ADMINISTRATIVE PROCEEDING
FILE NO. 3-4401

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :

MAXWELL BENTLEY : (Private Proceedings)

Rule 2(e), Rules of Practice :

:

INITIAL DECISION

Washington, D.C.
September 13, 1974

Warren E. Blair
Chief Administrative Law Judge

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APPEARANCES: Walter P. North, Frederic T. Spindel, and Theodore L. Freedman, for the Office of the General Counsel.

Ralph J. Hafen, for Maxwell Bentley.

BEFORE: Warren E. Blair, Chief Administrative Law Judge

By order dated October 31, 1973 ("Order") issued pursuant to Rule 2(e)(3) of the Rules of Practice, the Commission temporarily suspended Maxwell Bentley, an attorney, from appearing and practicing before the Commission. As the basis of that action the Order sets forth that Bentley, by reason of his misconduct, was permanently enjoined on November 30, 1971 by the United States District Court for the District of Utah from further violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder.

A petition of Bentley to lift the temporary suspension was denied by the Commission on December 21, 1973, at which time the Commission further ordered that a hearing be held on January 9, 1974 to afford Bentley the opportunity to show cause why he should not be censured or temporarily or permanently disqualified from appearing or practicing before the Commission. Upon application by Bentley, the commencement of the hearing was postponed until February 13, 1974.

During the hearing Bentley was represented by counsel. 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

Maxwell Bentley, a lawyer admitted to practice in the State of Utah in 1953, resides and has his law office in Salt Lake City. In November, 1962, Bentley became a director and secretary-treasurer of Mountain States Development Company ("MSD"), a Utah corporation, and held those positions until July 15, 1967. Thereafter, through July 26, 1968 Bentley continued as a director and secretary of the company. During the entire period that he served as an officer of MSD, Bentley exercised supervision over the MSD stock transfer office in Salt Lake City, and from February 24, 1968 until his resignation on July 26, 1968 he was the principal supervisor of that transfer office.

Bentley is and has for over 25 years been a close business associate of Walter D. Nebeker, Jr., a former officer and director of MSD, and since 1953 he has acted as Nebeker's sole legal advisor. Additionally, Bentley has performed legal services in connection with securities matters before the Commission for various other corporations in which Nebeker has an interest and has done similar work for other corporate clients.

Disqualification of Respondent

It is concluded on the basis of the record that respondent should be permanently disqualified from appearing or practicing before the Commission. As stated in the Order, Bentley was permanently enjoined on November 30, 1971 by the United States District Court for the District of Utah from further violations of Sections 5(a), 5(c), and 17(a) of the

Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.[1/] Subsequently, upon respondent's appeal, the United States Court of Appeals for the Tenth Circuit affirmed the judgment against Bentley.[2/]

It appears from the record in the injunctive action that from about mid-1967 through mid-1968 Bentley participated with others in a massive distribution of unregistered MSD common stock to the public in violation of Section 5 of the Securities Act and that sales of that stock were made through the use of false statements of material facts concerning (1) MSD's ownership of interests in producing oil wells, and (2) the net worth of Laser Power Industries, Inc. ("Laser Power"), a battery manufacturing company purchased by MSD on August 10, 1967. Underlying that injunctive action against Bentley were fraudulent personal sales by him or by him for his wife and brother of over 71,000 unregistered shares of MSD stock, as well as his activities that constituted aiding and abetting others in the fraudulent sales of additional large amounts of unregistered MSD stock.

MSD was incorporated in Utah in 1919 and until 1962 the company's activities were centered around owning and holding oil and gas leases in Utah, none of which was ever productive. During 1965 and 1966 MSD participated in a joint venture in which oil and gas leases in Kentucky were acquired, but by September, 1966 the venture was deemed practically worthless. As of February 10, 1967 MSD maintained its headquarters in

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1/ SEC v. Mountain States Development Company, Civ. Action No. C 68-69 (D. Utah, November 30, 1971).

2/ SEC v. Mountain States Development Company, No. 72-1108 (10th Cir., October 9, 1973).

Salt Lake City but had no employees.

