ADMINISTRATIVE PROCEEDING
FILE NO. 3-1212

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

THE NATIONAL DOLLAR STORES, LTD.
San Francisco, California
(81-79)

Securities Exchange Act of 1934
Section 12(h)

INITIAL DECISION

Washington, D.C.
February 1, 1968

Sidney Ullman
Hearing Examiner

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APPEARANCES: For The National Dollar Stores, Ltd.:

Richard D. Maltzman and Melvyn I. Mark, of Eisner & Titchell, 202 Montgomery Street, San Francisco, California 94104.

For the Division of Corporation Finance:

W. Stevens Tucker, Assistant Regional Administrator, San Francisco Regional Office, and Norman R. Cohen, Division of Corporation Finance.

BEFORE: Sidney Ullman, Hearing Examiner

I. The Proceedings

These proceedings were instituted by the Commission pursuant to Section 12(h) of the Securities Exchange Act of 1934, as amended, ("Exchange Act") by order dated August 16, 1967 ("Order") to determine whether a finding should be made, as requested by The National Dollar Stores, Ltd. ("applicant"), that the exemption of its common stock from the provisions of Section 12(g) of the Exchange Act would not be inconsistent with the public interest or the protection of investors. Exemption from the requirements of Section 12(g) would have the additional effect of exempting applicant from Sections 13 and 14 of the Exchange Act, which pertain to securities registered pursuant to Section 12, and from Section 16 of the Exchange Act, which pertains to persons who are beneficial owners of securities registered pursuant to Section 12 or who are directors or officers of the issuer of such securities.

Section 12(g) of the Exchange Act, effective August 20, 1964, requires the registration of the equity securities of every issuer engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or by any means or instrumentality of interstate commerce, with certain exceptions, if such issuer has total assets exceeding $1,000,000, and a class of equity securities held of record by 500 or more persons. Applicant is engaged in interstate commerce and meets the above-mentioned numerical requirements for registration under this section.

Section 12(h) of the Exchange Act authorizes the Commission, by order issued upon application of an interested person, after notice and opportunity for hearing, to exempt any issuer in whole or in part from the registration requirements of Section 12(g) or from the provisions of Sections 13, 14, or 15(d) of the Exchange Act, or to exempt from Section 16 any officer, director or beneficial owner of securities, upon such terms and conditions and for such period as it deems necessary or appropriate, "if the Commission finds, by reason of the number of public investors, amount of trading interest in the securities, the nature and extent of the activities of the issuer, the income or assets of the issuer, or otherwise, that such action is not inconsistent with the public interest or the protection of investors." The Order issued in this proceeding provided that at the hearing in this matter consideration should be given to the following specific matters and questions:

1) Whether the fact that the applicant has less than 500 shareholders of record who are United States residents is a reason to justify the requested exemption;

2) Whether the amount of trading interest, actual or potential, in applicant's securities is sufficiently limited to justify the requested exemption;

3) Whether adequate information is and will be available to investors concerning the financial and business affairs of applicant, the management of applicant, the principal holders of securities of applicant, and the nature and description of applicant's securities, and

4) Generally, whether the requested exemption is consistent with the public interest and with the protection of investors.

Pursuant to appropriate notice a hearing was held in San Francisco, California, at which both the applicant and the Division of Corporation Finance ("Division") were represented by counsel. At the conclusion of the hearing, proposed findings of fact, conclusions of law, and briefs in support thereof were filed by the parties.

Applicant urges that it is not required to register under Section 12(g), because it has fewer than 500 shareholders resident in the United States. It contends that "the primary interest of Congress was to provide greater protection to investors in over-the-counter securities who are residents of the United States", and that as an issuer with 456 resident shareholders and 143 non-resident shareholders, it does not come within the purview or intent of the Section. Alternatively, applicant suggests that if it does fall within the statutory requirement, its exemption for a limited period and under conditions discussed below would not be inconsistent with the public interest or the protection of investors. The Division disputes these contentions, urging that applicant is required to register, and that no exemption should be granted. Upon the record in this proceeding and after observation of the witnesses, the undersigned makes the following findings of fact and conclusions of law.

II. Findings of Fact and Conclusions of Law

A. Applicant's Business Operations and Management

Applicant was incorporated in 1921 as a California corporation and has its principal place of business in San Francisco. The corporation was formed to carry on the business of a sole proprietorship founded by Joe Shoong in 1903, which engaged in the operation of stores selling dry goods, moderately priced clothes, and miscellaneous products for the home. Joe Shoong died in 1961.

