testimony regarding consideration given by him to (a) travel by the accountant from Miami to Honduras for the purpose of examination of the records allegedly not susceptible of transmission out of Honduras or (b) the engagement of accountants in Honduras to certify the required financials. 18/

If the records did not become available, respondent testified, he intended to seek a waiver of the certification requirement. In support of this testimony he referred to a provision in the instructions for the filing of a Form S-3 registration statement which relates to Commission waiver of the filing of "one or more of the [financial] statements herein required or the filing in substitution therefor of appropriate statements of comparable character." The provision in no way suggests the possibility of a waiver of certification of required financial statements, and an experienced practitioner should have known or recognized this clear distinction between (a) the

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18/ It is almost common knowledge that some of the large United States accounting firms have branch offices in Central American cities.

waiver or substitution of one or more financials and (b) the waiver of certification of required financial statements. 19/ This explanation seems to be a rather poorly contrived afterthought, offered to justify a filing which, under all the circumstances, should not have been made. I am unable to conclude that respondent believed either that certification would be waived or that the

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19/ Item 12, on which respondent says he relied, reads as follows:

"Item 12. Financial Statements.

(a) The prospectus shall contain the following financial statements of the registrant which shall be prepared and certified in accordance with the applicable provisions of Regulation S-X:

(1) The statements specified in Rules 5A-02, 5A-03, 5A-04 and 5A-05 of that regulation, all as of a date within 90 days prior to the date of filing the registration statement.

(2) The statement of cash receipts and disbursements specified in Rule 5A-06 of that regulation for each of the last three fiscal years of the registrant, or for the life of the registrant if less, and for the period from the close of the most recent of such fiscal years to the date of the statements specified in (1) above.

(b) The Commission may, upon the request of the registrant, and where consistent with the protection of investors, permit the omission of one or more of the statements herein required or the filing in substitution therefor of appropriate statements of comparable character. The Commission may also require the filing of other statements in addition to, or in substitution for, the statements herein required in any case where such statements are necessary or appropriate for an adequate presentation of the financial condition of the registrant or any other person whose financial statements are necessary for the protection of investors."

records asserted to be in Honduras would be produced. 20/

As stated heretofore, respondent testified that he had intended, at the time of filing the registration statement, to ask the staff of the Commission for the opportunity of a conference at which he would discuss the possible Section 5 violation. (Apparently at the same conference, he also says, he would request the waiver of certification of the financial statements if the records did not become available). But at no time during his interrogation of December 18, 1961 did respondent indicate that such conference or disclosure of a possible Section 5 violation or deficiency in the filing was contemplated. It is incredible, moreover, that lacking specific and essential information concerning offerees who did not participate, and lacking detailed information concerning the persons who did participate and the extent of their "knowledgeability" of the finances and operations of the mining venture, respondent would have contemplated a discussion with the Commission staff of the possible Section 5 violation. Any request for advice or for the expression of staff views would have been totally unavailing absent detailed information, and respondent must have been aware of this. In short, I

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20/ On December 18, 1961, respondent testified as follows regarding the unavailability of records and the accountant's inability to certify:

"Q. Did Mr. Johnson hold out any hope that there would be, that he could certify in the near future? In other words, was there any hope there? What did Mr. Johnson say, since he was the one that was going to have to come through with this thing?

A. I don't recall any extended conversation with Mr. Johnson about this."

Mr. Johnson testified that he had never heard of the Commission having waived the certification of a financial statement filed in connection with a registration.

believe that the testimony that a conference would be sought by respondent for the purpose of seeking staff advice on the Section 5 problem is afterthought.

Conversely, however, I find it inconceivable that an attorney with respondent's experience could expect this filing to become effective without staff insistence on an amendment because of the absence of the certified financials, a glaring and significant deficiency expressly mentioned in the accountant's report. I conclude that respondent expected that he would receive a deficiency letter from the staff which would require discussion of the lack of certification. 21/ But because I know of no basis on which respondent might reasonably have expected a waiver of the certification requirement (and none was offered at the hearing), I must conclude that respondent filed the registration statement under pressure from his clients and without proper restraint; 22/ that he filed with more than appropriate concern for the fee to be earned, 23/ and without reasonable expectation that the shares could be sold under the proposed offering.

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21/ This conclusion is supported by respondent's testimony on December 18, 1961, as well as by his testimony at the hearing. And respondent obviously contemplated a less significant amendment of the preliminary prospectus to supply a dollar value for debentures referred to in the prospectus in blank amount to be issued to persons listed in Item 15, Part II.