In March, 1967 pursuant to a statutory merger with Ute Royalty Corporation ("Ute"), MSD issued approximately 1,200,000 shares of its stock to existing Ute stockholders in exchange for all of Ute's outstanding stock. Thereafter Bentley, in his capacity as an officer of MSD, caused MSD on July 17, 1967 to enter into a contract with Graham Oil Company, Ltd. ("Graham Oil"), under which MSD purportedly acquired certain oil properties in Illinois and Texas in consideration for $490,000 in promissory notes one of which, in the amount of $280,000, was convertible into MSD stock. At the date of acquisition by MSD, certain of the oil properties received from Graham Oil were subject to pre-existing liens, certain of the leases had been assigned in principal part to third parties other than MSD, and certain of the leases were losing money in 1967. Another of MSD's acquisitions occurred on August 10, 1967 when it purchased Laser Power. That company did not generate enough money from its operations between April 18, 1967 and August 31, 1968 to pay current debts as they became due, and as of December 31, 1967 had a deficit of $13,793. During the period April 18, 1967 to December 31, 1967 Laser Power had a loss of $23,793, which increased to $30,000 by August 31, 1968. 3/

Bentley acquired over 70,000 shares of unregistered MSD stock as a result of MSD's merger with Ute and he commenced to sell that stock about a month later over the Salt Lake Stock Exchange. Another 5,000 shares of MSD stock was received by Bentley on January 11, 1968 as a gift from

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3/ On or about May 15, 1968, MSD sold 80% of its interest in Laser Power.

Charles E. Graham, who had been a general partner in Graham Oil and to whom MSD had issued its notes upon acquiring Graham Oil's properties. Graham made the gift immediately after he had converted his $280,000 MSD note into 1,700,000 shares of unregistered MSD stock, and the 5,000 shares Bentley received were a portion of those 1,700,000 shares. Bentley knew of the restricted nature of the 5,000 shares he had received since he was largely responsible for the preparation of the letter of investment intent which Graham had furnished upon conversion of his note.

Between March 24, 1968 and July 30, 1968 Bentley sold 6,000 shares of unregistered MSD stock through his wife's brokerage account, 5,000 of which were the shares received as a gift from Graham, and continued to sell additional holdings of his MSD stock through August 8, 1968. In total, Bentley sold 71,274 shares of MSD stock during the period July 7, 1967 to August 8, 1968 through his own brokerage account and those of his wife and brother.

While Bentley was supervisor or principal supervisor of the MSD transfer office, large amounts of unregistered MSD stock were retransferred, and Bentley was aware that transfers were being made of unregistered stock issued in connection with Graham's conversion of the $280,000 note. While principal supervisor, Bentley personally participated in at least the transfer of the 5,000 shares he received from Graham, of 10,000 shares which Graham had given to another person, and of 66,500 shares which were transferred from Graham to R.C. Gardner on March 1, 1968 in exchange for certain assets of the latter's company.

Most of the sales in question were made at a time when Bentley knew or should have known that false and misleading information with respect to MSD was being disseminated to the investing public through false and misleading shareholders letters and reports which had been prepared, edited, distributed, or mailed with Bentley's assistance. In this connection, the District Court found that in Bentley's sale of MSD securities through the use of stockholder letters dated July 28, 1967, August 24, 1967, January 8, 1968, and May 28, 1968, false and misleading statements were made by reason of statements to purchasers and prospective purchasers that MSD as of then had acquired from Graham Oil interests in eight producing oil wells in Illinois, and in seven in Texas without a disclosure (1) that substantial portions of three of the leases acquired were owned by parties other than MSD or Graham Oil, (2) that three of the acquired leases were subject to liens in 1967, many filed prior to the publication of the shareholders letters, (3) that MSD received no income from three of the acquired leases and suffered losses since July 1, 1967 from three other of the leases, (4) that clear title to the acquired leases could not be obtained by MSD until funds were obtained from shareholders of MSD through an assessment of their stock, and (5) that even after the assessment was completed, MSD did not get clear title to the leases. It was also found that the shareholders letters stated that Laser Power had a net worth of $12,583 but that Bentley was omitting to state that since April 18, 1967 Laser Power had been unable to pay its current obligations as they became due and that on December 31, 1967 Laser Power had a deficit of $13,793. Further,

the District Court found that in the sales of MSD securities Bentley knew or should have known that he was making use of stockholders letters and an annual report which included the false and misleading statements (1) that Laser Power as of the time the statements were made was MSD's wholly-owned subsidiary, without disclosing that as of May 15, 1968 MSD had sold 80% of Laser Power, and (2) that MSD had earnings of 16¢ per share in the first quarter of 1968 when in fact MSD had a loss of 0.6¢ per share in that period.

A showing having been made that respondent has been permanently enjoined as noted above, respondent has the burden to show cause why he should not be permanently disqualified from appearing or practicing before the Commission.[4/] Respondent has not carried that burden.

