ADMINISTRATIVE PROCEEDING
FILE NO. 3-136

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of WILLIAM S. MARSHALL Rule 2(e), Rules of Practice	(PRIVATE PROCEEDINGS)

INITIAL DECISION

Sidney Ullman
Hearing Examiner

Washington, D. C.
June 22, 1966

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Before: Sidney Ullman, Hearing Examiner

Appearances: Ellwood L. Englander, Assistant General Counsel and David J. Meyerson, Attorneys for the Office of the General Counsel; Daniel J. Goldberg, of Counsel

Donald E. Van Koughnet
807 Copley Lane
Silver Spring, Maryland 20904
Attorney for Respondent

I. NATURE OF THE PROCEEDINGS

By order dated May 10, 1965 (Order), the Commission instituted these private proceedings under Rule 2(e) of its Rules of Practice (17 CFR 201.2(e)) to determine whether the respondent, William S. Marshall, should be temporarily or permanently denied the privilege of continuing to appear and practice as an attorney before the Commission.[1/]

The Order charges misconduct by the respondent in the preparation and the filing on May 6, 1960, of a registration statement for the sale of shares of Yuscaran Mining Co., Inc., (Yuscaran). Respondent filed an answer, through his attorney, denying that at the time of the filing he had knowledge of or responsibility for the falsity or the misleading nature of statements and other deficiencies in the registration statement, and disputing the charge that he has displayed a lack of qualifications to practice before the Commission or that he is lacking in character or integrity or has engaged in improper conduct within the meaning of Rule 2(e) of the Rules of Practice.

At an early stage of the hearing of these proceedings on July 27, 1965 before the undersigned Hearing Examiner, respondent was called by the Office of the General Counsel (General Counsel) to take

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1/ 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."

the stand and testify. However, on the advice of his counsel respondent refused to take the stand. Thereafter, on motion of the General Counsel the Order was amended to add the additional charge that by reason of his refusal to testify and to cooperate with the Commission in an examination of his fitness to practice before it, respondent was guilty of professional misconduct which would justify his disqualification to practice before the Commission.

Accordingly, the issues for determination are whether respondent has the qualifications to represent others before the Commission, whether he is lacking in character or integrity or has engaged in unethical or improper professional conduct, and if so, in what manner and to what extent the public interest requires that sanctions be imposed for his misconduct in connection with the Yuscaran registration statement and for his refusal to take the stand and testify in the instant proceedings.

More specifically, the Order contains charges asserted by the Commission's staff to the effect in preparing and filing with the Commission the registration statement for the sale of shares of Yuscaran, respondent "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 the following matters:

1. Prior sales of unregistered Yuscaran securities and a claimed exemption from registration requirements.
2. The financial statements contained in the registration statement.
3. The geological reports contained in the registration statement.
4. The biographical sketches or descriptions of certain officers or central figures of Yuscaran.

Each of these charges is expanded by more specific and particularized allegations in the Order, some of which are discussed in detail, infra.

Respondent's answer, as indicated above, does not in general contest the falsity of statements and material contained in the registration statement, but denies that he had knowledge or information of any such falsity and in part denies that he had responsibility for independent inquiry or investigation, as suggested in the Order.

Following respondent's continued refusal to take the stand on the advice of his counsel, even after having been directed to do so by the Hearing Examiner, a subpoena submitted by the General Counsel was served on him in the hearing room, and he persisted in his refusal. Thereafter, as indicated above, the Order was amended on motion of the General Counsel by adding the additional charge that by reason of said refusal he has been guilty of professional misconduct which would justify disqualification. No other witnesses were called, and the General Counsel expressed

an intention to request permission from the Commission to seek subpoena enforcement proceedings by the United States District Court at Miami, Florida. 2/ The proceedings were then adjourned, certain motions were thereafter made by the parties and orders thereon issued by the Hearing Examiner, and eventually the hearing was reconvened on November 23, 1965, for the purpose of fixing post-hearing procedures in accordance with Rule 16 of the Rules of Practice, neither side having indicated any desire to present live testimony at that juncture.

In one of the aforesaid motions the General Counsel sought an order closing the record, establishing post-hearing procedures, determining that the allegations of the Order be deemed to be true, striking the answer of respondent and declaring him to be in default, and prohibiting him from opposing the evidence submitted in support of the charges. The motion was predicated on respondent's refusal to testify and disclose evidence "uniquely in his possession" and the General Counsel urged that the refusal to cooperate was unprofessional conduct which ipso facto required the striking of the answer and the granting of judgment by default. The motion was denied by my order dated October 13, 1965 for reasons stated therein,

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2/ Section 22(b) of the Securities Act of 1933 provides that in case of refusal to obey a Commission subpoena, any United States court within the jurisdiction of which the subpoenaed person resides, upon application by the Commission may issue an order requiring appearance and testimony. Respondent resides in the Miami area.

including a limitation imposed by Rule 11(e) on the authority of a Hearing Examiner to issue such order, except in an initial decision.[3/] The General Counsel has renewed the motion in his proposed findings of fact and conclusions of law and urges that it be granted at this time, but for reasons stated, infra, the motion is not granted.