22/ Respondent testified on December 18, 1961, when he was asked whether the accountant had reported to him the inability to prepare the financials:

"Well, in view of the record he obviously did. I just don't recall."

In response to the next question he testified:

"Well, we both attempted, I think, obviously not strong enough, to resist the insistence on Mr. Kornberg's part that we get this filed and that we start to go through the necessary steps to clear his stock for sale".

23/ Respondent's firm retained \$5,000 paid as part of the agreed fee of \$10,000, but made no effort to collect the balance.

I have indicated my view that in the unlikely event that had no question been raised by the staff with respect to the registration statement, no conference or waiver would have been requested by respondent. But a challenge of the registration statement was made by the staff, and on May 17, 1960, some eleven days after the filing, respondent received a telephone call requesting that he appear in Washington with reference to the filing. During the telephone conference it was disclosed to respondent that there were questionable areas or deficiencies in the registration statement and respondent testified that at the subsequent meeting with the staff in Washington he learned the details of matters which had been falsified to him by his clients. Shortly, thereafter, respondent's firm withdrew its representation of Yuscaran. 24/

(3) Other Deficiencies in the Filing

The Order, as amended at the hearing, charges that the registration statement was inaccurate in stating that there was no provision in Yuscaran's by-laws for indemnification of its directors or officers. Respondent concedes that this statement was erroneous

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24/ On July 13, 1960, stop-order proceedings pursuant to Section 8(d) of the Securities Act were instituted by the Commission. Section 8(d) authorizes the Commission, after notice and opportunity for a hearing, to suspend the effectiveness of a registration statement if it appears to contain material misstatements or omissions. The proceedings resulted in a stipulation of facts and consent to the entry of a stop-order in September 1961. Respondent did not represent Yuscaran in these stop-order proceedings and was not a party thereto, and, as I stated in the initial decision, neither the stipulation of facts nor the stop-order was considered by me as evidence in support of the charges against respondent. That position is now reiterated: it applies to the findings in the instant decision as well.

and that the by-laws, which were appended as an exhibit to the registration statement, provided for such indemnification. The word "indemnification", moreover, was printed in capital letters at the heading of the paragraph in the by-laws dealing with that subject. Respondent accepted primary responsibility for the error, but denied any intention to deceive. I think there can be no question as to the correctness of this position. Although another attorney in the firm may have had the job of assembling the exhibits, respondent's failure to detect this obvious misstatement indicates a lack of diligence not consistent with the proper performance of duties owed to his client or to the Commission.

The Order, as amended, also charges that the registration statement was deficient and inaccurate because respondent's opinion letter, addressed to Yuscaran's secretary and appended as an exhibit, stated that the shares would be "legally issued, fully paid and non-assessable", whereas the mining code of Honduras, also appended as an exhibit, provides in Article 136:

"If proceeds from the mines are not sufficient the shareholders must fix the amount to be paid by them in order to meet the expenses."

I cannot agree with respondent's contention that an opinion of Honduran counsel, on which it is now asserted he relied, was a proper basis for such reliance. The opinion related to Yuscaran's qualifications to do business in Honduras and not to the non-assessability of its shares, and I reject the contention that respondent could, or did, rely on the letter as the basis for a statement that the shares were non-assessable. Similarly, the argument that reliance for the statement was based on a letter of December 4, 1959 from the Secretary of Economy and Finance of the Republic



Honduras is rejected. That letter authorizes Yuscaran to do business in Honduras and, adverse to respondent's contention, it provides expressly that the corporation acknowledges

"its submission to the laws, courts and authorities of the Republic in connection with any act or judicial procedure carried out in Honduran territory or which might affect the same."

It does not provide for or support a claim of non-assessability of the shares. Nor is there significance in the query raised in respondent's brief, "whether the provisions of the Honduran Mining Code to which the General Counsel refers apply without exception to all corporations in Honduras, foreign and domestic alike." Disclosure of the above provisions and of their apparent applicability was required since this was material information "as to which an average prudent investor ought reasonably to be informed before purchasing the securities registered." 25/ The penalties for not respecting Article 136 and the very practical methods available to the Republic of Honduras for the enforcement of that Article were also set forth quite clearly in the Honduran Mining Code. If, as urged in respondent's brief, he was aware of the provisions in the mining code and "they gave him pause" but he relied on the above-mentioned opinion of Honduran counsel, his dereliction was all the more reprehensible.

