ADMINISTRATIVE PROCEEDING
FILE NO. 3-4498

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
BRUCE WILLIAM ZIMMERMAN, d/b/a BRUCE W. ZIMMERMAN INVESTMENTS	:
(8-16467)	:

INITIAL DECISION

Washington, D.C.
August 25, 1975

Warren E. Blair
Chief Administrative Law Judge

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APPEARANCES: John E. Jones, Gregory L. Guilford, and Roger L. Keithley, of the Denver Regional Office of the Commission, for the Division of Enforcement.

John F. Campbell, of Spokane, Washington and Virgil D. Dohe of Aurora, Colorado, for Bruce William Zimmerman, d/b/a Bruce W. Zimmerman Investments.

BEFORE: Warren E. Blair, Chief Administrative Law Judge

These public proceedings were instituted pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934("Exchange Act") by order of the Commission dated May 22, 1974, later amended by order dated October 24, 1974. The order as amended ("Order") directed that a hearing be held to determine whether Bruce William Zimmerman, d/b/a Bruce W. Zimmerman Investments (hereinafter "Zimmerman" or "respondent") and John Alfred Bennett ("Bennett")[1/] wilfully violated and wilfully aided and abetted violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Zimmerman was also charged with failing to reasonably supervise persons subject to his supervision with a view to preventing the alleged violations. Additionally the Order recites that on July 11, 1974 Zimmerman, consenting to the entry of the decree, was permanently enjoined by the United States District Court for the Central District of California from violations of Sections 5 and 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.[2/]

In substance, the Division's allegations concerning the alleged violations are that from about May, 1973 to about September, 1973 Zimmerman and Bennett made fraudulent offers and sales of the common stock of Vanderbilt Gold Corporation ("Vanderbilt") through use of false and misleading statements concerning Vanderbilt's ore reserves, prospective revenues, earnings and operations, plant and equipment, and other aspects of that company's present and future operations.

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1 / On October 7, 1974 the Commission issued its Findings and Order barring John Alfred Bennett from being associated with any broker-dealer. Securities Exchange Act Release No. 11039 (1974). Findings herein are made only as to Zimmerman, the remaining respondent.

2 / SEC v. Vanderbilt Gold Corporation, Civil Action No. CV 74-635 (C.D. Cal. July 11, 1974).

Registrant appeared through counsel who participated throughout the hearing. As part of the post-hearing procedures, successive filings of proposed findings, conclusions, and supporting briefs were specified. Timely filings thereof were made by the parties.

The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon observation of the witnesses.

Respondent

Zimmerman, a sole proprietorship located in Aurora, Colorado doing business under the style of Bruce W. Zimmerman Investments, has been registered as a broker-dealer pursuant to the Exchange Act since June 1, 1971 and is a member of the National Association of Securities Dealers, Inc. In the seven years prior to becoming registered as a broker-dealer, Zimmerman was first employed as a salesman and district manager with a mutual fund group and then as a branch manager by a firm carrying on a general securities business.

In November, 1972 Zimmerman employed Bennett to act as the firm's trader and a salesman and at the same time hired Robert F. Archibold ("Archibold"), who had been working with Bennett in another securities firm, as another salesman and to head up the research department. At Zimmerman's request, Bennett resigned his positions in September, 1973.

Vanderbilt Gold Corporation

According to the registration statement filed by Vanderbilt pursuant to the Securities Act in March, 1972 and the amendments to that registration

statement filed in June, 1972 and in May and August, 1973, Vanderbilt was incorporated in California in 1967 under the name Rainbow Mines, Inc. It is primarily engaged in the exploration for gold ore bodies on its principal mining properties which are located in San Bernardino County, California and collectively known as the Vanderbilt Property, and is also planning further exploration on a joint venture basis of its Rainbow Property, a gold prospect idle for some years which is also located in San Bernardino County. The company also plans to mill material from old dumps on its property in the hope that the activity will be an economic operation.

It appears that Vanderbilt, its subsidiary, and its predecessors have expended approximately $2,750,000 on exploratory activities at the Vanderbilt Property and that those activities have not established the existence of a commercially mineable ore body. Further, the company's wholly owned subsidiary constructed and equipped a flotation mill on the Vanderbilt Property at a cost of approximately $459,000, but no known commercially mineable ore body has been found at the property to justify that investment.