The record in these proceedings comprises various files of the Commission, including the Yuscaran registration statement, stop-order proceedings[4/] instituted by the Commission under Section 8(d) of the Securities Act of 1933 (hereafter Securities Act) and a stipulation of facts in which deficiencies and falsity in the registration statement were admitted and issuance of a stop-order was consented to by Yuscaran's officers,[5/] as well as a transcript of testimony which respondent gave on December 18, 1961 before Commission attorneys who were investigating possible violations of the securities laws in connection with the filing. Respondent was not represented by counsel during this

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3/ In view of respondent's persistent refusal to testify as a witness for the General Counsel, my order imposed restrictions on his right to testify in his own behalf on the merits of the charges. In my view, however, respondent has never expressed or indicated a desire to testify on the merits of these proceedings, despite certain intentionally vague and non-commital expressions to the contrary by his counsel.

4/ Section 8(d) of the Securities Act of 1933 permits the Commission to suspend the effectiveness of a registration statement if it appears to contain material misstatements or omissions. Such suspension action was initiated on July 13, 1960.

5/ Respondent did not represent Yuscaran in these stop-order proceedings and was not a party thereto. Neither the stipulation of facts nor the stop-order have been considered by me as evidence in support of the charges against respondent.

testimony and of course neither received nor appeared to require legal advice that he refrain from testifying and cooperating with the Commission in its investigation. Conversely, he seems to have cooperated quite fully in his testimony with respect to the preparation and filing of the registration statement, and he had earlier submitted to the Commission's staff the relevant files of his law firm. 6/

The proposed findings of fact and conclusions of law submitted by the General Counsel rely heavily on the documents comprising the record (absent testimony by any live witnesses at the hearing). Respondent's proposed findings and conclusions urge the adoption of findings of his good faith and his reliance on information furnished by the principals of Yuscaran, who, it is urged, furnished false and misleading information and "were not trustworthy in respect of their disclosures to respondent and did many things behind his back in connection with furnishing information requested by respondent as a basis for the preparation and filing of the Yuscaran registration statement."

The General Counsel urges that respondent be permanently

6/ Respondent's counsel at several stages of this proceeding has sought to capitalize on the contention that respondent did not know that he was being investigated when he testified before Commission attorneys. However, I find his relative frankness at that time perhaps his sole "saving grace" in these proceedings, and I find little merit in a complaint that the investigation may have included or encompassed an inquiry into respondent's professional conduct, without express notice, advice or warning to that effect. Respondent was reminded of his Constitutional rights at the outset of that inquiry. Moreover, he had every opportunity during the instant proceedings to modify or explain his testimony had he wished to affirmatively controvert the charges on the merits.

denied the privilege of appearing or practicing before the Commission: counsel for respondent urges that the proceedings be dismissed.

The findings and conclusions herein are based on the record in the proceedings, which, while in some respects meager, amply supports the contention of the General Counsel that respondent's conduct in connection with the filing and in refusing to testify at the hearing was seriously reprehensible and requires the exercise by the Commission of its disciplinary power.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Registration Statement

During the summer of 1959, respondent was approached by another attorney practicing in Miami, Florida, who lacked expertise in securities matters, and he was asked to prepare and file with the Commission a registration statement with respect to certain securities to be sold to the public by Yuscaran, a corporation which was yet to be formed. The principals or central figures of this corporation had been doing business as a partnership under the name Bobak, Davis and Associates, Ltd. (partnership), and they proposed to assign to Yuscaran certain leases or rights to mine properties in Honduras and in North Carolina. Respondent met and discussed with these principals or central figures, Joseph Bobak, Emanuel Davis, and David Kornberg, the problems involved with respect to the preparation and filing of the proposed registration statement, and he undertook this responsibility for an agreed free of $10,000. On May 6, 1960, he filed a Form S-3 registration statement for the sale of 1,000,000 shares at $1.00 per share.

It is clear from the testimony given by respondent on December 18, 1961, that early in the course of his discussions with his clients he recognized that the partnership probably had violated the registration requirements of Section 5 of the Securities Act in selling to the public limited partnership interests or securities not registered with the Commission. Respondent testified that 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 apparently already participants" . . . in a "widespread group."

