ADMINISTRATIVE PROCEEDING
FILE NO. 3-7038

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)
	)
WILLIAM A. CALVO, III	)
	)

INITIAL DECISION

Washington, D.C.
September 20, 1989

Max O. Regensteiner
Administrative Law Judge

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APPEARANCES: Benjamin Greenspoon, Richard M. Humes and John J. Nicholas, for the Commission's Division of Enforcement.

G. Richard Chamberlin, for William A. Calvo, III.

BEFORE: Max O. Regensteiner, Administrative Law Judge.

William A. Calvo, III ("Calvo" or "respondent") is an attorney licensed to practice in Florida and New York, who until recently practiced before the Commission. In an action brought by the Commission against him and others in the United States District Court for the District of Connecticut, the Court, in June 1988, granted the Commission's motion for summary judgment against Calvo. It found that he had violated or aided and abetted violations of the antifraud provisions of Section 17(a) of the Securities Act of 1933, Sections 10(b) and 15(c) of the Securities Exchange Act of 1934 and Rules 10b-5, 10b-9 and 15c2-4 under that Act in connection with a public offering of the stock of The Electronics Warehouse, Inc. ("Warehouse"). 1/ Based on these and certain additional findings, the Court permanently enjoined Calvo from violating the above provisions. Pursuant to Rule 2(e)(3) of its Rules of Practice, the Commission thereupon issued an Order temporarily suspending Calvo from appearing or practicing before the Commission. Subsequently, it denied Calvo's petition to lift the suspension and set the matter down for public hearings, to be followed by a determination of what, if any, sanction should be imposed on him.

1/ S.E.C. v. The Electronics Warehouse, Inc., et al., 689 F. Supp. 53 (D. Conn. 1988). Subsequent to the hearings herein, the Court denied a motion for reconsideration. Calvo has filed an appeal with the Court of Appeals for the Second Circuit, which is pending.

Hearings were held at which Calvo was represented by counsel. The Division of Enforcement introduced the injunction and the Court's findings and certain other evidence; Calvo presented extensive evidence in his defense concerning the circumstances surrounding the Warehouse offering and his conduct in connection with it as well as character witnesses; and the Division presented further evidence by way of rebuttal. 2/ Thereafter the parties filed proposed findings and supporting briefs, followed by reply briefs. To the extent my findings and conclusions reflect evidence presented before me, they are based on the preponderance of the evidence as determined from the record and upon observation of the witnesses. 3/

2/ Subsequent to the close of the hearings, I received in evidence (1) the District Court's Ruling denying Calvo's motion for reconsideration and (2) the parties' briefs to the Second Circuit, together with appendices.

3/ Calvo contends that the appropriate standard should be the higher clear and convincing evidence standard, citing S.E.C. v. National Student Marketing Corp., 457 F. Supp. 682 (D.C. 1978). However, the language in that decision that he relies on lost its vitality when the Supreme Court, in Steadman v. S.E.C., 450 U.S. 91 (1981), held that the appropriate standard of proof in the Commission's administrative proceedings is the preponderance of the evidence standard. In William P. Carter, 47 S.E.C. 471, 472, n. 3 (1981), the Commission stated that this was the standard applicable in Rule 2(e) proceedings.

The Respondent

Calvo received a J.D. degree in 1976 and an LL.M in International Legal Studies in 1977. Most of his legal career has been spent in the private practice of corporate and securities law. As noted, he is admitted to practice in Florida and New York.

The Warehouse Offering

Warehouse was founded in 1982 by one Edward Bremer, to engage in mail order marketing of electronic products. Bremer was its principal shareholder as well as president and a director. On November 8, 1984, the Commission declared effective a post-effective amendment (Amendment No. 3) to a registration statement for Warehouse. 4/ Under its terms, the underwriter, Gallagher & Co., was to use its best efforts to sell a maximum of 15 million shares at 10 cents a share on a "12 million share or none" basis within 90 days of the prospectus date, or within 150 days if extended by agreement between the company and the underwriter. If 12 million shares were not sold and paid for within the offering period, all funds received from subscribers were to be returned to

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4/ The registration statement had originally become effective in June 1984. However, the original underwriter was suspended from membership in the National Association of Securities Dealers during the offering period, requiring Warehouse to obtain a new underwriter and to postpone the offering.

