ADMINISTRATIVE PROCEEDING
FILE NO. 3-2079

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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SECURITIES & EXCHANGE COMMISSION

In the Matter of

AUGION-UNIPOLAR CORPORATION

(2-32923)

INITIAL DECISION

Warren E. Blair
Hearing Examiner

Washington, D.C.
June 11, 1970

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AUGION-UNIPOLAR CORPORATION	:	INITIAL DECISION
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Appearances: Thomas N. Holloway and L. Keith Blackwell, for the Division of Corporation Finance.

Walter F. Wessendorf, Jr., for Augion-Unipolar Corporation.

Before: Warren E. Blair, Hearing Examiner.

This proceeding was instituted pursuant to Section 8(d) of the Securities Act of 1933 ("Securities Act") under an Order of the Commission dated July 23, 1969 ("Order") to determine whether a stop order should issue suspending the effectiveness of a registration statement filed on May 2, 1969 by Augion-Unipolar Corporation ("registrant"). The registration statement covering a proposed offering of 1,000,000 shares of registrant's common stock to be offered to the public at $10 per share became effective on May 21, 1969, by lapse of time as provided by Section 8(a) of the Securities Act. On June 12 and August 14, 1969, registrant filed post-effective amendments to its registration statement, neither of which has been declared effective pursuant to Section 8(c).

The Division's allegations, set forth in a Statement of Matters attached to the Order and supplemented by amendment on August 27, 1969, charge that the registration statement is deficient with respect to representations concerning registrant's use of proceeds from the offering, its organization and business, the remuneration of its officers and directors, and its financial condition as of March 31, 1969. In addition, the Division alleges that registrant failed to cooperate during the course of an examination and investigation being conducted pursuant to Sections 8(e) and 20(a) of the Securities Act and Section 21(a) of the Securities Exchange Act of 1934 in that registrant's president refused to produce registrant's books, records, and documents for examination by the

Division, and further that registrant's officers and directors refused to testify with respect to matters which were relevant and material to the inquiry then being conducted under Section 8(e).

Registrant appeared and participated throughout the course of the hearing in this matter. 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 Division and by registrant.

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

REGISTRANT

Augion-Unipolar Corporation was incorporated in February, 1969 under the laws of New York to engage in a business which includes inventing, manufacturing, and marketing products connected with electronics and related industries. Registrant proposes to conduct research and development for the utilization of "unipolarion" devices, but does not have present products or services. Registrant has no plant or facility for research and development and uses office space provided without charge by its president.

Walter F. Wessendorf, Jr., registrant's counsel in these proceedings, is president and a director of registrant, as well as one of its controlling stockholders. Registrant's other directors are Paul B. Fredrickson, also vice-president and treasurer, and

Paul S. Hobson, Sr., the corporate secretary.

As of March 31, 1969 registrant's authorized capital was 8,000,000 shares of common stock, of which 4,600,000 shares were outstanding. Wessendorf owned or controlled 3,380,000 of those shares, and another 1,100,000 of the outstanding shares were controlled by Fredrickson.

Registrant proposes to offer 1,000,000 shares of common stock at $10 per share through its executive officers and directors without compensation to them other than reimbursement for actual expenses incurred. Solicitation of subscriptions and sales under the offering are to be limited solely to residents of the State of New York.

MISLEADING STATEMENTS IN REGISTRATION STATEMENT.

Use of Proceeds.

Under the caption "Use of Proceeds," the registration statement estimates that net proceeds of $9,210,000 will be received if the entire offering is sold. The use of these proceeds is allocated to five categories of research and development, and proposed annual and four-year budget projections are set forth

as follows:

Research and Development	Annual Budget	Over 4 years
A. Exhaust Control	$ 560,000	$2,240,000
B. Industrial Stack	420,000	1,680,000
C. Medical and Therapeutic	400,000	1,600,000
D. Hot-Air Heating	170,000	680,000
E. Water Purification	250,000	1,000,000
	$1,800,000	$7,200,000
General Administration	500,000	2,000,000
	$2,300,000	$9,200,000

Registrant further indicates that if the offering is undersubscribed, some of the research and development will be undertaken if sufficient proceeds are received, and states that if the proceeds are insufficient for any research or development operation the company will simply pay the salaries of its officers and "allow the Company to become bankrupt."