Vanderbilt has no earnings or operating history, its activities having been limited to exploration, and as of June 30, 1973 had $191,835 in current liabilities which exceeded its current assets of $20,255 by nearly $192,000. Of those liabilities, $74,703 represented accrued salary indebtedness to officers and loans from principal stockholders.

Violations

The record establishes that during the period alleged, Zimmerman wilfully violated Section 17(a) of the Securities Act and Section 10(b)

of the Exchange Act and Rule 10b-5 thereunder, and wilfully aided and abetted those violations by means of a false and misleading research report on Vanderbilt prepared by Bennett for use by Zimmerman in connection with the offer and sale of Vanderbilt common stock. Since it appears that Zimmerman was a principal in these violations, it is concluded that a finding of a failure to supervise with a view to preventing those violations would not be appropriate.[3/]

Initially Zimmerman was primarily a mutual fund dealer, but in November, 1972, with an increase in personnel through employment of Bennett and Archibold, the major portion of the firm's operations became a general securities business. Shortly after Bennett's arrival the firm began trading and making a market in Vanderbilt stock and continued to do so until September 20, 1973 when this Commission suspended trading in that security. In connection with the firm's trading interest in Vanderbilt, about 450 copies of a research report on that company prepared by Bennett and dated May 1, 1973 were mailed out by Zimmerman and Bennett during June, July, August, and September, 1973 to approximately 310 addressees. Of those addressees, 163 were individual customers of Zimmerman and 147 were broker-dealers. Additionally, an undetermined number of copies were forwarded to Vanderbilt.

In fact, the May 1 research report was not a product of Bennett's independent research but an updating, using information received from Vanderbilt officers, of an earlier report which Bennett put together in 1971 by consolidating information received from a securities firm then

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3/ Cf. Charles E. Marland & Co., Inc., Securities Exchange Act Release No. 11065 (1974); Fox Securities Company, Inc., Securities Exchange Act Release No. 10475 (1973); Adolph D. Silverman, Securities Exchange Act Release No. 10327 (1973); Anthony J. Amato, Securities Exchange Act Release No. 10265 (1973).

interested in the sale of Vanderbilt debentures. According to Bennett's testimony, the only portion of the 1971 report that had been original with him was a section setting forth the history of Vanderbilt.

As distributed in 1973 on a Zimmerman letterhead, the May 1, 1973 Vanderbilt report was replete with false and misleading information concerning Vanderbilt and its operations. Further, no basis existed for the highly optimistic predictions in that report concerning Vanderbilt's earnings and future activities which were presented without disclosure of the risks inherent in an investment in Vanderbilt stock.

As alleged by the Division, it is found that the estimates of Vanderbilt's earnings in the May 1, 1973 report of "42¢ after tax" in 1974 and in excess of $1.00 per share in 1975 were without basis and inherently misleading absent an accompanying disclosure of the information on which those estimates were based as well as the material adverse facts of which Bennett and Zimmerman were or should have been aware.[4/] It is clear that Bennett and Zimmerman knew or should have known and should have disclosed that Vanderbilt had not discovered a "commercially mineable ore body" on either its Vanderbilt Property or the Cactus Hill Project on its Rainbow Property, and that without a "commercially mineable ore body," Vanderbilt could not achieve the earnings estimated in the report.

The representation that Vanderbilt was preparing for a gold mining operation in the Vanderbilt Mining District that had been mined "successfully

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4 / Richard J. Buck & Co., 43 S.E.C. 998, 1006 (1968); Richard Bruce & Co., Inc., 43 S.E.C. 777, 782 (1968); James De Mammos, 43 S.E.C. 333 (1967).

and extensively in the past to depths of 600 feet," was false in that Vanderbilt was not preparing for a gold mining operation except in the remote sense that its planned further exploratory activities could result in such operations were its explorations fruitful. That fact should have been disclosed to allow the reader of the report to assess the likelihood of Vanderbilt actually commencing gold mining operations. Further, the Vanderbilt Mining District (Vanderbilt Property) had not, as Vanderbilt admitted, been mined successfully or extensively in the past.