them. In the meantime, such funds were to be held in escrow by a bank. The prospectus stated that Warehouse was "completely dependent" on the personal efforts and abilities of Bremer, its chief executive officer, who would devote his entire time to its activities, and that the loss or unavailability of his services would have a materially adverse effect on Warehouse's business prospects and/or potential earning capacity. Calvo was named as counsel for the underwriter. 5/

The offering period was extended to 150 days, which meant that it expired on April 7, 1985. However, the offering was permitted to continue to April 22, when the closing took place. The proceeds were disbursed pursuant to Calvo's directions, including a $15,000 fee to Calvo and $324,350 to one Marvin Richmond. Not long thereafter, Warehouse went into receivership and, according to the Court, investors suffered substantial losses.

The Effect of the Court's Findings

A substantial part of the Division's proposed findings is predicated on the findings of the District Court. With minor exceptions, those proposed findings accurately reflect the Court's findings. Yet Calvo,

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5/ The prospectus actually named Calvo & Bofshever. However, according to Calvo, this was not really a partnership, but simply an association.

disregarding their source, attacks many of them as distorted, misleading or unsupported by the record. This approach reflects his contention that because the Court's decision is presently on appeal, it has no "res judicata, collateral estoppel or issue preclusive effect" in these proceedings and cannot be used to prove facts in dispute. (Reply brief, p. 33).

Rule 2(e)(3) provides that in a hearing such as the one held here, the petitioner (respondent) may not contest any findings made against him in the judicial proceeding on which the 2(e) proceeding is predicated. This is, of course, consistent with general principles of collateral estoppel. 6/ Calvo cites no authority in support of his argument that the pendency of an appeal compels a different result here. In fact, the law is to the contrary. In the D.C. Circuit's recent Blinder Robinson decision, which Calvo himself cites in support of other propositions, the Court stated that the fact that a judgment is pending on appeal ordinarily does not detract from its finality (and therefore its preclusive effect) for purposes of subsequent litigation. 7/

6/ See, e.g., Blinder Robinson & Co., Inc. v. S.E.C., 837 F.2d 1099, 1109 (D.C. Cir. 1988), cert. denied 109 S.Ct. 177.

7/ Id. at 1104, n. 6. See also Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983) ("Under well-settled federal law, the pendency of an appeal does

(continued...)

The Court's Findings

Concluding that there was no genuine issue as to any material fact, the Court granted the Commission's motion for summary judgment against Calvo. The Commission's complaint had alleged that Calvo and other defendants, including Bremer, the Gallagher firm and Gary Granai, issuer's counsel, fraudulently extended the offering beyond the period specified in the prospectus; that they obtained short term loans so as to make it appear that the offering had been completed; that the loans were then repaid from the offering proceeds, a fact not disclosed in or contemplated by the prospectus; and that defendants failed to disclose that on March 8, 1985, Bremer was indicted by a federal grand jury on 17 counts of mail fraud. Calvo did not dispute the existence of the fraudulent schemes alleged, but claimed that there were issues of material fact as to whether he knowingly participated. The Court recognized that to find a violation (or aiding and abetting of a violation) of most of the designated sections required a finding of

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7/(...continued)
not diminish the res judicata effect of a judgment rendered by a federal court"); 1B J.Moore, Moore's Federal Practice, ¶0.416[3] ("The federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel."); C.R. Richmond & Co., 46 S.E.C. 412, 414, n. 11 (1976).

scienter. It held that reckless conduct satisfied the scienter requirement.

The Court's findings of fact and conclusions were as follows: As the termination date of the offering approached, sales of Warehouse stock were far below the 12 million share minimum. Bremer, Russell Gallagher (Gallagher & Co.'s owner) and Granai devised a scheme to give the appearance that the minimum had been sold. Short term loans were obtained from three persons including Richmond, and the proceeds were wired into the escrow account on April 22, the day of the closing. The lenders had no intention of buying Warehouse stock. At Granai's instruction, Calvo prepared and delivered to the escrow bank a letter authorizing it to release the escrow funds by paying Richmond $324,350, Calvo $25,000 as his fee, 8/ and other funds to Gallagher and to Granai as trustee for Warehouse. Of the latter funds, $480,000 was paid to the lenders other than Richmond. As a result, Warehouse received only about $130,000 from the offering, rather than the $964,000 that the prospectus specified it would receive if the 12 million shares were sold. While denying any knowledge of the loans other than Richmond's, Calvo admitted that he authorized the payment to Richmond and that Richmond