The disclosure regarding the intended "Use of Proceeds" is entirely inadequate for the purpose of conveying material information regarding the allocation of the proceeds from the proposed offering. The five general categories referred to are no more than general areas in which the company has an interest, and do not of themselves indicate in any wise the assets to be acquired nor earmark the proceeds for specific uses. For example, although registrant

has no plant or facility, no information is furnished under "Use of Proceeds" regarding the amount to be expended before research and development can commence, nor the charges that each category in the budget must bear for those start-up costs. In short, registrant's disclosure giving the prospective investor only the allocation of proceeds that the company had made among its projects is equivalent to a statement that the proceeds will be used for general corporate purposes, a kind of disclosure that has been heretofore found by the Commission to be inadequate when, as here, it is possible for a registrant to be more specific.[1/]

The "Use of Proceeds" section is further deficient because of a failure to detail the amount of proceeds necessary for the company "to conduct some of its proposed research and development," the priority of use of proceeds if the offering is not entirely sold, the amount of proceeds below which the company would consider the offering undersubscribed to a degree that proceeds would be used for salaries and the company permitted to become bankrupt, and the maximum time during which the offering would be continued before plans for research and development would be abandoned because of undersubscription to the offering.[2/] Without such details, the

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1/ See American Finance Company, Inc., 40 S.E.C. 1043 (1962).

2/ Cf. Central Oils Incorporated, 39 S.E.C. 349 (1959); Texas Glass Manufacturing Corp., 38 S.E.C. 630 (1958).

statements made in the registration statement concerning the use of proceeds from the offering are materially misleading.

Registrant has filed additional information in its post-effective amendment No. 2 on the subject of the intended use of proceeds, but the deficiencies noted in the initial filing have not been cured. The arbitrary dollar brackets selected as cut-off points for engaging in certain activities do not provide meaningful information about registrant's intentions or probable ability to perform as represented, nor does registrant explain the bases upon which it selected those brackets nor when it intends to halt further attempts to sell under the offering after the extent of the success of the offering in the first month is determined.

Registrant's insistence that it has complied fully with disclosure requirements as to use of proceeds cannot change the fact that the representations used are bare generalities insufficient to comply with Schedule A(13) under the Securities Act requiring disclosure of "the specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, ..." That registrant's operations may be "in the field of the unknown and esoteric," is not sufficient reason for depriving investors of specific information along the lines herein indicated concerning registrant's intended use of proceeds. Nor does the fact that the Federal Government may, as registrant

asserts, apply a different standard "in the field of the unknown and esoteric regarding the defense military-industrial establishment," justify different treatment for registrant than would be accorded others contemplating offerings subject to registration under the Securities Act.

Organization and Business

The registration statement is found to be deficient in several areas covered in the section registrant has captioned "Organization and Business." Whether post-effective amendments filed by registrant have cured the deficiencies cannot be ascertained from the record because sufficient detail about the matters in question is not available to permit a determination of the adequacy of registrant's later disclosures.

The disclosure in the registration statement under the subcaption "Executive Director of Research" mentions that registrant's executive director of research, Paul B. Fredrickson, has been employed since 1963 by Edgerton, Germeshausen & Grier, Inc. ("EG&G"), is its "Manager of Nuclear Effects of the Developmental Engineering Department," and for eleven years has engaged in his own private efforts in research and development with respect to the field of unipolar ions and unipolar-ion generating devices. The registrant does not disclose the further information that an existing agreement between Fredrickson and EG&G requires Fredrickson to inform EG&G about all inventions and discoveries directly or indirectly

related to his work with EG&G and to assist EG&G to obtain patents on such inventions or discoveries for the benefit of EG&G, nor does registrant disclose that the contract also provides that such inventions and discoveries become the property of EG&G whether patented or not. Obviously the agreement should be disclosed in order that a prospective investor have the material fact before him that registrant's interest in any of Fredrickson's inventions and discoveries is subject to a possible adverse claim against those inventions and discoveries by EG&G.[3/]

