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UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

**FILED**

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SECURITIES & EXCHANGE COMMISSION

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In the Matter of  
:  
BILTMORE SECURITIES CORP.  
:  
160 Broadway  
:  
New York, New York  
:  
File No. 8-6284  
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RECOMMENDED DECISION

IRVING SCHILLER  
Hearing Examiner

Washington, D. C.

September 20, 1960.

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

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RECOMMENDED DECISION

APPEARANCES:

Eileen Evers and John J. Devaney, Jr., Esqs.  
appeared for the Division of Trading and  
Exchanges.

Mr. John R. Steinert, Investigator, appeared  
for the Securities and Exchange Commission.

Mr. Wilbur Buff appeared for Biltmore Securities Corp.

BEFORE: IRVING SCHILLER, HEARING EXAMINER.

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Pursuant to Rule IX(d) of the Rules of Practice, this Recommended  
Decision is advisory only and the findings, conclusions and other  
matters herein contained shall not be binding upon the Commission.

The issues presented in these proceedings under Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") is whether it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration as a broker and dealer of Biltmore Securities Corp. ("registrant"), pending final determination of whether such registration should be revoked.<sup>1/</sup>

By order dated December 31, 1959, the Commission instituted proceedings to determine whether, pursuant to Section 15(b) of the Exchange Act, it is in the public interest to revoke or, pending final determination on the question of revocation, it is necessary or appropriate in the public interest or for the protection of investors to suspend registrant's registration; whether, pursuant to Section A(1)(2) of the Exchange Act, registrant should be suspended or expelled from membership in the National Association of Securities Dealers, Inc. ("NASD"), a registered securities association; and whether, under Section 10A(b)(4) of the Exchange Act, Wilbur Buff, president, director and beneficial owner of 10% or more of the common stock of registrant and Samuel Goldberg, general manager of the registrant are each a cause of any order of revocation, suspension or expulsion which may be issued by the Commission.

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<sup>1/</sup> Section 15(b) of the Exchange Act provides with respect to suspension of registration as a broker or dealer:

"Pending final determination whether any such registration shall be revoked, the Commission shall, by order, suspend such registration if, after appropriate notice and opportunity for hearing, such suspension shall appear to the Commission to be necessary or appropriate in the public interest and for the protection of investors."

The order for proceedings, as amended, alleges among other things that during the period from approximately February 1, 1960 to approximately August 11, 1960, registrant, Buff and Goldberg, willfully violated Section 17(a) of the Securities Act of 1933 ("Securities Act") in that in the offer and sale of securities by use of the mails and means and instruments of transportation and communication in interstate commerce, registrant, Buff and Goldberg, directly and indirectly, employed devices, schemes and artifices to defraud, obtained money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices and a course of business which would and did operate as a fraud and deceit upon the purchasers; that registrant, Buff and Goldberg willfully violated Section 10(b) of the Exchange Act and Rule 17 CFR 240.10b-5 promulgated by the Commission under said Section; that registrant willfully violated Section 15(c)(1) of the Exchange Act and Rule 17 CFR 240.15c1-2 promulgated by the Commission under said section and Buff and Goldberg caused, aided, abetted, counselled, <sup>2/</sup>commanded, induced and procured such violations by registrant.

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2/ Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 17 CFR 240.10b-5 and 17 CFR 240.c1-2(a) and (b) thereunder, as applicable in the instant case provide in essence that it shall be unlawful to use the mails or means of interstate commerce in connection with the purchase or sale of any security by the use of any devices to defraud, an untrue or misleading statement of a material fact, or any act, practice, or course of business which operates or would operate as a fraud or deceit upon a customer, or by the use of any other manipulative, deceptive or fraudulent device.

After appropriate notice, a hearing was held before the undersigned Hearing Examiner on August 30, 1960. Proposed findings of fact and conclusions of law were submitted by counsel for the Division of Trading and Exchanges and by counsel for the registrant.

The following findings are based on the record, the documents and exhibits therein and the Hearing Examiner's observation of the various witnesses.

Registrant, a New York corporation, has been registered with the Securities and Exchange Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act since December 29, 1957. Buff is, and has been, president, director, and owner of a majority of registrant's issued and outstanding common stock. Registrant is a member of the NASD.