I find that both of the above deficiencies resulted from a failure to give adequate care to the accuracy of the statements, and that reasonable diligence in the preparation of the registration statement would have obviated the errors.

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25/ See Rule 405, General Rules and Regulations under the Securities Act, defining "material" information in those terms.

Conversely, however, I am not persuaded by the evidence that respondent should be faulted in this proceeding for the material misstatements and deficiencies in the registration statement relating either to the geological matters or to the experience of the promoters, as alleged in the Order. I find no sufficient evidence to indicate that respondent should have recognized the inadequacy of the geologist, which he testified was made apparent to him at the meeting with the staff of the Commission in May 1960. Nor do I find that he was under a duty to seek independent advice or assurance that the geologist was qualified to make the studies and reports on which the geology described in the filing was based.

I believe there is insufficient evidence to support a finding that respondent is subject to criticism in these proceedings for failing to take steps which would have disclosed the falsity in the biographical sketches in the prospectus concerning the mining experience and backgrounds of Bobak and of Davis. Respondent concedes that the function of an attorney preparing a registration statement is not that of a mere scrivener and that he must make reasonable effort to ferret out the true facts. It seems clear that respondent was deceived by Bobak and Kornberg, 26/ who appear from the evidence to have had little regard for truth. Respondent had considered Bobak "an extremely believable man and a very charming man" and was shocked when he learned of his deceit. I find no sufficient evidence of respondent's lack of required diligence in this regard, nor of indication that he did not act in good faith in accepting the information given him, false though it was.

The Order, as amended, also alleges that the opinion letter furnished by respondent to the registrant and annexed to the registration statement was inaccurate in stating that the shares, when sold, would be "legally issued". The basis for the charge is that

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26/ Respondent never met Davis, and he apparently accepted the background information and other information received orally from Bobak and Kornberg.

although the authorized capital stock of Yuscaran was 20,000,000 shares of common stock, more than that number of shares had been sold and would be issued. Although the testimony and documentary evidence show that a great number of shares were sold and promised to be issued, as indicated, for example, by the various lists and the amended certificate of partnership agreement prepared by Mr. Schneiderman, together with the figures stated in the prospectus and in other portions of the registration statement, nevertheless the evidence is not sufficiently precise to indicate what that number was. And there was an apparent lack of knowledge, on the part of anyone, with respect to the number of shares which were to be transferred to pre-incorporation subscribers by the partnership from the 15,300,000 shares issued to it, as well as the number, if any, which were to be transferred by Bobak or by Davis from shares they were to receive individually. In brief, although the evidence supports the charge that Yuscaran was obligated to issue shares in excess of those mentioned in the registration statement, there is no credible evidence that the authorized capital of 20,000,000 shares had been or would be exceeded. 27/ It follows, also, that an allegation that

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27/ The evidence shows that Mr. Schneiderman did not know the total number of shares to be issued. He testified to "running a tape" which totalled 14,400,000 shares and of a companion document with a total of 2,016,000 shares, both prepared in connection with his effort to amend the partnership certificate. As to whether these lists represented "stock committed to be issued, stock sold, or stock to be issued, he testified:

"I believe that these people named were in different categories. Some of them were just interested people. Some of them had committed themselves possibly in writing without money and some of them had committed themselves in writing or not in writing, with money."

He also testified that certain people were paid back their investments.

Respondent himself testified, in refuting the accuracy of the stipulation in the stop-order proceeding, which, as stated above, is not deemed binding on him, that the stipulated figure of 33,284,000 shares should have been 19,362,000 shares.

the prospectus contained a material deficiency in stating that

" . . . if the 1,000,000 shares sought to be registered were all sold, the investing public would have paid \$1,000,000 for approximately 6% of the total common stock outstanding."

must fail for lack of proof, on a purely mathematical basis.

Nor is there sufficient evidence of the charge in the Order, as amended, that respondent was derelict in his responsibility as an attorney for not having known the falsity of a statement in the prospectus to the effect that no salary or other compensation had been received from the partnership by Bobak or Kornberg. In his deposition before an officer of the Commission, given during the investigation of this filing, Kornberg testified that he had received his interest in the partnership in return for services rather than for payment of money. While I have no reason to doubt the truth of that statement (nor reason to believe that Bobak or Davis paid cash for their stock interests), I do not accept Kornberg's uncorroborated testimony on this issue as adequate basis for a finding that respondent should have known that the statement in the prospectus was false, nor, indeed, that it was in fact false.