Registrant's descriptions of the five inventions owned by the company and the statements describing the categories of research and the development in which it intends to operate also fall short of meeting the requirements of full and fair disclosure. The general descriptions resorted to by registrant in these portions of the registration statement do little more than serve to convey an impression that the company owns the rights to inventions that it believes will be useful in connection with the research and development to be undertaken, without providing information that would enable a prospective investor to reach an informed judgment in that regard. Lacking are informative descriptions of the devices and systems and their operations, as well as an absence of detail regarding the stages of development

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3/ Cf. United States Molybdenum Corporation, 10 S.E.C. 796, 806 (1941).

of the inventions, the specific nature of the problems which registrant refers to simply as "the factor of the unknown and esoteric" and which may preclude the success of the "exhaust control" and "industrial stack" devices, the known problems and risks attendant upon the success of each of the inventions, and the anticipated times, with the bases therefor, within which the company expects its inventions to become commercially feasible.[4/]

Additionally, the invention identified as "Emitter" and the one referred to as the "Method of Aerodynamically Ejecting Ions" which are described in highly technical terms cannot be evaluated by the average investor seeking to determine the potential uses and unusual characteristics of those inventions. Registrant's assertion that it owns an invention of a motor vehicle exhaust control device gives the impression that the device merely needs attachment to a vehicle to be operable, whereas registrant's statements relating to the "Exhaust Control" phase of its research and development refer to an intended "sophisticated adaptation" of the invention. If registrant does not plan to use the exhaust device in its present design, the anticipated changes and attendant difficulties in accomplishing those changes should be clearly

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4/ Registrant estimates development of a prototype for mass production as possible by March-July, 1970 for its exhaust control device on the assumption of concentrated research and development commencing July, 1969, but fails to give any basis for such projection.

delineated. Further, registrant's recital of the number of vehicles contributing to air pollution by exhaust emissions and the production of passenger and commercial vehicles achieved in 1968 should be revised to eliminate the erroneous implication that every vehicle on the road or coming off the assembly line represents a potential user of registrant's device. Also requiring revision is registrant's statement concerning the quantities and magnitude of the pollutants emitted from vehicles which are set forth in meaningless percentage figures which give an appearance of totalling 463%.

Further clarification is required with respect to the invention stated to be a device to control and abate pollutants from industrial stacks and chimneys. The description of the invention on page 7 of the registration statement leaves the impression that the invention is a fully developed device that the company will produce; not until the later discussion on page 9 under the subcaption "Industrial Stack" does it appear that the invention will be no more than a starting point for a control device that the company proposes to develop.

The "Medical and Therapeutic" discussion fails to indicate the type of "unipolar-ion device" the company intends to develop for use in medical treatment or therapeutic purposes, nor does it indicate the uses to which "[m]edical and other scientific reports and literature" have indicated such a device could be put. The

section also omits material facts concerning the availability of a "medical research group" competent to give the direction and evaluation needed to assure proper development of the proposed device.

Another invention claimed by registrant is a "new type of forced, hot-air heating system," but here again as with the contemplated "Industrial Stack" operation, it appears that the company proposes to develop a new device rather than rely upon the invention. Unless augmented by a description of the present stage of development of the heating system, the relationship of the invention to the proposed development, and the reasons for registrant's belief that the new system will enjoy the eleven advantages it enumerates, the sections in question are materially misleading.

Registrant's statements under "Water Purification" require additional details about the devices and systems it proposes to develop for use in water treatment and the company's capacity to carry out its plans in that regard. Without such addition, the statements made provide no facts upon which the company's ability to carry out its proposals may be assessed by a prospective investor.