Unfortunately for respondent, in continuing to represent the corporation which was thereafter formed, he attempted to conceal the violation of law. In doing so, he knowingly compounded the problems by including in the registration statement material misstatements of fact as to the securities previously sold by the partnership and the securities to be issued and sold by the corporation.

Thus, the registration statement included the statement that Yuscaran had issued 15,900,000 shares of common stock and $94,099 of its debentures to four persons who had purchased for investment and who were all well-informed regarding Yuscaran's mining activities. It also listed 27 persons who had purchased unregistered stock and debentures which were asserted not to have been issued as of May 27, 1960, and it stated that:

> "The company relies upon the second clause of Section 4(1) of the Securities Act of 1933, as amended, as the provision of the Act which exempts [these recent sales of unregistered securities] from the registration requirements of Section Five of the Act."7/

7/ The second clause of Section 4(1) exempts private or non-public offerings of securities. Offerings and sales confined to persons who are truly well-informed regarding the issuer's business sometimes qualify as non-public offerings. S.E.C. v. Ralston Purina Co., 346 U.S. 119 (1953).

Respondent acted improperly in making this filing in reliance on the claimed exemption. He had, several months earlier, prepared for the corporation a form of "investment letter" to be distributed to and signed by its stockholders or investors, and he recognized that these persons were certainly not well-informed regarding Yuscaran or its mining activities. Respondent now admits that the letter was to be sent to 27 stockholders or investors for signature in an effort to avoid sanctions for unlawful public sale of unregistered securities. The evidence suggests that he probably was aware of a much larger number of investors of this class.[8/] In any event, he should have recognized the inapplicability of the exemption and the impropriety of making the filing. Whether he filed the registration statement in order that he might earn his fee or whether, as he stated on December 18, 1961, he acted because "Those persons were constantly stating to me that they had very limited funds and that they had to get this registration statement filed and cleared in order to proceed with what I was of the opinion was a worthwhile mining venture," it is apparent that respondent was lacking in proper restraint and good judgment in filing the registration statement. And he made no inquiry with respect to offers of limited partnership interests in Bobak,

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8/ Respondent advised a corporate officer that the form investment letter was to be reproduced by the corporation and sent to stockholders who had received or would receive stock certificates evidencing their respective prior investments in the partnership, for which the stock of Yuscaran was being issued. The transcript of respondent's testimony on December 18, 1961 indicates that a number in excess of 150 investors of this class existed and that respondent either knew this or intentionally refrained from investigating and ascertaining this fact.

Even as to the 27 of whom he admittedly knew, there is no evidence or suggestion that he believed them to be well-informed. The evidence is clearly to the contrary.

Davis and Associates, Limited, which may have been made to but were not accepted by members of the public, although he recognized that such offers would constitute additional reasons precluding an exemption from registration as a private offering. At the least, respondent was willing to close his eyes to this problem. And he closed his eyes to the need for including in the registration statement a caveat concerning the corporation's potential liability for an unregistered public offering.

In several other respects respondent was derelict in his duties and responsibilities. He accepted from the principals of the corporation, financial information and figures which they furnished to him with no adequate basis or support, when good judgment dictated caution and skepticism if not incredulity on his part. Thus, he states that he saw neither records of claimed expenses by the principals nor the stock books of the corporation, but accepted these figures.

The registration statement was materially deficient in that it failed to contain certification of the corporation's financial statements as required by law. Respondent knew of the requirement but recklessly made the filing with knowledge of the deficiency and with the added knowledge that it was highly improbable that such certification by the accountant he had engaged would be possible. On December 18, 1961, when he was asked whether the accountant had reported to him the inability to prepare the financials, he answered:

> "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."

The prospectus was incorrect in stating that geological reports were filed as exhibits to the registration statements, for no such reports were attached. Numerous statements in the prospectus concerning the geology were admittedly materially false and misleading, but respondent's answer to the charges and his proposed findings deny responsibility for these deficiencies and false statements. I conclude that at the least, this is a part of the total picture of respondent's failure to exercise the care and caution required of him while assuming a dominant role in efforts to make available to the investing public securities of a speculative mining venture.

Admittedly, the registration statement was replete with inaccuracies and false statements concerning the backgrounds of the principals, Bobak and Davis, and had the Commission not issued its stop-order prohibiting the sale of the securities, investors would have been deluded and defrauded by many misstatements and omissions of material facts relating to claimed engineering and mining experience which never existed, but which it seems unnecessary to detail. This, too, is consistent at the least with respondent's lack of restraint and his submission to the pressures and influence effectively exerted by his client's principal officers.

