

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-1982

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

FILED

JUL 15 1970

SECURITIES & EXCHANGE COMMISSION

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In the Matter of  
  
MONTE CRISTO CORPORATION  
P. O. Box 756  
Moab, Utah 84532  
  
(24D-2811)  
  
Securities Act of 1933  
Section 3(b) and Regulation A

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INITIAL DECISION

Washington, D. C.  
July 15, 1970

Sidney L. Feiler  
Hearing Examiner

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INITIAL DECISION

APPEARANCES: Thomas E. Boyle and Dillworth A. Nebeker, Esqs.,  
of the Denver Regional Office of the  
Commission, for the Division of Corporation  
Finance.

Clarence C. Neslen, Esq., 1000 Continental Bank  
Bldg., Salt Lake City, Utah 84101,  
for Monte Cristo Corporation.

BEFORE: Sidney L. Feiler, Hearing Examiner

## I. THE PROCEEDINGS

Monte Cristo Corporation ("Issuer"), filed with the Commission on October 23, 1968, a notification and an offering circular for the purpose of obtaining an exemption from the registration requirements of the Securities Act of 1933, as amended ("The Act"), pursuant to the provision of Section 3(b) thereof, and rules set forth in Regulation A promulgated by the Commission thereunder as part of its General Rules and Regulations under the Act, with respect to a proposed public offering of 300,000 shares of its \$.10 par value common stock at \$1 per share, for an aggregate of <sup>1/</sup> \$300,000.

Thereafter, the Commission, pursuant to Rule 261(a) of the aforementioned rules, issued an order temporarily suspending the exemption. <sup>2/</sup> It is alleged in the order of temporary suspension that the notification and offering circular contain untrue statements

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1/ The Commission, pursuant to the provisions of Section 3(b) of the Act is empowered to exempt an issue of securities from the provisions of the Act where the aggregate amount at which such issue is offered to the public does not exceed \$300,000. Pursuant to this provision the Commission has adopted Regulation A governing the terms and conditions under which exemption may be available to an issuer from the full registration provisions normally required under the Act for public offerings of securities.

2/ It is provided in Rule 261(a), so far as is material herein, that the Commission may, at any time after the filing of a notification, enter an order temporarily suspending the exemption, if it has reason to believe that the notification and offering circular contain untrue statements of material facts or omissions of material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading; or, that the terms and conditions of Regulation A have not been complied with; or that the offering is being made or would be made in violation of Section 17 of the Act (the so-called anti-fraud provision of the Act).

of material facts and omissions to state material facts with respect to:

(1) The failure to disclose that David K. Tanner would participate in the offer and sale of the Issuer's stock;

(2) Failure to disclose that David K. Tanner would be paid a commission of \$.10 per share for each share of the Issuer's stock he sold;

(3) The representation that Richard Minasian, president of the Issuer, would be responsible for the sale of the issue and would undertake to sell it personally; and

(4) The representation that the officers and directors of the Issuer would undertake to sell the securities directly to the public and they would not receive a commission for the sale of the shares.

It is further alleged that the terms and conditions of Regulation A have not been complied with in that:

(1) The name and address of each underwriter and the amount of participation for each such underwriter is not disclosed as required by Item <sup>5</sup>/~~6~~ of Schedule I;

(2) In response to sub-item (b) of Item 6 of the Form 1-A notification, the Issuer made an untrue statement of material facts when it stated that none of the persons specified in paragraph (d) of Rule 252 is subject to any order, judgment or decree specified in subparagraph (2) thereof; and

(3) In response to sub-item (b) of Item 6 of the Form 1-A

notification the Issuer failed to disclose that David K. Tanner was preliminarily enjoined by the United States District Court in Salt Lake City, Utah on October 25, 1968, from further violating Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder. It is further alleged that the offering was made in violation of Section 17 of the Act for the reasons listed above.

The Issuer filed an answer to the allegations contained in the order admitting a technical violation of the Act and requested a hearing thereon. A hearing was held before the undersigned pursuant to the direction of the Commission. Prior to the hearing, counsel were given time in order to explore the possibility of arriving at a stipulation concerning the basic facts relating to the issues. A stipulation was agreed to and was submitted for the record.

(Div. Ex. 1). The Division and the Issuer were represented by counsel and were given full opportunity to present evidence. At the conclusion of the hearing the parties waived oral argument, but requested and were given an opportunity to file proposed findings and briefs in support thereof. On the basis of the entire record, including the proposed findings and briefs submitted by the parties, the undersigned makes the following:

## II. FINDINGS OF FACT AND LAW

The basic issue in this case is whether the Issuer violated provisions of Regulation A in that it failed to reveal in documents filed with the Commission its use of an underwriter in the sale of

its common stock pursuant to Regulation A and the arrangements for his compensation, thus making these documents incomplete, false and misleading.