Deficiencies in registrant's representations regarding its license agreements are also apparent from the record. While disclosing that the company has entered into two exclusive licensing agreements with the same licensee which provide for multi-million

dollar payments to the company by the licensee if the company succeeds in developing within four years satisfactory control devices for vehicle exhaust and industrial stack pollutants, the registration statement is silent regarding the licensee's ability to meet its financial obligations under the terms of the agreements. The testimony of the representative of the licensee establishes that the licensee does not have the financial capacity to pay the millions of dollars that are called for by the agreements without resorting to some means of raising funds from other sources. In order for an investor not to be misled, the registration statement must disclose the financial limitations of the company's licensee and detail the methods by which the licensee intends to meet its potential obligations under the licensing agreements with appropriate reference to the difficulties that the licensee may reasonably anticipate in attempting to raise the required funds.[5/]

Registrant's argument that the record does not establish that Fredrickson's employer has an interest or intention of asserting a claim against Fredrickson's inventions is beside the point. The fact is that an agreement is in existence between Fredrickson and his employer under which the latter could assert claims or rights against the former's inventions. Since that

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5/ See Mining and Development Corporation, 1 S.E.C. 786 (1936).

possibility exists, it is incumbent upon registrant to fully and accurately disclose the agreement and that risk in its registration statement.

Registrant's assertion that it has provided a "wealth of detailed information" about its inventions and "their stage of development" from which "meaningful, comprehensible information" can be obtained sufficient to permit conclusions to be drawn regarding those matters is not supported by a reading of the prospectus. In fact, the assertion is refuted by registrant's own further statement admitting that the invention referred to as the "Method of Aerodynamically Ejecting Ions" is "explained in technical language." Registrant attempts to justify the use of such technical language by arguing that an explanation would require a "treatise on higher mathematics in addition to transcendental equations." Registrant fails to appreciate that the technical language used in the registration statement cannot substitute for language understandable to the average investor which is required under the Securities Act. Complexity of an invention affords no excuse for failing to acquaint an investor with the information he needs in order to intelligently assess that invention. But beyond the example provided by registrant's description of the "Method of Aerodynamically Ejecting Ions," the generalized information supplied regarding each of the inventions upon which registrant's success is predicated does not allow an investor to

reach an informed judgment regarding the risks assumed in connection with an investment in registrant.

With respect to its license agreements, registrant argues that Schedule A(24) of the Securities Act requires a summary only with respect to "the general effect of bilateral executory contracts," and that the license agreements in question are "reversed unilateral contracts" which need not be summarized. There appears no warrant for registrant's position in this regard. The disclosure requirements of Schedule A(24) are not conditioned upon whether a contract is bilateral or unilateral, but whether it is a material contract. Here, the license agreements being material contracts fall within the ambit of Schedule A(24) and must be appropriately disclosed.

Remuneration of Directors and Officers

In connection with the remuneration of officers and directors, the registration statement sets forth that compensation of $5,000 per annum for directors and annual salaries aggregating $85,000 will be paid when active status is given to the officers and directors by declaration of the board of directors. Additionally, compensation for the company's two deputy corporation counsel is to be fixed and paid at such time as active status is accorded to them by the board of directors. There is no disclosure, however, of the circumstances and times that would be considered appropriate for declarations of active status to be made by the board of

directors. Without information from which a judgment could be reached as to when the company would become obligated to pay over $100,000 per year to its directors, officers, and deputy corporation counsel, the registration statement is materially misleading.

Registrant's post-effective amendment No. 2 does not appear to correct the noted deficiencies regarding compensation. In purporting to set forth the circumstances under which directors and officers will achieve active status and thereby receive compensation, registrant states that active status will be declared no later than one month after the commencement of the public offering or at the time the offering is fully subscribed, if that occurs earlier. It is not clear, however, what registrant's intentions are in the event that net proceeds exceed $300,000 but are less than $2,300,000 during the first month. Registrant represents that proceeds in that range will result in a deduction being made of "a projected amount sufficient to cover the salaries of the executive officers, and the compensation of the directors, and their fringe benefits. . . ," but fails to indicate the projected amount that will be set aside for such compensation so that a determination can be made of the amount to be used for that purpose