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8/ Actually the amount to be paid, and in fact paid, to Calvo was $15,000.

indicated to him that he was wiring money into the escrow account that was "going in with one hand and out with the other." Calvo claimed that he authorized the payment to Richmond because Granai told him that Richmond had bought an account receivable from Bremer, representing advertising and promotional expenses advanced by Bremer on behalf of Warehouse. However, concluded the Court, Calvo had raised no issue of material fact with respect to his recklessness with respect to the Richmond payment. Calvo conceded that Richmond spoke to him to confirm that $324,350 would be paid to Richmond from the escrow account and that he told Calvo he was wiring money into the escrow account. Based only on Granai's oral explanation that the payment was for an account payable, Calvo authorized release of nearly one-third of the offering proceeds to Richmond, an amount $74,350 in excess of Richmond's payment. Calvo made no inquiry as to why Richmond was wiring money to the escrow account, and not to Bremer from whom he was purportedly buying the account receivable, on the same day he was to receive payment of the account receivable, and he did not ask for documentation of the Bremer-Richmond or Bremer-Warehouse transactions.

Moreover, the Court found, nothing in the three post-effective amendments, which Calvo reviewed and for which he bore at least partial responsibility, or in the

prospectus informed investors that Warehouse owed Bremer a large amount, that such an amount would be paid from the proceeds of the closing, or that Bremer's advertising agency had performed services for Warehouse. Thus, the prospectus was materially misleading. And, assuming Calvo relied on Granai's explanation, it should have put him on notice that authorizing the payment to Richmond made the prospectus materially misleading and that the payment was part of a fraudulent device to close the offering. Releasing the funds in reliance on the information provided by Warehouse's counsel, without any investigation, constituted recklessness on Calvo's part. Moreover, even if he did not know the dubious, if not wrongful, basis for the transaction, he knew it was not disclosed. That knowledge and his failure to rectify the non-disclosure constituted recklessness as a matter of law.

The Court next turned to the fact that the offering was permitted to continue beyond the 150-day period specified in the prospectus. It found as follows: Calvo reviewed Amendment No. 3 which stated that the offering period was to be measured from the date of the prospectus. Nina Gordon, an attorney employed by him, was notified of the November 8 effective date by the Commission. The prospectus displayed this date on the first page. As underwriter's counsel, Calvo supplied and

reviewed the escrow agreement form. Under that agreement, the offering period would be measured from the effective date. As a securities law specialist, Calvo was fully aware of the importance of the offering period limit as protection for investors. In February 1985, Calvo received a letter from the escrow bank setting a closing date of April 22, about two weeks beyond the offering period. He also knew that funds were being deposited into the escrow account up to the morning of the closing. Despite this knowledge, he authorized the escrow bank to disburse the funds on April 22.

The Court went on as follows: Calvo's contentions that he did not know the effective date or the expiration date of the offering, and that he relied on the bank's letter or that he had been replaced as underwriter's counsel and had no reason to determine the proper closing date raised no genuine issue of fact with regard to his scienter in authorizing the extended closing. His actual knowledge of the effective date was irrelevant to whether his conduct was reckless. There was no need to determine whether notice to his associate charged him with constructive knowledge of the effective date. His failure to ascertain the correct effective date and hence the proper closing date was in reckless disregard of the truth or falsity of the prospectus' representation as to the offering period. Calvo's argument erroneously

presumed that he had no obligation to assure that the offering adhered to the specified time limitation. He should have known that his April 22 letter would lead to what the most modest inquiry would have shown was an illegal and fraudulent closing.

With respect to nondisclosure of Bremer's indictment for mail fraud in March 1985, the Court's findings were as follows: Granai informed Calvo of the indictment the same month. Calvo considered the indictment a material fact. He suggested to Granai that Bremer should resign and that a post-effective amendment be filed. Granai told him that Bremer would resign and that an amendment would be filed. Calvo had a duty to investors to act, by causing sales to be suspended pending disclosure or the offering to be cancelled. He did not do so. In fact, as Calvo knew before the closing, Bremer had not resigned and no amendment disclosing the indictment had been filed. Bremer pleaded guilty to one count of mail fraud in July 1985.