In brief, respondent relies upon evidence which he contends demonstrates that he was not directly responsible for the illegal transfers of MSD stock, that his role in the preparation of the shareholders letters was of a minor nature, and that at the time of sale of his MSD stock he believed that an exemption from registration was available under Rule 133 of the Securities Act. Bentley also refers to his present practice as an attorney, citing the fact that several corporate clients rely upon him for advice and work connected with securities and with reports or filings before the Commission, and that the work for those clients represents more than 50% of his practice.

Contrary to respondent's assertion that he has shown he was not

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4/ 17 C.F.R. 201.2(e)(3)(iv).

directly responsible for the retransfers of large amounts of unregistered stock referred to by the District Court, it is found that the evidence relied upon by respondent does not lend itself to respondent's interpretation. While evidence was introduced to the effect that numerous transfers were accomplished during the hours when Bentley was not present, the transfers that respondent saw fit to have identified as ones which were made without his knowledge are not the only transfers that were made during the period covered in the injunctive action. Moreover, the transfers of 81,500 shares respondent acknowledges having made personally in that period are sufficient for respondent to be deemed to have played a substantial role in the activities of the MSD transfer office and in the illegal distribution of the company's stock.

Nor can respondent be viewed as having no more than a minor participation in the preparation of the fraudulent shareholders letters. True, the record establishes, as respondent contends, that Nebeker decided that it was not necessary to make the disclosure of the encumbrances upon the oil properties being purchased from Graham Oil. But that circumstance must be viewed as an aggravation rather than justification of respondent's conduct. Respondent had the obligation, not only as a corporate officer and director but as the counsel to whom Nebeker turned for legal advice, to make the decision and not accede to Graham's and Nebeker's wishes which obviously were directed at making the proposed acquisition of Graham Oil properties attractive and the later assessment acceptable to MSD shareholders. Further, while it appears that respondent

discussed the disclosure question with Nebeker sometime in July, 1967 in connection with the preparation of the July 28, 1967 shareholders letter, there is an absence of proof that a further discussion with superior corporate officers took place on the same subject in connection with the contents of the January 8, 1968 shareholder assessment letter which respondent prepared. Under the circumstances, respondent cannot be heard to disclaim responsibility for the extensive fraud that was perpetrated through means of the shareholders letters. But beyond responsibility for the letters, there are additional manifestations of respondent's callous lack of concern for MSD shareholders and the investing public. Respondent did nothing to call attention of anyone other than MSD's board of directors to the false and misleading nature of the MSD 1967 annual report, and took advantage of his inside information by making sales of MSD stock following his resignation from the company when he was fully aware that if the information he had acquired about MSD were publicly known, the price of the stock would have dropped and ". . . no one would have paid an assessment." 5/

As to respondent's claim that he believed an exemption from registration under former Rule 133 was available for the MSD stock he acquired in the Ute merger, it suffices to note, as the Office of the General Counsel argues, that respondent did not assert such claim in the injunctive action. It strains credulity to assume that respondent at the time of his

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5/ Tr., May 8, 1974, at 33-34.

sales of MSD stock believed the stock to be exempt from registration but failed to proffer that defense in the injunctive action. Rather, it appears that the claimed exemption was contrived for use in these proceedings. 6/

In sum, the record clearly reflects the active and inexcusable participation of respondent in extensive and serious violations of the securities laws, and an attitude toward the investing public which makes a continuation of his appearance and practice before the Commission a grave threat to the public and to the integrity of the Commission's own processes. Consideration has been given to the good character of respondent as testified to by various witnesses, but in the absence of their knowledge regarding the injunction against him and the nature of the offenses which he was found to have committed, that testimony cannot prevail over the contrary evidence regarding his lack of honesty and trustworthiness. The extent of the loss of practice that respondent may suffer has also been taken into account, and it is concluded that respondent's prospective loss is far outweighed by the jeopardy to the public which would result from permitting respondent to continue or, in the alternative, resume a practice before the Commission at any foreseeable time in the future. In this connection it may be noted that the record indicates respondent's willingness to serve the personal interests of his long-time associate, Nebeker, regardless of ethical considerations. Inasmuch as it appears that close association will continue, it is not

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6/ No exemption from registration was claimed for the 5,000 MSD shares received from Graham.

unreasonable to expect that respondent would again allow Nebeker's rather than the public's interest to dominate his thinking. 7/

Accordingly, IT IS ORDERED, pursuant to Rule 2(e)(3)(iii) of the Rules of Practice, that Maxwell Bentley be, and he hereby is, permanently disqualified from appearing or practicing before the Commission.

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 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

Washington, D.C.
September 13, 1974

7/ 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.