and how much for other specified purposes. Further, there is no information about registrant's intentions with respect to proceeds that may be received after the first month. For example, if net proceeds are less than $85,000 during the first month, but exceed that figure thereafter, there is no indication of the manner in which the latter proceeds will be used if they are less than the proceeds from a sale of the entire offering. Moreover, the post-effective amendments do not furnish additional information regarding the circumstances under which the deputy corporation counsel will achieve active status. It is also noted that the post-effective amendment No. 2 injects new elements of compensation for executive officers and directors which are described as "fringe benefits" and that needed information regarding the nature and allocation of those fringe benefits has been omitted. Registrant's view that it has complied with the disclosure requirements of the Securities Act in regard to remuneration of its directors and officers is therefore rejected.

Financial Statement

Registrant's balance sheet as of March 31, 1969, filed with its registration statement, is materially misleading. This results from an overstatement of registrant's assets by $45,000, the total dollar amount shown on the balance sheet for "Property" and "Organization Expense."

According to the notes to the balance sheet, the $35,000 attributed on the balance sheet to "Property" represents the values placed by registrant upon intangible property in the form of four inventions which were acquired in exchange for 3,500,000 shares of its common stock; the $10,000 shown for "Organization Expense" is derived from a bill for legal services submitted by Wessendorf which registrant paid by issuing 1,000,000 shares of its common stock to him. Neither of the items in question, therefore, represents a cash transaction of the registrant.

Rule 5A under Regulation S-X, 17 CFR 210.5A, which is applicable to the registration statement in question, provides that dollar amounts for other than cash transactions shall not be extended on financial statements, except in instances not pertinent here, for intangible property[6/] or for unrecovered promotional or development expenses.[7/] Since the dollar extensions for registrant's "Property" and "Organization Expense" did not involve cash transactions, the balance sheet was not in the form required by Regulation S-X and was materially misleading.[8/] The post-effective amendments appear to have rectified the noted deficiencies in registrant's

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6/ Rule 5A-02(13)(a), 17 CFR 210.5A-02(13)(a).

7/ Rule 5A-02(14), 17 CFR 210.5A-02(14).

8/ Strategic Minerals Corporation of America, 39 S.E.C. 798, 804, 806 (1960).

balance sheet, but those amendments do not alter the fact that when the registration statement became effective the financial statements therein were materially misleading. Registrant's argument that Rules 5A-02(13)(a) and 5A-02(14) under Regulation S-X are inapplicable to registrant's intangible property and its payment for legal services must be rejected.

REGISTRANT'S FAILURE TO COOPERATE

By order dated May 23, 1969 the Commission directed that an examination and private investigation pursuant to Sections 8(e)[9/] and 20(a) of the Securities Act and Section 21(a) of the

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9/ Section 8(e), the statutory authority under which the Division urges the issuance of a stop-order because of registrant's failure to cooperate during the course of the examination ordered by the Commission, provides:

> The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

Securities Exchange Act of 1934 be made in connection with registrant's registration statement which had become effective by then through lapse of time, and designated members on the staff of the Division as officers of the Commission for the purpose of conducting the examination and investigation. A supplementary order of May 26, 1969 designated additional Division staff members as officers for purposes of that examination and investigation.

In the course of the examination and investigation conducted pursuant to the Commission's orders of May 23 and 26, 1969, subpoenas duces tecum were issued requiring appearances by registrant, Wessendorf, Fredrickson, and Hobson before one of the designated Commission officers for the purpose of giving testimony, and requiring each of them to bring and produce specified books, papers, and documents at the time of appearance. The subpoenas called for registrant and Wessendorf to appear on May 26, 1969, for Hobson to appear the day following, May 27, and for Fredrickson's appearance on May 29. Challenging the validity of the service of the subpoena addressed to registrant and that addressed to him, Wessendorf moved to have those two subpoenas set aside, and at the same time requested a 24-hour postponement of his scheduled appearance.[10/] No formal ruling was made on the motion to set aside the two subpoenas, and no attempt