The gravamen of the charges against the registrant, insofar as they are pertinent to a consideration of the suspension of registrant, relate to the activities and conduct of registrant in the offer and sale of the stock of Universal Fuel and Chemical Corporation ("Universal"). In general it is alleged that Buff and Goldberg, the general sales manager of registrant, made false and misleading statements of material facts and omitted to state material facts with respect to Universal.<sup>3/</sup>

The record shows that registrant sold approximately 112,500 shares of Universal in the period of March 1, 1960 to July 29, 1960. These shares were sold by registrant and its salesmen to members of the

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3/ The Commission's order of December 31, 1959 contained similar allegations concerning registrant's offer and sale of stock of Shelton Warren Oil Co. However, no proof was offered at the instant hearing with respect to these allegations.

investing public in many states. At the hearing, five public investors residing in Virginia, New Jersey and Massachusetts testified that they had purchased Universal shares from registrant after being solicited by long distance telephone. During the course of these conversations, lasting between five and ten minutes, registrant's salesmen represented that the Universal stock was a good buy, that it was good for increase to \$5 a share in a matter of months, that there is no telling how high it would go, that it would reach six points by the time the papers hit the street that evening, that it would be listed later on an exchange, and that Universal was buying into another company.<sup>4/</sup>

In light of the evidence adduced at the hearing, all of these representations were false and misleading. Universal's president testified that at the time registrant's sales were made, Universal had a substantial net loss which, for the fiscal year ended April 30, 1959 amounted to \$126,028.07, that for the fiscal year ended April 30, 1960 the net loss amounted to \$363,605.03 and that the net loss for the two-month period, May 1 to June 30, 1960, was \$60,057.07. The president further testified that at no time during 1959 or 1960 did Universal have plans to merge with another large corporation, that the corporation had no plans for listing its stock on a national securities exchange,<sup>5/</sup> and

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<sup>4/</sup> Not all of these representations were made to each investor but all of them stated they were told the price of the stock would increase substantially.

<sup>5/</sup> Universal's president testified that officers and directors informally (not at directors' meetings) talked of listing on an exchange at some time but no such information had ever been given out to any individual or any public source.

that there were no startling developments in the finances of the company to increase income or lower the deficit.

Registrant contended at the hearing that it mailed a copy of Universal's annual report to stockholders for the fiscal year ended April 30, 1959, containing a copy of the company's statement of profit and loss indicating the company's substantial net loss, to each of the persons to whom it sold Universal stock prior to effecting such sales. However, all of the investors who testified stated they received the report from registrant after they purchased their stock, that they were induced to purchase their stock by the oral representations made to them by registrant's salesmen over the telephone, that they were never told of Universal's substantial net loss and that if they had been made aware or told of such losses, they would not have purchased the stock. The record shows that one of the investors who testified stated that merely because a company had losses would not in itself deter him from buying stock. However, he testified if he had known the complete facts about Universal's losses he would not have purchased. He further testified he was certain he did not receive any literature from Biltmore until after he had purchased his stock because about a week after he acquired the facts, he received another phone call and refused to purchase stock. The record shows that in February, 1960, registrant requested Universal to furnish it with financial reports and other material and that in response thereto, a copy of the company's annual report for the year ending April 30, 1959 was sent to registrant by Universal's president. It is quite clear from the record, therefore, that registrant knew or should have known of Universal's financial condition and its substantial

net losses and that its salesmen failed to disclose this material fact to investors.

On the basis of observation of the demeanor of the investor witnesses, the Hearing Examiner accepts their versions of the telephone conversations with registrant's salesmen.<sup>6/</sup> The pattern of representations made by respondent's salesmen to investors in widely separated parts of the country concerning the increase in the price of Universal's stock and failing to disclose that company's net loss was clearly established by the investors who testified.

The Hearing Examiner is satisfied that the record amply demonstrates, and he so finds, that registrant, through its salesmen, made false and misleading statements to customers and failed to disclose material facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading. With respect to the salesmen's representations to customers concerning the increase of the price of Universal stock, the Commission has consistently held that a prediction by a securities salesman to an investor that a stock is likely to go up should have a reasonable basis and that there are no known facts which make such a prediction dangerous and unreliable.<sup>7/</sup> Since, as pointed out above, registrant had available

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<sup>6/</sup> Some of the investor witnesses who testified characterized the technique used by registrant's salesmen as high pressure.