With respect to Vanderbilt's ore reserve potentials, Bennett's report was false and misleading in asserting that the company had millions of tons of potential ore reserves and of provable and possible ore. In its registration statement Vanderbilt made no such estimate, representing that it intended to further explore the Vanderbilt Property "with a view of determining whether mineralization is present . . . ." Nor can the brief conversation that Bennett had in 1973 with Vanderbilt officers who informed him that such reserves existed be relied upon as a justification for inclusion of the estimates in the report. 5/

In his report, Bennett represented falsely that the Gold Bar Project area within the Vanderbilt Property was "a modern underground mine" and that "ore will be extracted starting at the lower levels." Although Bennett visited the mine and in his testimony gave his opinion that there was a modern mine on the property, weight cannot be accorded that

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5/ Cf. Billings Associates, Inc., 43 S.E.C. 641 (1967); Richard J. Buck & Co., supra, at 1008; J.P. Howell & Co., Inc., 43 S.E.C. 325, 329 (1967).

opinion in view of his acknowledged lack of mining expertise. There being no other evidence in the record to support Bennett's statements regarding the existence of a modern mine and the extraction of ore in the Gold Bar Project, it is found that a reasonable basis did not exist for those statements and that the statements were therefore false and misleading. 6/

The representation that Vanderbilt's mill-concentrator plant was "one of the most modern Flotation Mills in the U.S." was also without basis and false and misleading, as was the projection that Vanderbilt would "reach a 6,000 ton per month production by late summer to early fall of [1973]." The record clearly reflects that the capabilities of the Vanderbilt mill were entirely speculative and possibly unsuited or incapable of the tasks that a "most modern flotation mill" would be called upon to perform in the recovery of precious metal values. Further, considering that a commercially mineable ore body had not been discovered by Vanderbilt, Bennett's projection of a 6,000 ton per month production can be viewed only as evidence of his deliberate intent to deceive prospective investors.

In the light of Vanderbilt's registration statements and the absence of verifying independent investigation, Bennett's representation that Vanderbilt was "preparing to further its exploration work to confirm its belief of the existence of several million tons of low-grade reserves" is found to be without acceptable basis and misleading. The

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6/ Cf. A.T. Brod & Company, 43 S.E.C. 289 (1967); Harris Clare & Co., Inc., 43 S.E.C. 198 (1966).

fact that opinions expressed by officers of Vanderbilt may have been Bennett's predicate for his representation can not justify inclusion of the statements without independent corroboration of the reliability of those sources. 7/

Projections of potential earnings which Bennett included in his report were also without basis and founded upon unwarranted assumptions. Thus, gross smelter returns and operating costs which were calculated by Bennett to produce a net profit of $2,992,264 before taxes and 50¢ per share after taxes if the price of gold were $80 per troy ounce and $4,102,024 and 69¢ per share were the price $100 per ounce improperly assumed Vanderbilt's possession of a commercially mineable ore body extensive enough to produce gross smelter returns between $6,000,000 and $7,500,000 annually, with smelter and shipping charges limited to $45 per ton of concentrates shipped by rail from Ivanpah, California to International Smelting and Refining at Salt Lake City, Utah. As earlier noted, Vanderbilt had not discovered an ore body, much less millions of reserve tonnage from which gold concentrates could be recovered for shipping to a smelter. But were Vanderbilt to commence mining commercially, the estimated smelter and shipping charges would be double the estimated $45 per ton resulting from (1) the closing in 1970 of the International Smelting and Refining smelter operation in Salt Lake City, Utah, (2) the materially greater shipping distance and costs to reach alternative

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7/ J. P. Howell & Co., supra.

smelters, and (3) the increases in smelter charges taking place in 1973. Additionally, it was grossly misleading for the report to suggest as it did that Vanderbilt offered an unusual investment opportunity because of its provable and possible ore reserves, when, in fact, the extent of those ore reserves was neither known or ascertainable.