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10/ The subpoena directed to registrant was addressed: "To Augion-Unipolar Corporation by Walter F. Wessendorf, Jr."

was made by the Division to enforce those subpoenas when Wessendorf did not appear on May 26.[11/]

When Hobson appeared on May 27, 1969 in response to his subpoena, Wessendorf appeared as his counsel. Prior to Hobson's testimony being taken, copies of the Commission's order of May 23 and of the supplementary order of May 26 were examined by Wessendorf and Hobson. Upon completion of Hobson's interrogation, abbreviated after Hobson invoked his privilege under the Fifth Amendment to the United States Constitution in response to questions asked excepting those calling for his name and address, Wessendorf next appeared as counsel for Morris J. Bloomberg, registrant's New York deputy corporation counsel, also subpoenaed to testify on May 27. Following Bloomberg's testimony, the Division called Wessendorf as a witness, but ceased its interrogation when Wessendorf stated that he was claiming his privilege under the Fifth Amendment as to all questions relating to registrant or to his corporate or individual connection with registrant. On May 29 Fredrickson appeared as required by his subpoena and signed an affidavit in which he stated that with the exception of giving his name he would invoke his privilege under the Fifth Amendment to refuse to answer questions asked by the Division and would, on the same basis, refuse to produce

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11/ The Division does not contend that the nonappearance of Wessendorf on May 26 is evidence of registrant's failure to cooperate, nor is such nonappearance considered herein as evidence of a failure by registrant to cooperate.

the personal records and documents which had been subpoenaed.

Because the Division had doubts about the validity of the service of the subpoenas that called for registrant and Wessendorf to appear on May 26, two additional subpoenas duces tecum, one addressed to registrant and the other to Wessendorf, were prepared and served on Wessendorf while he was present on May 27. Registrant's subpoena called upon registrant to appear on June 5, 1969 and to produce various specified corporate books, records, and documents; Wessendorf's also required him to appear on June 5 and to produce various specified books, records, and documents in his possession or control relating to registrant. No response to the last two subpoenas was received by the Division, no appearance was made on June 5 as required by the subpoenas, nor were any books, records, or documents of registrant or Wessendorf produced as called for by the subpoenas.

It is clear from the record that registrant failed to cooperate in an examination that duly designated officers of the Commission were attempting to conduct pursuant to Section 8(e) of the Securities Act and that such failure to cooperate should be made a basis for issuance of a stop order. Regardless of any other conduct of registrant or its officers during the course of the examination conducted by the Division under Section 8(e), the failure of registrant to respond to the subpoena duces tecum duly served on May 27, 1969 which required registrant by its president to appear

on June 5, 1969 for the purpose of testifying and producing corporate books, papers, and documents establishes registrant's failure to cooperate within the meaning of Section 8(e). In addition, it appears that registrant failed to cooperate in the Section 8(e) examination when on May 27 Wessendorf claimed privilege against self-incrimination with respect to the question which was obviously being asked of him in his corporate capacity as president of registrant, whether he was "willing, either by subpoena or voluntarily, to produce for the examination of the Commission staff, the corporate books and records of Augion-Unipolar Corporation."[12/] While Wessendorf was entitled to assert his personal privilege against self-incrimination, no similar privilege existed for registrant which could be asserted on its behalf.[13/] Nor could such privilege be asserted by Wessendorf on his own behalf with respect to the corporate books and papers since "the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity."[14/]

It does not appear that the refusal of Fredrickson or Hobson to testify or produce personal documents in accordance with the

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12/ Division Exhibit 5 at 79.

13/ United States v. White, 322 U.S. 694, 699 (1944).

14/ Id.

subpoenas directed to them should be considered evidence of registrant's failure to cooperate. They were subpoenaed as individuals and had a right to assert personal privilege against self-incrimination. Registrant cannot be charged with a failure to cooperate where the Division had not clearly made known that it intended its examination to include the interrogation of Fredrickson and Hobson in their corporate as well as individual capacities. A different conclusion might well result if the subpoenas had been addressed to these officers in their corporate capacities or if they had been unequivocally so advised at the time of their examinations, but such is not the case here. It would also follow and for the same reason that as to those questions addressed to Wessendorf on May 27 which were not of a nature that he could reasonably conclude were being asked of him as registrant's agent, registrant should not be held accountable.