(C) Character Evidence and Respondent's Prior Conduct

Finding, as I do, that respondent engaged in improper professional activity in connection with the preparation and filing of the registration statement, I turn to the evidence with respect to his character and reputation -- that which was adduced in his favor and that which was adduced by the General Counsel with respect to

his prior conduct while an employee of the Commission -- all of which reflects in some measure on the issue whether he should be suspended or disbarred from practicing before the Commission at this time.

Mr. Schneiderman, as well as Mr. Johnson, the certified public accountant, testified favorably regarding respondent's reputation as an attorney in the locale in which he practices, and I accord weight to their testimony with respect to his reputation and also with respect to his professional activity outside the scope of the charges in this proceeding.

The General Counsel introduced countervailing evidence of prior misconduct, however, through the testimony of William E. Becker, Chief Management Analyst of the Commission, who was Director of Personnel in 1955 when respondent was Washington Regional Administrator. Mr. Becker testified that in accordance with the requirements of the Commission's conduct regulations, on March 14, 1955 respondent had reported a purchase of stock in Coastal Finance Corporation ("Coastal"), a small loan company. Respondent also became a director of that company, as Mr. Becker learned from a news item which was later called to his attention.

In July 1955, Mr. Marshall filed with Mr. Becker a memorandum stating that he was a director of Coastal and that the company was about to file a letter of notification for a public issue under the Commission's Regulation A. Since it would normally have been Mr. Marshall's duty to review this filing as Regional Administrator, he advised Mr. Becker that he proposed to delegate that function to his

assistant, a senior attorney, who would review the filing in the capacity of Acting Regional Administrator. After conferring with other officials of the Commission, Mr. Becker advised Mr. Marshall that it would be appropriate for him to resign as a director of the corporation and to transfer the review function to the Commission's Corporation Finance Division rather than to his subordinate. The testimony indicates that respondent had no objection to the transfer of the review function, but he did object to the requirement that he resign his directorship. After insistence by Mr. Becker and others in responsible positions at the Commission, however, respondent agreed to accede to this demand and to resign the directorship forthwith. Thereafter, he delivered to Mr. Becker an initialed copy of a letter of resignation addressed to the president of Coastal, and a copy of a memorandum to the Corporation Finance Division transferring to it the function of reviewing the Coastal filing. Mr. Becker informed his superior, the Acting Executive Director, of what had been done, and advised that in his opinion there was no need for further action.

In December 1955, Mr. Becker learned from a news broadcast that Coastal was in financial difficulty. The following day he was called to a meeting of Commission officials, attended by Mr. Marshall, at which he learned that Mr. Marshall had not in fact resigned as a director of Coastal. Later in that month, the then Chairman of the Commission requested Mr. Marshall to submit his resignation as a member of the staff and Mr. Marshall resigned in January 1956.

Following an investigation of the Coastal filing, the Commission determined later in 1956 that the evidence showed a prima facie record of violation of the letter and spirit of the Commission's conduct regulations by Mr. Marshall (and by another employee), and that Mr. Marshall should be disqualified from appearing and practicing before the Commission. The Secretary of the Commission was directed to inform Mr. Marshall that the Commission assumed that he would refrain from practicing before it rather than apply for a hearing under Rule 2(e) of the Commission's Rules of Practice, which, of course, he was entitled to have if he desired it. In subsequent exchanges of correspondence with the Commission, Mr. Marshall agreed to waive his right to a hearing but requested that the period of suspension from practice before the Commission be limited to two years. The Commission agreed to suspension for a period of three years and this was the end of the matter.

Mr. Becker testified that Mr. Marshall asserted that he had intended to inform an officer of the Commission of his retraction of the letter of resignation, but due to the pressure of work on a special assignment for the Commission in New York City he did not do so, and that the matter was thereafter forgotten by him. It seems difficult to conceive of so important a matter being forgotten, even under pressure of a heavy work assignment, and although I do not believe it is my function at this time to make detailed findings regarding the prior misconduct, I must state that it is difficult to credit such assertion.