Bennett's research report was also seriously misleading from the standpoint that it omitted to disclose material facts that should have been disclosed in order to make statements made in the report not misleading. In this area Bennett should have, but did not, disclose that the $2,756,000 expended on the Vanderbilt properties had not established the existence of a commercially mineable ore body, that Vanderbilt had no operating history, that as of June 30, 1973 its current liabilities of $191,835 were in excess of its $20,255 in current assets, and that the company had never paid and did not expect to pay dividends in the foreseeable future. Also omitted were disclosures that Vanderbilt might require further financing, that an investment in the company might be lost, that approximately 570,000 shares of Vanderbilt's stock held by company insiders would be eligible for sale in the open market a year after completion of the offering covered in Vanderbilt's registration statement, and that the California Commissioner of Corporations had suspended over-the-counter trading of Vanderbilt's common stock in that State because of the company's relative inactivity since March, 1970 and its need for additional capital to continue mining operations.

Zimmerman concedes that there is ". . . evidence in the record that the research report was at variance with the true facts and that the

research report did not adequately convey the risks inherent in investing in a speculative stock," [8] that there is no dispute that the research report was disseminated to customers and other broker-dealers, and that Bennett and Archibold violated the Securities Act and Exchange Act and rules thereunder. [9] Respondent asserts that the two issues to be decided are whether his actions and conduct "require a finding of a wilful violation of the Securities Act and the regulations promulgated thereunder," [10] and whether he failed to reasonably supervise Benett and Archibold. Since the second issue referred to by respondent has been resolved on the basis that a finding of failure to supervise would not be appropriate because Zimmerman had acted as a principal, [11] only the contentions relating to whether Zimmerman's actions and conduct constituted wilful violations or the wilful aiding and abetting of the alleged violations need be reviewed.

In support of his position that he should not be found to have committed the alleged violations, respondent urges that the absence of any profit from the dissemination of the research report indicates his state of mind during the period in question, and relies upon the fact that when he commenced his trading operations he "attempted rather extensively" to investigate the backgrounds of Bennett and Archibold. Neither of those considerations is of assistance to respondent. It is obvious from

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8/ Brief of Respondent, June 26, 1975, at 2.

9/ Id. at 8.

10/ Id. at 2.

11/ Supra, 4.

the fact that respondent disseminated the research report that his intention was to interest brokers and customers in Vanderbilt stock, thereby making it irrelevant in determining his state of mind whether a profit was actually enjoyed. As to the second point, the record does not bear out the claim regarding respondent's check into the backgrounds of Bennett and Archibold. As the Division points out, the sum total of the investigation consisted of a very limited general inquiry by respondent of their immediate past employer and inquiries of persons connected with other of their past employers made at respondent's request by a certified public accountant. Further, although derogatory information was not developed, there was nothing gained from those sources which should have instilled in respondent a feeling of confidence in Bennett as a research analyst.

To the extent that Zimmerman suggests that employment of Archibold to head the research department relieved respondent of responsibility for the contents of research reports sent out under the Zimmerman imprimatur, respondent has no support in the law. "It has long been the position of the Commission that a broker-dealer may be sanctioned for the wilful violations of its agents under the doctrine of respondeat superior. See Cady Roberts & Co., 40 S.E.C. 907, 911 (1961); H.F. Schroeder & Co., 27 S.E.C. 833, 837 (1948)." [12/] Moreover, respondent cannot be allowed to exculpate himself from a failure to exercise the authority and to discharge the responsibilities he assumed as principal of registrant by delegation of that authority and those responsibilities to an employee. [13/]

12/ Armstrong, Jones & Co. v. SEC, 421 F.2d 359, 362 (1970); see also Sutro Bros. & Co., 41 S.E.C., 470, 479 (1963).

13/ Cf. Aldrich, Scott & Co., Inc., 40 S.E.C. 775 (1961).