The Division relies upon Campbell Painting Corp. v. Reid,[15/] to support its position that the refusals of Wessendorf, Fredrickson, and Hobson to testify are proof of registrant's failure to cooperate, but under the circumstances here the cited case does not appear to be apposite. In Campbell Painting Corp., the statute in question was § 2601 of the New York Public Authorities Law which required a clause to be "inserted in all contracts awarded by a

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15/ 392 U.S. 286 (1968).

public authority of the State for work or services to provide that upon refusal of 'a person' to testify before a grand jury, to answer any relevant question, or to waive immunity against subsequent criminal prosecution, such person and any firm or corporation of which he is a member, officer, or director shall be disqualified for five years from contracting with any public authority, and any existing contracts may be cancelled by the public authority . . . ." 16/ Based upon the refusal of the company's former president, who had remained in the company's employ as an estimator, to sign a waiver of immunity in connection with his appearance before a New York grand jury investigating alleged bid rigging on public contracts, the Public Housing Authority terminated its contracts with the company and disqualified the company and its former president from doing business with the Authority for five years. In affirming the New York Court of Appeals,which denied relief to the company, the Supreme Court refused to consider the constitutionality of § 2601 of New York's Public Authorities Law or the validity of the contract provisions incorporating that section, pointing out that a corporation cannot avail itself of the privilege against self-incrimination and, therefore, cannot invoke the privilege to challenge the statute and cannot attack the validity of the contract provision which incorporated the substance of § 2601.

16/ Id. at 287.

Distinctions between Campbell Painting Corp. and the present case may be found in the thrust of the statutory provisions involved in each instance. Under the New York Public Authorities Law, the triggering act contemplated and which occurred in Campbell Painting Corp. was that of the individual and not that of the corporation which suffered because of its relationship with that person. Section 8(e), on the other hand, requires a showing that registrant failed to cooperate, and as indicated above, the burden of proving registrant's failure to cooperate is not carried without a showing that registrant's officers and directors were uncooperative while acting in a corporate capacity.

While agreeing with registrant that the refusal of Hobson and Fredrickson to testify cannot under the circumstances be regarded as evidence of failure to cooperate, the same is not true with respect to Wessendorf, who had adequate notice that he was being addressed in his corporate capacity when he was asked on May 27, 1969 whether he was willing to produce registrant's books and records. Registrant's position that Wessendorf was testifying in his personal and individual capacity throughout his interrogation on May 27 and that the Division did not then call upon him in his corporate capacity to produce registrant's books and records is not sustained by the evidence.

Also rejected is registrant's argument that Wessendorf was excused on May 27, 1969 from responding to the subpoenas which

called for his appearance and the production of registrant's books and records on June 5, 1969. The testimony of registrant's officers, Wessendorf and Hobson, that Division counsel excused Wessendorf from compliance with those subpoenas cannot be credited.

The record is clear that Division counsel was deeply interested in examining registrant's books and records, and had hoped that they would have the opportunity to do so on May 26, 1969. It is not reasonable to believe that after the service of the subpoena calling for production of registrant's books and records on May 26 was challenged and the Division had gone to the trouble of serving a second subpoena in an attempt to reach those books and records, that Division counsel would be satisfied, as contended by registrant, with no more than testimony of Wessendorf. Further appearing against the likelihood of an agreement excusing production of registrant's books and records in exchange for Wessendorf's testimony is the fact that the Division would lose documentary evidence about registrant's affairs for which oral testimony, whether supplied by Wessendorf or any other person, could not substitute. It is also unlikely, were there such an agreement, that Division counsel would inquire just before concluding Wessendorf's interrogation on May 27 whether Wessendorf was "willing, either by subpoena or voluntarily, to produce for the examination of the Commission staff, the corporate books and records of Augion-Unipolar Corporation." [17/]

17/ Division Exhibit 5 at 79.

and persist in that inquiry by further asking Wessendorf whether he proposed to honor the subpoenas requiring him to return on June 5, "[m]ore particularly, the one calling for the production of the books of Augion-Unipolar."[18/] The making of such inquiries tends not only to refute the existence of the agreement in question, but evidences the continuing interest of the Division in having registrant's books and records made available for examination.