An issuer seeking to take advantage of the provisions of Regulation A is required to file with the Commission a notification on Form 1-A as well as an offering circular to be used in the offer of the particular securities. In its notification filed with the Denver Regional Office of the Commission and filed on behalf of the Issuer by Richard Minasian, its President, for the issue under consideration here it was stated that the offering was to be made by officers of the Issuer through <sup>PERSONAL</sup>~~personnel~~ solicitation and by mail and telephone (Item 8(c)). It was further stated that none of the persons specified in paragraph (d) of Rule 252 was subject to any order, judgment or decree specified in paragraph (2) thereof.<sup>3/</sup>

In the offering circular which was used to sell the offering it was stated:

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3/ It is provided in Rule 252(d) (in pertinent part) that,  
"No exemption under this regulation (Regulation A) shall be available for the securities of any issuer, if. . .any underwriter of the securities to be offered, . . . -

(2) "Is subject to any order, judgment or decree of any court of competent jurisdiction temporarily or permanently enjoining or restraining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer or investment adviser;"

"All sales will be attempted directly by the Corporation's directors and officers. It is estimated that the expenses of the sale will not exceed 10¢ per share and depending on the success of the sale, may be somewhat less." (p. 5)

In a section headed "UNDERWRITING AGREEMENTS" it was further stated:

"There is no underwriter or agreement involved in connection with the sale of the securities in this offering because, as previously stated, the Corporation through its officers intends itself to undertake to sell these securities directly to the public. Mr. Minasian, President of the Corporation, will be the principal person engaged in selling these securities.

In view of the fact that there is no underwriter, it should be clearly understood that there is no representation herein made or implied that the Corporation or its officers can or will complete the sale of all of the securities registered herein and offered hereby." (p. 6)

It is undisputed that the Issuer commenced the offering of 300,000 shares of its common stock at \$1 per share in claimed reliance on Regulation A on February 5, 1969, and completed that offering on February 17. David K. Tanner was employed by Minasian to help sell these shares and he sold 245,000 shares to approximately 98 members of the public and received a check in compensation for his services at the rate of 10¢ per share sold or \$24,500 (Div. Ex. 5). It is also undenied that the arrangements for the employment of Tanner and his compensation were not disclosed in the notification or offering circular filed in connection with this issue. At all relevant times Tanner was subject to an injunction obtained against him by

the Commission of the kind specified in Rule 252(d)(2)<sup>4/</sup> and no exemption under Regulation A was available for these securities referred to herein if Tanner was an underwriter of the securities to be offered.

It is provided in Rule 251 that the term "underwriter" shall have the meaning given in Section 2(11) of the Act. It is provided in the Act in the above Section in relevant part that

"The term 'underwriter' means any person who. . . sells for an issuer in connection with, the distribution of any security. . ."

The term "issuer" includes every person who issues or proposes to issue any security (Section 2(4)). Under these provisions Tanner was an underwriter within the meaning of the Act.<sup>5/</sup>

Richard Minasian, President and Treasurer of the Issuer since 1954, was the sole witness at the hearing. He testified that he had a slight acquaintanceship with Tanner, whom he knew as a registered representative for a broker, until January 1969. During that month Tanner saw Minasian several times. Tanner inquired how Minasian intended to sell the securities which were the subject of the Regulation A filing. Minasian at first was noncommittal, he

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<sup>4/</sup> (Div. Ex. 2). This was an order of preliminary injunction filed in the United States District Court, Central Division, for the District of Utah on October 28, 1968. A final judgment of permanent injunction against Tanner was filed on December 3, 1969 (Div. Ex. 3).

<sup>5/</sup> American Gyro Company, 1 S.E.C. 83, 93 (1935); Free Traders, Inc., 7 S.E.C. 913, 922 (1940); Automatic Telephone Dialer, Inc., 10 S.E.C. 698, 703 (1941).



testified, because he had not yet formulated final plans for the marketing of the issue and was talking to a number of prospective underwriters. Finally, towards the end of the month when Minasian was not able to obtain the services of a broker to act as an underwriter he told Tanner that he could participate in the selling of the issue if he obtained an appropriate license from the State of Utah.