Calvo claimed that he was told by Granai that the indictment would be dropped, but he made no effort to verify that this had occurred. On April 22, 1985, the day of the closing, Granai gave Calvo a letter signed by Granai and addressed to Gallagher which stated in part that the registration statement and prospectus complied with applicable requirements and were accurate in all

material respects, "except as may be required, if required at all, (as to which our firm expresses no opinion) by the recent proceeding brought against Mr. Bremer . . ." (emphasis added) Calvo was thus informed that the indictment had not been dropped. At best, Granai and Bremer expected that it would be dropped upon Bremer's agreement to cooperate with the government. Calvo did not verify this information with Bremer's defense attorney or the U.S. Attorney. He insisted that Granai strike the underlined portion of the letter and add the following: "It is our opinion, based upon our review of the proceeding and evidence to date that there is little likelihood that the government will prevail in this matter." After receiving the amended opinion letter, Calvo authorized the release of the funds.

The Court went on as follows: Calvo's argument that there was an issue of fact concerning the reasonableness of his conduct, in view of his claimed reliance on Granai's assurances that Bremer would resign and that the indictment would be dropped, is meritless. The indictment of Bremer, Warehouse's president and founder, was a material fact. The prospectus stated that Warehouse was completely dependent on Bremer's personal efforts and abilities and that his unavailability would have a materially adverse effect on the company. His indictment and its consequences were likely to make him

unavailable. Moreover, it cast a cloud on the bona fides of Warehouse, which was essentially his alter ego. Disclosure was required under SEC regulations.

Moreover, Granai's representation that the indictment would be dropped was only a prediction, which Calvo made no effort to verify. There is no issue of fact that, at the time the funds were released, Calvo knew of the indictment, that it had not been dismissed, and that it had not been disclosed in the prospectus. His conduct in authorizing the closing, absent such disclosure, was at least reckless.

If Calvo, as claimed, was not obliged to disclose Bremer's indictment to investors, he was obliged to prevent continued dissemination of misinformation. There is no factual support for his assertion that he was no longer underwriter's counsel at the time of the closing. Up to and at the closing he consulted with Granai and Bremer; acting on Gallagher's behalf, wrote the letter regarding release of funds from escrow; and reviewed the Granai opinion letter addressed to Gallagher and obtained changes in it. Even if Calvo's position as underwriter's counsel did not impose on him a duty of disclosure or to rectify the misrepresentation, such a duty existed by virtue of his substantial participation in the offering. Thus, he prepared post-effective amendment No.1 and reviewed amendments Nos.2 and 3, and

he authored the letter authorizing the release of funds from escrow. Moreover, he benefited from the closing by receiving his fee. In failing to disclose the indictment and allowing the offering to be closed without disclosure, Calvo violated his duty to investors, and his conduct was reckless as a matter of law.

The Court then proceeded to consider whether there was a reasonable likelihood of future violations, a necessary predicate for issuance of a permanent injunction. In concluding to issue an injunction, the Court made the following findings: Calvo's reckless conduct was a substantial factor in furthering the violations. The seriousness of the violations was reflected in Warehouse's defunct status and the investors' substantial losses. Calvo had not recognized the wrongfulness of his conduct, and lost no opportunity to blame others. He persisted in asserting the unfounded claim that he was removed as underwriter's counsel after amendment No. 3 was filed. There was no showing that Calvo had made any effort to help investors recoup their losses, and he only belatedly agreed to make restitution to the receiver. He had manifested no contrition and portrayed a callous indifference. As a securities attorney, Calvo had the opportunity to commit further violations. The sincerity of his assurances against

future violations was problematic.

Contentions of Parties 9/ and Findings

As noted, Calvo is not free in this forum to relitigate the Court's findings, including its conclusions regarding his violations. 10/ Thus, his argument to the effect that while he "bears a portion of the causative responsibility" (Brief, p. 4), he was not culpable, is not entitled to consideration. However, on the issue of what if any sanction is required in the public interest by virtue of the injunction and his violations, Calvo was and is free to present evidence and argument bearing on the degree of his culpability and the existence of mitigating factors. 11/ Under Rule

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9/ I am appalled at several significant misstatements of the holdings of cases in the Division's brief. Most disturbing is the reliance on Lloyd Feld, 46 S.E.C. 103 (1975) (inappropriately cited in the brief only by administrative proceeding file number) for the proposition that the Commission has "routinely permanently barred" attorneys for certain kinds of misconduct (p. 17). In fact, Feld was censured. In a footnote on page 13, it is represented that Jo M. Ferguson was barred. In fact he, too, was censured. There simply can be no excuse for these and other misstatements. Moreover, they tend to cast doubt on the reliability of the Division's submissions in their entirety.