OTHER MATTERS

Registrant is in error in its contention that only after the Commission has instituted a formal stop-order proceeding pursuant to Section 8(d) of the Securities Act may the examination of registrant under Section 8(e) take place with a stop-order being a potential consequence for failure to cooperate during such examination. The flaw in registrant's reasoning lies in its erroneous assumption that the Section 8(e) examination contemplated by the Securities Act is that which occurs at the hearing held as part of the Section 8(d) proceedings when the Division attempts to prove the allegations in its Statement of Matters. Such is not the case; the Section 8(e) examination when utilized usually precedes the institution of a proceeding pursuant to Section 8(d).[19/]

18/ Id. at 80.

19/ 1 Loss, Securities Regulation, 274-75 (2d Ed. 1961).

The clear language of Section 8(e) empowers the Commission to undertake examination of an issuer preliminary to instituting a proceeding pursuant to Section 8(d), and permits no argument with respect to its meaning in that regard. Nothing is found in the legislative history of the Securities Act nor the cases cited and relied upon by registrant supporting any other construction of Section 8(e).

Registrant's argument that the Commission and the Division are estopped in this matter from taking any action adverse to registrant's interest is entirely without merit. The record shows that Wessendorf had a pre-filing conference with the Division staff on April 7, 1969 in anticipation of a filing on behalf of registrant, and that he received comments on a draft prospectus[20/] that registrant proposed to incorporate in its registration statement. Although it appears that Wessendorf sought to have the Division staff provide comments encompassing all deficiencies in registrant's proposed filing, the record does not establish that any of the Division staff members participating in the pre-filing conference gave Wessendorf reason to believe that their comments or

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20/ Registrant attached to its Counterstatement of Proposed Findings of Fact and Conclusions and Brief in Support Thereof a 39 page prospectus dated May 1, 1969 which it asserts represents the draft reviewed at the pre-filing conference and requests that official notice be taken of the attachment under the authority of 5 U.S.C. § 556. Official notice of the attachment does not appear to be appropriate, but the attachment is accepted into the record as an exhibit to registrant's counterstatement and supporting brief.

views regarding the deficiencies noted during the conference were to be relied upon as definitive or all-inclusive or that any filing by registrant in line with what Wessendorf might have taken as the substance of the Division's views would be acceptable as compliance with the requirements of the Securities Act.

Registrant cannot by the device of soliciting assistance from the Division staff nor by any other means relieve itself of its obligation to comply with the Securities Act.[21/] As has been noted by the Commission, "[t]he burden of seeing to it that a registration statement filed with us neither includes any untrue statement of a material fact nor omits to state any material fact required to be stated therein or necessary to make the facts therein not misleading always rests on the registrant itself, and it never shifts to our staff."[22/]

CONCLUSION

It is found that in the respects set forth above the registration statement is materially false and misleading, that registrant failed to cooperate in connection with an examination being conducted pursuant to Section 8(e) of the Securities Act, and that a stop order should issue suspending the effectiveness of the registration

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21/ 4 Loss, Securities Regulation 2336 (Supp. 1969).

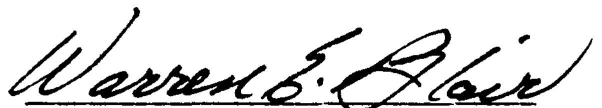
22/ Doman Helicopters, Inc., 41 S.E.C. 431, 441 (1963).

statement.[23]

Accordingly, IT IS ORDERED that the effectiveness of the registration statement filed by Augion-Unipolar Corporation be, and it hereby is, suspended.

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
Hearing Examiner

Washington, D.C.
June 11, 1970

23/ 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.