At the time of the hearing, applicant owned and operated 39 stores in California, two stores in Arizona, two in Texas, three in Hawaii, and one in Nevada, for a total of 47 stores. Plans have been formulated for the opening of two additional stores in California in 1968. Applicant also owns a portfolio of securities and real property for income and for investment, through a subsidary, N.D.S. Development Corporation.

Walter Shew, an employee of applicant for 32 years and currently vice-president and a member of the Board of Directors, testified with regard to the history and growth of the company, its earnings, and its management. The increases in applicant's business and income throughout its history have been relatively steady, if not dramatic, and the book value per share reached approximately $884 as of January 31, 1967. Dividends of $20 per share were paid in 1962, 1963 and 1965, and dividends of $16 per share were paid in 1964 and 1966. Mr. Shew testified that during

the last 20 years applicant's sales have approximated $10,000,000 to $12,000,000 per year. As of January 31, 1967, its total assets were $12,449,437, several times more than the asset figure in Section 12(g).

The company has recently acquired new management. On the death of Joe Shoong in 1961, his son, Milton Shoong, became president, and Mr. Shew, having risen from trainee and stock boy in 1935, became executive vice-president. In 1964, Mr. Shew became president of the company and Milton Shoong became Chairman of the Board.

In early 1967 the company had a rather dramatic change in its management when "new blood" was brought in. A new chief executive, Mr. Robert Williams, was brought in and appointed to the office of president. Mr. Shew then became one of three vice-presidents, along with Mr. Edward Douglas and Mr. James Caveny, both new men experienced in retailing. At the time of the hearing Mr. Shew expressed the view that it was too early to evaluate the effect of this change in management on the company's business operations. But it is clear that a rather significant change in company policy occurred with regard to salaries and stock options at that time. Mr. Williams' compensation is $50,000 per year, Mr. Douglas receives $27,000 and Mr. Caveny $24,000 annually, as guaranteed earnings. In addition, stock options have been given as follows: 500 shares to Mr. Williams and 100 shares to each of the three vice-presidents.[1/]

1/ The record does not appear to disclose the price at which the options are exercisable.

B. Applicant's Stock and Its Shareholders

Applicant has an authorized capitalization of 30,000 shares of $100 par value common stock. Approximately 10,000 shares are issued and outstanding. Of these, some 5000 are owned by the Shoong Investment Company, which holds 80 per cent of the shares for the members of the Shoong family and 20 per cent for a charitable institution, the Joe Shoong Foundation.

Prior to 1928, all of applicant's shares were owned by Joe Shoong and his family, but in that year, in order to raise capital for expansion and future operations, applicant proceeded to sell 10,000 shares at their par value of $100. Joe Shoong and his immediate family then acquired approximately 5000 shares and the remaining 5000 were purchased in 1928 and 1929 in small lots by friends and relatives of Joe Shoong and by members of Chinese communities in this country and persons in China who had heard of the offering. Some of the original purchasers thereafter returned to China; some shares have been transferred by gift or bequest from the original purchasers to persons residing outside of the United States; and some shares have been sold under circumstances described below. This offering was the only public offering of applicant's securities.

As of January 31, 1967 applicant had a total of 599 shareholders of record, 456 of whom reside in the United States and 143 of whom reside in foreign countries. Of this number, 466 shareholders owned 5 shares or less, including 220 shareholders who

owned 1 share and 133 shareholders who owned 2 shares. Only 11 shareholders owned 100 or more shares, and of this number, the largest single shareholder, the Shoong Investment Company, owned 4,774 shares of the approximately 10,000 shares outstanding.

There is a very nominal amount of trading interest in the stock. In the 10 years from 1957 through 1966 a total of 84 sale transactions took place.[2/] As a result of a practice which developed during the life of Joe Shoong, applicant has been directly involved in the sales transactions. When a stockholder wanted to sell all or part of his holdings, he would advise Joe Shoong, who, in turn, would try to find a purchaser,and this practice has continued to the present time, with officers or other representatives of the applicant now substituting for Joe Shoong as the intermediary. The selling shareholder is informed of the price of the last sale transaction and, generally, only if he demurs or indicates an unwillingness to sell does the practice involve efforts to find a buyer at the higher price sought by the shareholder. The sale price of the stock has tended to remain rather constant as a result of this practice. The company has had, and continues to have an informal plan for interesting its store managers and other employees in acquiring stock,and as a result of the above practice the managers of various stores and other persons connected with applicant's business have acquired stock, frequently a single share or in small amounts. The purchase price in these transactions during the recent past has

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2/ During the period 1957 through 1966, 114 transfers were made as the result of gifts or bequests or other transactions not deemed to be sales.

been $250 per share.