10/ Of course, should the Court of Appeals overturn the District Court's decision, the predicate for this proceeding would be removed.

11/ See Blinder, Robinson & Co., Inc. v. S.E.C., 837 F.2d at 1109, 1110.

2(e)(3), he has the burden of showing why he should not be sanctioned.

In urging that he not be disqualified from practicing before the Commission, Calvo stresses that his involvement in the Warehouse offering was more limited than the normal involvement of underwriter's counsel and that he was not compensated in that role, and he asserts that prior to the closing, whatever involvement his firm had was almost entirely that of a young associate, Nina Gordon. He further asserts that he was led to believe that at about the effective date of the post-effective amendment, another firm had actually replaced him as underwriter's counsel. With respect to the fact that the 150-day offering period was exceeded, Calvo claims that he was simply not aware of this until long after the closing, that he relied on the escrow bank's notification of the offering's termination date and that, in view of his limited contact with the offering, he was justified in not making an independent calculation. With respect to the Bremer indictment, Calvo asserts that he was advised by Granai that it had been dropped, made some effort to confirm that information and pending receipt of written confirmation arranged for proceeds that were to go to Warehouse to go instead into an escrow account (also referred to by Calvo as a trust account) in Granai's name. With respect to the payment of over

$324,000 to Richmond at the closing, Calvo asserts that he was informed by Bremer and Granai that because of the delay in closing the offering, Bremer had advanced about $350,000 to Warehouse to be used for advertising and other expenditures of the nature described in the Use of Proceeds section of the prospectus, and that the resulting receivable was sold to Richmond. He further asserts that verification of these expenditures was to be provided in the Warehouse accountant's "cold comfort" letter to be furnished before funds were released to Warehouse from Granai's escrow account.

Calvo also urges that the Warehouse matter was an unusual situation that will not be repeated; that, if permitted to resume his securities practice, he will revise the nature of that practice to preclude further problems; that he is well qualified to practice securities law and has good character and integrity; that he paid the receiver for Warehouse $25,000 in settlement, $10,000 more than the fee he had received; and that the Warehouse "fiasco" has already had a devastating impact on his life.

The Division, on the other hand, urges that Calvo be permanently barred from practicing before the Commission. It points to the Court's findings of serious securities law violations and contends that the evidence presented by Calvo, rather than mitigative in nature, only

reaffirms his culpability. It asserts that Calvo has failed to accept responsibility or show remorse, by maintaining he did nothing wrong, claiming that he was replaced as counsel for the underwriter and attempting to place the blame on junior associates. This attitude, it asserts, indicates that he would again commit violations if permitted to resume practice before the Commission.

At the outset, it should be noted that there is substance to Calvo's argument that the Warehouse offering, and his role in it, were somewhat out of the ordinary. When he came into the picture in the fall of 1984, there was already an effective registration statement; counsel for the original underwriter had done the usual due diligence work. Calvo was asked to draft a post-effective amendment involving only the designation of a substitute underwriter and a restructuring of the terms of the offering. This was not a function typically performed by counsel for the underwriter. And the fee which he was to receive was specifically for that assignment only. Admittedly, he also agreed at that time to represent the underwriter, and he was named as underwriter's counsel in the amended registration statement. Thereafter certain tasks normally performed by underwriter's counsel, involving clearance with the National Association of Securities Dealers ("NASD") and

the blue sky work, were assigned to another law firm. 12/ Calvo was not paid a fee which he had asked for to serve as underwriter's counsel. I credit his testimony that he had little contact with the offering for a period of several months after the post-effective amendment became effective and that, in giving some advice to Gallagher, without charge, he considered that he was essentially seeking merely to cultivate a potential client. It is possible that for a time he actually believed, as he testified, that the other firm had replaced him as counsel for the underwriter. However, subsequent events must have brought home to him that the other principal actors still viewed him as having that status. And his own conduct was that of at least de facto underwriter's counsel with respect to matters other than the NASD clearance and blue sky work.