<sup>7/</sup> Cf. A. G. Bellin Securities Corp., Securities Exchange Act Release No. 5966 (May 18, 1959). See also Best Securities, Inc., Securities Exchange Act Release No. 6282 and Leonard Burton Corporation, Securities Exchange Act Release No. 5978 (June 4, 1959).



Universal's annual report which set forth its losses, its failure to disclose them to investors rendered the prediction that the price of the stock would increase materially misleading.

Registrant further contends that it was denied due process of law "by the nature of the procedure employed at the hearing". Respondent's contention appears to be based upon two grounds, namely, that it was denied the right to be represented by competent counsel and that the Hearing Examiner refused to grant an application to reopen the hearing. In light of these contentions, a review of the record of these proceedings appears necessary. The Commission's order for public proceedings dated December 31, 1959 was duly served upon respondent in January, 1960; the Commission's order, dated July 29, 1960 setting the date and place of hearing was duly served upon respondents on or about August 1, 1960 for a hearing on August 22, 1960; on August 17, 1960, the Commission amended its original order to include allegations relating to respondent's activities in the sale of stock of Universal, and postponed the date of hearing to August 30, 1960; by letter dated August 24, 1960 counsel for respondent requested the Commission to grant a thirty day extension, which the Commission denied on August 25, 1960 and counsel was immediately so advised; on August 29, 1960, the Commission issued a supplemental order limiting the issues in the instant case to the question of whether it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration of registrant until final determination of the question of revocation and respondent was notified by telegram of the contents of the supplemental order. On August 30, 1960, the date of the hearing,

respondent applied to the United States District Court for the Southern District to adjourn the hearing, which application was denied on the ground the Court had no jurisdiction. At the opening of the instant hearing, the respondent again applied for an adjournment giving the same reason previously urged before the Commission. The record shows that the Hearing Examiner denied respondent's application. The Hearing Examiner thereupon explained the nature of the proceeding to respondent's president.

The record also shows that respondent was afforded the right to examine witnesses and present any evidence it desired in its own behalf. Respondent's president cross-examined the witnesses who testified at the hearing and at the conclusion of the hearing declined to produce any evidence stating "I feel that we did not make any misrepresentations in the sale of the stock." Respondent, in its brief, also argues that respondent was denied the right to defend itself and in addition that when respondent's president refused to take the stand without counsel present, the Hearing Examiner "directed him to testify".

Under Section 15(b) of the Exchange Act, the Commission's authority to suspend the registration of a broker or dealer may be exercised after appropriate notice and opportunity for hearing.

The Hearing Examiner is of the opinion, and so finds, that the statutory requirements of notice and opportunity for hearing have been met and that the respondent was not denied due process of law. The record establishes, and the Hearing Examiner finds, that respondent had adequate and appropriate notice of the proceedings herein, had ample

8/ opportunity to retain counsel, prepare for the instant hearing on the limited issues and was afforded an opportunity to present a defense. With respect to the contention that respondent's president was directed to testify, the record is clear that he was called as a witness by the staff of the Commission, at which time the Hearing Examiner advised him that since he had been subpoenaed he was required to take the stand and the Hearing Examiner stated unequivocally "You may not have to answer any questions". After the president was sworn, the record shows he was duly advised by the Hearing Examiner of his constitutional rights and five times during the course of his examination, he was reminded by the Hearing Examiner of such rights and availed himself thereof and refused to testify.

With respect to respondent's contention that the Hearing Examiner refused to reopen the hearing was a denial of due process of law, the Hearing Examiner is of the view that the arguments in support of such contention are, in essence, similar to those advanced for respondent's claim of denial of due process of law by reason of its inability to secure an adjournment of the proceedings and be represented by counsel at the hearing. Accordingly, and for the reasons stated above, the Hearing Examiner finds the foregoing contention without merit.