B. The Refusal to Testify:

Respondent's decision not to testify at the hearing was obviously a deliberate and considered choice of alternatives. His decision, or that of his counsel, not to premise the refusal on a plea of his Constitutional privilege was also deliberate. Numerous court

decisions cited and referred to by the General Counsel support the position that disbarment proceedings are not penal in nature, and they express the view that an attorney charged in such proceedings who pleads the privilege and refuses to testify should not be retained on the rolls.[9/]

Respondent has been duly and fully warned of the possible consequences of his refusal to testify. That he has not predicated his refusal on his Constitutional privilege not to incriminate himself, as was done with little success in most of the above-cited disbarment proceedings, cannot and should not aid or strengthen respondent's position in the instant proceedings. As stated in the brief of the General Counsel with regard to Cohen v. Hurley, supra, where the Supreme Court upheld the disbarment of an attorney whose refusal to testify in an inquiry relating to "ambulance chasing" was predicated on his Constitutional privilege against self-incrimination,

> "When, as here, there is neither a claim of privilege nor any legally cognizable substitute therefor offered in justification of the refusal to testify and the inquiry is directed specifically at the respondent's qualifications to practice, the attorney's action is a fortiori grounds for disbarment."

9/ Cf. Cohen v. Hurley, 366 U.S. 117 (1961); Matter of Rouss, 116 N.E. 782 (C.A.N.Y. 1917); In re Wysell, 198 N.Y.S. 2d 456 (App. Div. 1961); In re Broome, 213 N.Y.S. 2d 821, (App. Div. 1961).

III. DISCIPLINE REQUIRED AND ORDER BARRING RESPONDENT

Although I have no doubt there is ample support in the cases cited for the issuance of an order permanently and unconditionally barring respondent from practicing before the Commission because he has engaged in unethical and improper professional conduct in connection with Yuscaran's registration statement and in his unwarranted refusal to cooperate in this inquiry into his conduct and his fitness to practice in this forum,[10/] I do have some doubt that this drastic sanction or discipline of respondent is required under the circumstances. In his testimony of December 18, 1961, respondent stated that from this experience he had been through with Yuscaran "We are learning quite a bit." Regretably, in refusing to be frank, honest and cooperative thus far in this proceeding,he has demonstrated that he certainly has not learned enough. But from his relatively youthful appearance it would seem that he has a potential for learning from the mistakes he has made, enough to enable him to convince the Commission at a future time that he has the qualifications to represent others and is not lacking in character or integrity. Primarily for this reason I am denying the motion of the General Counsel to strike respondent's

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10/ Cf. also, In re Spevack, 34 U.S. Law Week 2078 (N.Y. App. Div., 1965), cert. granted sub. nom. Spevack v. Klein (No. 944, March 21, 1966); and see Sheiner v. State, Fla., 82 So. 2d 657 (1955), and cases cited and discussed therein. See also, Kemp, Disciplinary Proceedings by the S.E.C. Against Attorneys, 14 Cleveland-Marshall Law Review 23 (January 1965).

answer.[11] But I would also deny to respondent the privilege of appearing or practicing before the Commission without obtaining its prior approval, with the added proviso that no application for approval may be submitted to the Commission for a period of four years from the effective date of this order. 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.[12] I do not believe that a more severe discipline is required under the circumstances of this case, despite the serious nature of the offenses.

Accordingly, IT IS ORDERED that William S. Marshall be and he hereby is permanently denied the privilege of appearing or

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11/ Also, I see no purpose in adopting a summary method of imposing discipline at this time, even if the ultimate sanction of permanent and unconditional disbarment were deemed appropriate.

12/ Such burden is of course a matter for determination of the Commission but it seems especially appropriate in light of respondent's refusal to testify and the inferences that may be drawn therefrom as to his inability to have controverted the General Counsel's evidence in a manner that would be helpful to his case. Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909); In the Matter of Heft, Kahn & Infante, Inc., Securities Exchange Act Release No. 7020 (February 11, 1963); H. Sims Organ v. Securities and Exchange Commission 293 F. 2d 78 (C.A. 2, 1961), cert. den. 368 U.S. 968.

practicing before the Commission without obtaining its prior approval to do so, provided however, that he shall not apply for such permission for a period of four years from the effective date of this order.

Petition for review of this initial decision may be filed in accordance with Rule 17(b) of the Commission's Rules of Practice within 15 days from service. Pursuant to Rule 17(f) of the Commission's Rules of Practice, this initial decision shall become the final decision of the Commission unless respondent shall file a petition for review or the Commission determines on its own initiative to review. If respondent timely files a petition for review or the Commission takes action to review, this initial decision shall not become final. 13/

Sidney Ullman
Hearing Examiner

Washington, D.C.
June 22, 1966

13/ To the extent that the proposed findings and conclusions submitted to the Hearing Examiner are in accord with the views set forth herein they are accepted, and to the extent they are inconsistent therewith they are rejected.