Thus, in January 1985, Granai sent to Calvo draft copies of documents, including the "opinion letter" of issuer's counsel and the "cold comfort" letter of the accountant that were to be furnished to the underwriter at closing. At that time, according to Granai's covering letter (Resp. exhibit 18), a January 15 closing was contemplated. There is no suggestion anywhere in the

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12/ The record shows that the other firm actually did blue sky work for Warehouse already in June 1984, well before Calvo even came into the picture. (See Resp. exhibit 25).

record that Calvo returned the enclosures or told Granai that he had contacted the wrong person. In February, the escrow bank sent Calvo a copy of its letter to Bremer regarding the offering's termination date. (Resp. exhibit 12) In March, as noted, Granai informed Calvo of Bremer's indictment and discussed the possible consequences with him. Calvo, in turn, discussed the matter with Gallagher. Calvo's name was never deleted from the Warehouse prospectus. In addition, there are the factors which led the Court to reject Calvo's argument that he was no longer underwriter's counsel at the time of the closing. Thus, Calvo met with Bremer, Granai and Gallagher in his office on April 19, 1985, in preparation for the closing; was responsible for the change in the language regarding the Bremer indictment in Granai's letter to Gallagher; and signed the letter to the escrow bank that directed the manner in which the funds held in escrow by the bank were to be disbursed. Moreover, Calvo attended the closing; the other firm which had supposedly replaced him was not represented. Notwithstanding his testimony that he attended the closing only to collect his fee for preparing the post-effective amendment, it is clear that in these activities, Calvo was acting as counsel for the underwriter; his participation cannot be otherwise explained. Moreover, his letter to the escrow bank

represented that "we represent Gallagher and Company, the underwriter..." Calvo's attempt to explain away this language as indicating simply that he represented Gallagher, which happened to be the underwriter, and not that he was underwriter's counsel, is disingenuous. In any event, the Court's finding, not subject to challenge here, was that Calvo was still underwriter's counsel at the time of the closing.

There may be mitigating circumstances with respect to Calvo's misconduct involving the delayed closing. The Court did not find that Calvo knew at the time that the offering continued beyond the 150-day period; it found that he was under a duty to know the correct termination date. Particularly in light of Calvo's somewhat limited role in the offering, I credit his testimony that he did not know that date and that he relied on the escrow bank's computation. 13/ However, neither that factor nor his office practice of delegating detail work to junior associates can mitigate his conduct in relation to the payment of a major portion of the funds in the escrow account to Richmond and the non-disclosure of that payment or the Bremer indictment. Calvo himself was fully aware of these matters and was

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13/ It appears that the escrow bank calculated the termination date from the date of the escrow agreement rather than from the effective date of the post-effective amendment.

personally responsible for the manner in which they were handled.

With respect to the Bremer indictment, the Court's finding that Calvo made no effort to verify Granai's prediction that the indictment would be dropped is dispositive of that issue. Calvo now claims that on April 19 he asked an associate to make a telephone call to verify that the indictment had been dropped and was informed that it had been. 14/ Aside from the fact that the associate flatly denied being given such an assignment, the claimed reliance on information obtained over the telephone by an associate who had been hired only a week earlier and was not yet admitted to practice, would in itself have been reckless. Moreover, Granai's opinion letter, in both its original and revised forms, showed that the indictment had not been dropped. Calvo's

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14/ In its Ruling on Calvo's motion for reconsideration, the Court noted certain discrepancies between his deposition testimony, which was before the Court when it granted summary judgment, and an affidavit filed by Calvo with his motion. In the deposition, he testified that he was told the indictment was going to be dropped. In the affidavit, on the other hand, he claimed that he had been advised that the indictment had already been dropped and that an associate had verified this fact. At the hearings in this proceeding, Calvo initially testified that on April 19 Bremer said either that it had been dropped or that it was being dropped (Tr. 196). A few minutes later he testified that he was told that the indictment "was dropped" (Tr. 202). On cross-examination, he testified that his recollection was not clear whether he was told that the indictment was in the process of being dropped or had been dropped. (Tr. 296).

argument that as a result of his advice the portion of the proceeds to be disbursed to Warehouse went into an escrow account in Granai's name pending receipt of written confirmation that the indictment had been dropped and receipt of certain other documents and information, is of no avail to Calvo. The account was not an escrow account, but simply a bank account in the name of Granai's firm as trustees, and there was no restriction on Granai's ability to disburse the funds. Calvo admittedly had no control over when or how the funds were disbursed. As noted, Granai promptly disbursed most of those funds to the other lenders.