#### PUBLIC INTEREST

Under Section 15(b) of the Exchange Act, the Commission may suspend the registration of a broker-dealer, pending final determination

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8/ In fact, respondent was represented by counsel until a week before the hearings when it determined to discharge its counsel and retain new counsel.

whether such registration should be revoked if, after notice and opportunity for hearing, such suspension appears to be necessary or appropriate in the public interest or for the protection of investors. It is evident from the record that respondent's salesmen who effected sales of Universal stock to public investors by long distance phone calls of five or ten minutes' duration urging such investors, by high pressure selling techniques, to purchase securities on the unjustified representation that the stock would rise and be listed on an exchange without disclosing to such investors that Universal had sustained substantial net losses, a fact of which respondent was well aware, demonstrates that respondent is oblivious of the responsible relationship which should exist between securities dealers and customers and indicates that respondent is unaware of the standards of the profession requiring customers to be treated fairly.<sup>9/</sup>

The Hearing Examiner finds that the record herein contains a sufficient showing of misconduct to make it necessary and appropriate in the public interest and for the protection of investors to suspend registrant's registration pending final determination of the revocation issue. Respondent's argument that there is no substantial evidence in the record to sustain a finding that it is in the public interest to invoke a sanction of the magnitude of suspension cannot be accepted in light of the testimony of the investor witnesses with respect to the untrue and

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<sup>9/</sup> See Barnett & Co., Inc., Securities Exchange Act Release No. 6310 (July 5, 1960); Best Securities, Inc., Securities Exchange Act Release No. 6282 (June 3, 1960).

misleading statements of material facts made to them and the omission of registrant's salesmen to disclose material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. In considering the question of whether it is in the public interest to suspend the registration of registrant, the Hearing Examiner also notes that on January 27, 1960 respondent, its president and sales manager <sup>10/</sup> were enjoined by a judgment of preliminary injunction entered in the United States District Court for the Southern District of New York <sup>11/</sup> in regard to the offer and sale of shares of common stock of Shelton-Warren Oil Company and that on August 12, 1960, a temporary restraining order was entered in the same court <sup>12/</sup> in another injunction action against respondent, its president and general sales manager restraining respondent, its president and sales manager from violating Section 17 of the Securities Act of 1933 in regard to the offer and sale of the shares of common stock of Universal. The fact that within a seven-month period the Commission found it necessary to twice seek to enjoin respondent in connection with its offer and sale of two different securities because of the nature of the representations made by its salesmen to investors is indicative of the type of activities carried on by registrant and confirms the Hearing Examiner's opinion that the public

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10/ One of the investor witnesses testified that he was induced to purchase Universal stock by the representations made by registrant's sales manager.

11/ Civil Action No. 152-211.

12/ Civil Action No. 60-3197.

interest would best be served if registrant were suspended from dealing with investors. The Exchange Act contemplates that the sanction of suspension should be invoked where a preliminary showing is made that a registered broker or dealer has engaged in serious misconduct of a nature that would warrant revocation.<sup>13/</sup> Such a showing, as indicated above, has been made in the instant case.

CONCLUSIONS:

The sole issue presented is whether registrant's registration as a broker-dealer should be suspended as necessary or appropriate in the public interest or for the protection of investors pending final determination of whether such registration shall be revoked. The record in the instant proceeding contains a sufficient showing of misconduct to make it necessary and appropriate in the public interest and for the protection of investors to suspend registrant's registration pending final determination of the revocation issue.

It is recommended that the Commission issue an order forthwith under Section 15(b) of the Exchange Act finding it is necessary and appropriate in the public interest and for the protection of

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<sup>13/</sup> A. G. Bellin Securities Corp., Securities Exchange Act Release No. 5966 (May 18, 1959).

Investors to suspend the registration as a broker and dealer of registrant pending final determination of whether such registration should be revoked.<sup>14/</sup>

Respectfully submitted,



Irving Schiller  
Hearing Examiner

Washington, D. C.

September 20, 1960.

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<sup>14/</sup> The Division of Trading and Exchanges and registrant have submitted proposed findings of fact and conclusions of law. To the extent that proposed findings are in accord with the recommended decision, they are sustained and to the extent they are inconsistent with such decision, they are overruled.