The proposed findings submitted in respondent's behalf urge that his withdrawal from practice before the Commission was voluntary, and that

" . . . there has been no adjudication or determination by the Commission of any unethical or other misconduct on the part of the respondent, whether in connection with his resignation from the staff of the Commission or otherwise. It is to be assumed that if the Commission was of the view that any of the conduct on the part of the respondent warranted his disbarment, it would have preferred formal charges and presented its proof of such charges, rather than to employ the devious tactics by which the charges in this proceeding have been prosecuted."

I do not agree that the withdrawal from practice was voluntary, or that the Commission has not determined that there was misconduct by respondent which warranted the sanction imposed, albeit this was not done in a Rule 2(e) proceeding. Conversely, I do not overlook the fact that respondent probably has abstained from practicing before the Commission for the required period, and thus has sustained and suffered the sanction imposed upon him for that misconduct. But the implication in the above-quoted language that the charges in these proceedings were preferred because of the respondent's conduct as an employee and for the purpose of imposing added sanctions is, in my opinion, entirely unwarranted.

### III. DISCIPLINE REQUIRED AND ORDER SUSPENDING RESPONDENT FROM PRACTICE

The question whether respondent should be suspended or disbarred in this proceeding because he engaged in unethical and improper professional conduct in preparing and filing the registration



statement or because he has displayed a lack of the requisite qualifications to represent others and a lack of character or integrity is a difficult and troublesome one. The task has not been appreciably simplified for me even after having heard and studied the extensive testimony and documentary evidence produced during the remanded proceedings.

I am convinced, as indicated above, that respondent acted in bad faith with respect to the Section 5 violation, and that in filing a registration statement which he had no reasonable basis to believe would be authorization for the sale of his client's stock he performed a disservice to the client. In other respects noted, his professional conduct fell short of the standard of reasonable diligence required of an attorney filing a registration statement. It is unfortunate, moreover, that respondent's testimony at the hearing did not impress upon me a conviction that no sanction should be imposed. His testimony concerning the preparation of the registration statement not only failed to justify or support his conduct and activity as an attorney, but also included, unfortunately, the belated and unpersuasive excuses discussed above, which did not benefit his case.

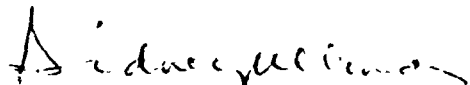
I have considered the character testimony given in respondent's favor and the evidence of his prior misconduct while a Commission employee; have studied his testimony and demeanor at the hearing; have evaluated the fact that the filing was made eight years ago; and have assessed the trouble, embarrassment and expense which these proceedings, although private, have already caused him. This was done in the light of all of the testimony and credible evidence in the record.

My conclusion, under all the circumstances, is that respondent has been shown to have engaged in unethical and improper professional conduct, and that a period of suspension from practice before the Commission is appropriate. Almost two years ago I stated in the initial decision that I believed respondent should be denied the privilege of appearing or practicing before the Commission without its prior approval, and that no application for approval should be submitted for a period of four years. A substantial, though frankly, indefinite and undefinable part of the disciplinary action I deemed to be required at that time was the consequence of respondent's refusal to testify in these proceedings, a refusal which I considered inappropriately and improperly asserted by an attorney practicing before a Commission which was questioning his prior professional activity performed within its operational sphere and under its surveillance. That aspect of the proceeding, as stated above, no longer persists. My conclusion at this time, nevertheless, is that the seriousness of the violations in the record reflect unethical and improper professional conduct and a lack of character and integrity of such seriousness as to require a period of suspension from practice before the Commission, which, after weighing all factors bearing upon this matter, I believe should be fixed at three years from the effective date of the order which follows. I am of the view that from this experience and during that period of three years respondent will have acquired an understanding of and respect for the obligations of ethical and proper professional conduct in his practice before the Commission and of the high standards required

of an attorney, and that it is neither necessary nor appropriate to include in the order a provision that he apply to the Commission for permission to practice before it at the expiration of that period of time. Accordingly,

IT IS ORDERED that William S. Marshall be, and he hereby is, denied the privilege of appearing or practicing before the Commission for a period of three years from the effective date of this order. 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(b) of said Rules of Practice either party may file a petition for Commission review of this supplemental initial decision within 15 days after service thereof on him. Pursuant to Rule 17(f) this initial decision shall become the final decision of the Commission as to each party unless he files a petition for review or the Commission, pursuant to Rule 17(c), determines on its own initiative to review. If either party timely files a petition for review or if the Commission takes action to review as to a party, this initial decision shall not become final with respect to such party. 28/

  
Sidney Ullman  
Hearing Examiner

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