For the first time in its history, the company early in 1967 sought to acquire treasury shares by purchase from its stockholders. One purpose of the proposed acquisition was to "fund" the stock options mentioned above. A second purpose was an effort to reduce the number of shareholders below the 500 shareholder figure of Section 12(g). Accordingly, letters were sent to a majority of the shareholders, particularly to those holding relatively few shares, offering to purchase their stock at $250 per share, an amount fixed after consultation with and recommendation by the company's accountants, Arthur Andersen & Company. Approximately 140 shares were purchased as a result of the offer. Obviously, the effort to reduce the number of shareholders below 500 was not successful.

As further evidence of the lack of any significant trading interest in the company's stock, applicant produced as witnesses two San Francisco stockbrokers who testified to the lack of such interest, either actual or potential, absent some drastic change such as a stock split.The lack of interest results especially from the very limited number of shares available for acquisition by the public and the inability to make a fair market without an adequate supply of "floating" stock. It follows that there is no market for the stock, no apparent interest by any broker in making a market in the stock or in trading it, and, to the knowledge of the broker witnesses and of Mr. Shew, there has been no indication of interest in acquiring the stock by members of the public.

C. Sections 12(g) and Residence of Shareholders

As indicated above, applicant urges that inasmuch as fewer than 500 of its shareholders reside in the United States, the registration requirement of Section 12(g) does not apply. Applicant's brief states that "The law does not expressly provide that the reference to 500 shareholders means resident shareholders, but such a conclusion is called for by the legislative history of the Act and administrative policy of the Securities and Exchange Commission." In support, the brief refers to language in the hearings on the bill, mentioning "protection of the American investment public" and the "American investor". The argument is entirely unconvincing and the inference sought by the applicant is not available. Conversely, my reading of the legislative history on this part of the 1964 amendments leads to a contrary conclusion. In connection with a discussion of the desirability of requiring the registration of securities which are issued by foreign companies, the report of the Senate Committee on Banking and Currency, reads as follows: 3/

> "A residence requirement would add undue complexities to the administration of the provisions of the bill with respect to foreign securities. It should be noted that domestic companies will be required to register any class of securities held of record by 500 or more shareholders, regardless of whether they are U.S. or foreign residents."

3/ Sen. Rep. No. 379, 88th Cong., 1st Sess. (1963) at p. 30.

The same language appears in the "Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives", incorporating therein a statement by the Commission on the proposed amendments.[4/]

Because of the clear language and import of the Section with regard to residence, the adoption of applicant's position on this issue would be error, quite apart from the accepted principle that the terms of an exception to the "general policy" of a statute must be strictly construed against the claimant of its benefit. Securities and Exchange Commission v. Sunbeam Gold Mining Co., 95 F.2d 699 (C.A. 9, 1938). It follows that there is no statutory basis for the conclusion that registration is not required.

Although the administration of other statutes by the Commission suggests that the primary, if not the exclusive concern of those statutes, is the protection of the American investor rather than investors residing in foreign countries,[5/] it does not necessarily follow that an equally limited concern in administering Section 12(g) would be consistent with the Congressional intent, or that a relatively limited concern would be a significant factor in this proceeding.

D. Information Available to Shareholders

Applicant urges that the information which is made available to its shareholders together with additional information which

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4/ Hearings on H.R. 6789, H.R. 6793, and S. 1642, 88th Cong., 1st and 2d Sess., Part I, Investor Protection, at page 180.

5/ Cf. In the Matter of Paribas Corporation, 40 S.E.C. 487 (1961), in connection with a request for exemption under the Investment Company Act of 1940. Cf. also, Securities Act Release No. 4708, July 9, 1964, with respect to "The Applicability of the Securities Act of 1933 to Offerings of Securities Outside of the United States."

it proposes to make available in the future is adequate to support its contention that an exemption should be granted.

In March of each year applicant holds its annual shareholders meeting. The meeting is preceded by a notice to shareholders of record and an annual report, including a financial statement certified by Arthur Andersen & Company. The annual report also contains a statement reviewing the applicant's activities for the year and announcing its plans for the future.

The notices of the annual shareholders meeting are accompanied by proxy solicitations which the applicant contends include a full disclosure of all matters which the company expects to present for shareholders' approval. Since many of the shareholders are of foreign ancestry and some reside in foreign countries, applicant has on many occasions reported company developments in the Chinese language.

Applicant states in its proposed findings that it has decided to further supplement its reporting practice to provide

> ". . . adequate information . . . concerning the financial and business affairs of applicant, the management of applicant, the principal holders of securities of applicant, and the nature and description of applicant's securities."

In addition, the testimony indicates that applicant intends to include in future and annual reports and proxy statements a full description of all outstanding stock options.[6/]

6/ Applicant states that the stock options made available for the first time during 1967 were approved by a vote of the shareholders.