But responsibility for his employee's misconduct is not, alone, the basis for finding that respondent committed the alleged violations. The record makes clear that respondent was active in the preparation and dissemination of the admittedly misleading research report. Respondent brought Bennett and Archibold in for the purpose of expanding his business and encouraged the use of the Vanderbilt report without reasonable attempts to verify the data in it or to check its representations against the Vanderbilt registration statement referred to in the research report and which he knew to be on file.[14/] Under those circumstances, and knowing that Vanderbilt was a speculative venture and that over-the-counter trading in Vanderbilt stock had previously been suspended by California authorities, respondent's approval and his and Bennett's use of the Vanderbilt report must be deemed conduct constituting wilful violations and wilful aiding and abetting of violations of the anti-fraud provisions of the securities laws.[15/] "A securities dealer occupies a special relationship to a buyer of securities in that by his position he implicitly represents he has an adequate basis for the opinions he renders. [Footnotes omitted]"[16/]

As for respondent's contentions that a person cannot be considered

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14/ Cf. Hanly v. SEC, 415 F.2d 589 (2d Cir. 1969).

15/ Cf. Dunhill Securities Corporation, 44 S.E.C. 472, 475-76 (1971).

16/ Hanly v. SEC, supra, at 596. See also SEC v. North American R. & D. Corp., 424 F.2d 63 (2d Cir. 1970), where the Court noted at 84:

> The "special relationship" between a broker and the public creates an implied warranty that the broker has an adequate and reasonable basis in fact for his opinion. . . .

to be wilfully aiding and abetting if he did not know and had no reasonable cause to know of the acts constituting the violation and that a violation of Section 17(a) of the Securities Act requires as one of the essential elements of the offense the conception of a fraudulent enterprise, the law is quite the opposite. "Wilfulness" for purposes of these proceedings does not require that a person know that he is breaking the law, but only that there be an intent to perform the acts that resulted in the violation. 17/ As succinctly put by the Court of Appeals for the Second Circuit in Hanly v. SEC:

> Brokers and salesmen are "under a duty to investigate, and their violation of that duty brings them within the term 'wilful' in the Exchange Act. [Footnote omitted]" 18/

Public Interest

On the question of the need for remedial action, the Division asserts that Zimmerman has demonstrated either gross indifference to the basic duty of fair dealing required of those engaged in the securities business or ignorance and incompetence to a degree that requires a revocation of Zimmerman's registration as a broker-dealer and a bar against his association with a broker or dealer in order to protect the investing public. On the other hand, respondent implies that he was the victim of a plan or scheme concocted by Bennett, Archibold and Vanderbilt officers, and affirmatively states that his shortcoming was that of misplaced trust rather than intent to defraud, that there is no substantial likelihood of future violations, and that any sanction should be consistent with nothing more than a failure

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17/ Tager v. SEC, 344 F.2d 5 (2d Cir. 1965); Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949); Churchill Securities Corp., 38 S.E.C. 856, 859. (1959).

18/ 415 F.2d at 595-96.

to have adequate written supervisory procedures.

Upon careful consideration of the evidence bearing upon the public interest and Zimmerman's activities as a registered broker-dealer, and of the mitigating factors alluded to by respondent, including the absence in this record of evidence that respondent caused substantial loss to the investing public, it is concluded that the public interest requires that the registration of Zimmerman as a broker-dealer be revoked and that he be barred from association with a broker-dealer. However, it also appears appropriate to allow Zimmerman to apply for reentry into the securities business in a supervised capacity after a period of one year.[19/]

Accordingly, IT IS ORDERED that the registration of Bruce William Zimmerman, d/b/a Bruce W. Zimmerman Investments, as a broker-dealer is revoked and that Bruce William Zimmerman, as an individual, is barred from association with any broker or dealer, except that after one year from the effective date of this order Bruce William Zimmerman may apply to the Commission for permission to become associated with a broker-dealer in a nonproprietary and nonsupervisory position wherein his activities would receive adequate supervision.

This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Rules of Practice.

Pursuant to Rule 17(f) of the Rules of Practice, this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon

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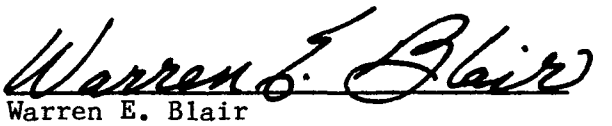
19/ All proposed findings and conclusions submitted by the parties have been considered, as have their contentions. To the extent such proposals and contentions are consistent with this initial decision, they are accepted.

him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.



Warren E. Blair
Chief Administrative Law Judge

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