In the Richmond situation, Calvo does not even claim that he attempted to verify Bremer's alleged expenditures for projects described in the Use of Proceeds section of the prospectus or the nature of the arrangements between Bremer and Richmond. He again refers to the supposed "second escrow arrangement" (Brief, p. 17) as a vehicle to protect investors, in that no proceeds were to be disbursed to Warehouse until, among other things, the Bremer advances on behalf of the company could be verified. 15/ As noted above, this was not really an escrow account. In any event, the payment whose propriety was to be substantiated had already been made

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15/ The Court, in denying the motion for reconsideration, noted that Calvo's "second escrow" theory was never alluded to before summary judgment.

at Calvo's direction. As pointed out by the Court in denying reconsideration, about half the proceeds were paid out at the closing (including about one-third to Richmond) pursuant to the terms of Calvo's disbursement letter, under circumstances in which Calvo himself doubted the representations made to him about Richmond and the indictment.

Calvo's Constitutional Claims

Calvo contends that it is an unconstitutional denial of due process for the Commission to be a litigant against him in the injunctive action and then to sit as judge and decide how severely he should be sanctioned for the conduct that was the subject of the lawsuit. He presents the additional arguments that Rule 2(e) exceeds the Commission's authority and, as applied here through the automatic suspension of Calvo's right to practice before the Commission, violates the 5th Amendment's due process provisions. 16/ These or comparable arguments have previously been rejected by the Commission, either in this proceeding when it denied Calvo's motion to

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16/ Additional arguments that this proceeding also violates the 6th amendment's right to counsel and the 13th amendment's proscription of involuntary servitude are so devoid of substance as not to warrant further discussion.

dismiss or in prior decisions, 17/ and they are not open for re-examination by me.

Conclusion

In determining the sanction that is appropriate in the public interest, I have given no weight to the Division's argument that Calvo's continued insistence that he is not culpable signals a likelihood that the same or similar misconduct will recur. As I have repeatedly noted, for the purposes of this proceeding Calvo is bound by the District Court's findings, a fact which he has failed to recognize or acknowledge. However, Calvo is still litigating the injunctive proceedings, as he has a perfect right to do, and, as the Court itself pointed out, he cannot be penalized for doing so. (Note 19 of the Court's decision)

The violations found by the Court were of a very serious nature. While Calvo points out that the Court did not find intentional or knowing misconduct on his part, damage to the investing public and the Commission's processes can be equally great from reckless conduct. Calvo had a golden opportunity to put a halt to a

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17/ See William R. Carter, 47 S.E.C. 471, 472 et seq. (1981) (reaffirming the Commission's authority to promulgate Rule 2(e)); Emanuel Fields, 45 S.E.C. 262, 265-267 (rejecting contention that "ex parte temporary suspension order" on basis of injunction deprived attorney of due process).

fraudulent offering. He not only failed to do so, but by his actions contributed to the implementation of the fraud. Nevertheless, I have determined that Calvo need not be permanently disqualified from practice before the Commission. Among other factors, it appears that he was deceived not only by Bremer, but by Granai, a fellow-attorney. 18/ Despite his continued denial of culpability, I believe, based in part on observation of his demeanor, the testimony of certain of his witnesses, and the great impact on him of the injunctive and administrative proceedings, that if permitted to resume practice before the Commission after a substantial period of suspension, he will be vigilant to avoid repetition of the type of misconduct that occurred here or similar misconduct. Everything considered, I conclude that a suspension totalling two years (including the almost 14 months for which he has already been suspended) is appropriate in the public interest. 19/

18/ Granai consented to a permanent injunction in the Warehouse proceeding and thereafter, pursuant to an offer of settlement, was permanently disqualified from practice before the Commission. Securities Act Release No. 6762 (March 24, 1988).

19/ All proposed findings and conclusions and all contentions have been considered. They are accepted to the extent they are consistent with this decision.

Accordingly, IT IS ORDERED that William A. Calvo, III is hereby disqualified from appearing or practicing before the Commission until July 28, 1990.

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 that rule, this initial decision shall become the final decision of the Commission as to each party who has not filed a petition for review pursuant to Rule 17(b) within fifteen days after service of the initial decision upon him, 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.

Max O. Regenstein
Max O. Regenstein
Administrative Law Judge

Washington, D.C.
September 20, 1989