In brief, applicant's request for an exemption has been modified by its post-hearing documents to include terms or conditions on which it now requests the exemption. It requests that the exemption be granted (1) for a limited period of 10 years; (2) on condition that applicant will send to the Commission copies of all annual reports and other written material sent to shareholders; (3) that the annual report and proxy material sent to shareholders will follow in form the annual report and proxy material for the fiscal year ended January 31, 1967, except that the report will be expanded to make full disclosure of the officers and directors receiving total compensation annually in excess of $30,000, to identify all shareholders of record owning 10 per cent or more of the outstanding stock, to reflect all outstanding stock held directly or beneficially by or for each director or officer, to show the terms of outstanding stock options, and to show in detail all transactions not in the ordinary course of business between applicant and any officer or director. Applicant also agrees to furnish a copy of its latest annual report to any person requesting the same, and to advise the Commission promptly of any development which has the effect of changing any material fact upon which an exemption might be premised.

The Division contends that the kind and the adequacy of information deemed important to investors and potential investors is spelled out in the registration requirements and forms, the

reporting requirements and forms, and the proxy solicitation rules; that the requirements are aimed not at a particular evil but at the "tendency to evil in all cases". In this connection, language in the Report of the Senate Committee on Banking and Currency on the proposed amendments is pertinent.[7/]

> "In the absence of statutory requirements, it cannot be expected that corporate managements, in times of stress - when the need for full and accurate disclosure is most marked - will always voluntarily disclose matters which may tend to reflect adversely on the activities of their companies."

In no way do I suggest that the company officers who testified before me were less than completely candid or forthright, or that the newly appointed officers whom I did not see are not of the same calibre. But the contentions of the parties suggest the question whether the burden of compliance with Section 12(g), when weighed with all of the above-mentioned factors, is sufficient to support a departure from the statutory and regulatory requirements which would give investors and prospective investors the protection of the registration, reporting, proxy solicitation, and insider trading requirements of the Exchange Act.[8/] General testimony was introduced by applicant to the effect that registration would cost between $3000 and $5000 per year, including added fees of its accountants and attorneys, and the expense of office personnel. Somewhat more

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7/ Sen. Report, op. cit., at pp. 13, 14.

8/ The statutory requirements for registration were enacted and formulated after full consideration "of the burden on the issuers, the administrative burden on the Commission and the public interest to be protected." Sen. Report, op. cit., p. 20.

precise figures thereafter indicated that the added expense, as computed by applicant's personnel, would approximate $3,000 per year. But it seems probable that these figures were computed without regard to the added cost of the "additional information" which applicant now proposes to furnish as indicated in its post-hearing documents. There is no evidence that $3,000 fairly represents the additional annual cost of compliance with Section 12(g), over and above applicant's expenses in furnishing the information "volunteered" in partial compliance with the statutory and regulatory requirements.[9/] Whatever the added cost, it is obviously not a great financial burden on this applicant.

In any event, applicant's proposal for furnishing information falls consideraly short of satisfying the more detailed and specific requirements of the Commission's rules and regulations. The administrative burdens which the proposal undoubtedly would create, and the difficulty or the inability of Commission personnel to "police" the disclosures,whether made in proxy solicitations or otherwise, is an important factor which helps to outweigh the significance of the low trading activity in the stock. And under applicant's proposal there would be also an absence of statutory protection afforded investors by Section 16 with regard to the use of inside information.

9/ These requirements, apart from registration under Section 12(g) would include the filing of reports, periodic and otherwise, which would supplement the registration, together with the detailed schedules and information called for by the regulations and the forms specified by the Commission.

E. Conclusion and Order

I conclude, under all the facts and circumstances, that applicant has not sustained the burden imposed upon it of justifying an exemption from registration,[10] and that the requested exemption would not be consistent with the public interest and with the protection of investors. Accordingly,

IT IS ORDERED that the application of The National Dollar Stores, Ltd. for an exemption of its common stock from the provisions of Section 12(g) of the Exchange Act is denied.

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

Pursuant to Rule 17(b) of the Commission's Rules of Practice a party may file a petition for Commission review of this initial decision within 15 days after service thereof on him. Pursuant to Rule 17(f) this initial decision shall become the final decision of the Commission as to each party unless he files a petition for review pursuant to Rule 17(b) or the Commission, pursuant to Rule 17(c), determines on its own initiative to review. If any party timely files a petition for review or if the Commission takes action to review as to a party, this initial decision shall not become final with respect to such party.[11]

Sidney Ullman
Hearing Examiner

10/ S.E.C. v. Ralston Purina Co., 346 U.S. 119, 126 (1953); S.E.C. v. Sunbeam Gold Mining Co., supra, p. 10.

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

Washington, D.C.