According to Minasian, Tanner showed him a printed form entitled "Agent Application for Registration to the Utah Securities Commission Department of Business Regulation," and asked him to sign it. Minasian testified that he did sign the document below the paragraph headed "BROKER-DEALER (ISSUER) RECOMMENDATIONS OF AGENT -- I hereby certify that the applicant whose name appears on this application is honest, truthful, and of good reputation, and recommend that registration be granted." In all other respects, Minasian testified, the application was blank when he signed it. According to Minasian he had followed this procedure once before and relied on officials of the Utah Securities Commission to take care of any problem which might arise in the course of issuing a license to the particular applicant. The application was received by the Utah Securities Commission on January 30, 1969 and does contain information on the injunction issued against Tanner.

Minasian did learn from a representative of the Utah Securities Commission that Tanner had had some problems with the

Securities and Exchange Commission but a license was issued to Tanner to work exclusively for the Issuer, subject to the limitation that he work under the personal and close direction of Minasian.<sup>6/</sup>

Minasian was hospitalized from February 7 to February 12, 1969 and while some indications of interest were obtained during that period, the selling campaign for the issue commenced on February 14 and, as previously noted, it was completed within a few days with Tanner selling 245,000 of the 300,000 shares.

Contentions of the parties; Conclusions

It is urged on behalf of the Issuer that Minasian did not understand that Tanner was an underwriter within the meaning of the Act and that he did not know that Tanner was subject to an injunction. It is argued that there may have been a technical violation of applicable rules and regulations, but there was no intent on the part of the Issuer or its officials to circumvent them. It is also asserted that there have been no complaints from investors, that no harm has been done, and that the Issuer acted in good faith relying in part on the fact that Tanner had received a license from the State of Utah.

The burden of proving an exemption from the full registration requirements of the Securities Act rests on the person claiming the

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<sup>6/</sup> Stipulation, Div. Ex. 1, par. 7.

<sup>7/</sup> exemption. Requirements prerequisite for an exemption must be strictly complied with. Intent to violate the Act, knowledge of a violation, or good faith efforts to comply with applicable requirements are not relevant to a determination of a violation of the registration provisions of the Act. <sup>8/</sup> The short answer to Issuer's contention is that since Tanner is included within the definition of "underwriter" within the meaning of the Act no exemption under Regulation A was available for this issue even if there had been <sup>9/</sup> full disclosure of the outstanding injunction against Tanner.

This is not a case where a misstatement of some fact was inadvertently made in a notification or offering circular which, under appropriate circumstances, might justify a finding that it is not necessary to enter an order of permanent suspension but, rather, it is a case where an exemption from full registration was unavailable by the specific provisions of Regulation A. Moreover, the Issuer by

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7/ S.E.C. v. Ralston Purina Co., 346 U. S. 119 (1953); Advanced Research Associates, Inc., Sec. Act Rel. No. 4630 (August 16, 1963).

8/ Herman Hanson Oil Syndicate, 2 S.E.C. 743, 746 (1937); Del Consolidated Industries, Inc., Sec. Act Rel. No. 4795, p. 3 (1965); Gold Dust Mining & Milling Company, 3 S.E.C. 55, 56 (1938); Franchard Corporation, Sec. Act Rel. No. 4710, pp. 16-17 (1964).

9/ An argument has been made that at the time the offering circular was filed with the Commission the information contained therein was true and accurate. Of course, the requirement that information be filed with the Commission necessarily includes the requirement that the information contained therein be true and accurate not only as of the time of original filing but that it remain so and that if there is a change rendering any information inaccurate or misleading that an appropriate amendment be filed. (Rule 261(a)(2) and (4); Weiss, "Regulation A under the Securities Act of 1933 - Highways and Byways," pps. 92, 99, and cases cited in note 308).

the exercise of due diligence could have taken action which would have avoided the violation found. Thus, in a letter of comment to the secretary and counsel of Issuer, dated November 7, 1968, sent by a member of the staff of the Denver Regional Office of the Commission it was stated

"Underwriting Agreements

The discussion under this caption should be expanded to disclose the principal persons who will be engaged in the selling effort and the methods they contemplate using.

It should be pointed out that the employees and agents of the company, who are engaged in the offer and sale of the company's securities, may be deemed underwriters as that term is defined in Section 2(11) of the Securities Act of 1933, as amended." (Div. Ex. 4, p. 3)

On approximately January 12, 1969, counsel for the Issuer had a telephone conversation with a member of the staff of the Salt Lake Branch Office of the Commission during which counsel was cautioned that any underwriter used would have to be disclosed in the notification and offering circular in the appropriate places (Stipulation, Div. Ex. 1, par. (6)). Also, if Minasian had refused to sign Tanner's application for registration with the Utah Securities Commission until he had an opportunity to read Tanner's answers, the latter's prior employment history, including the outstanding injunction, would have been made apparent to him. Of course, the obligation to comply with the terms and conditions of Regulation A rests on the one seeking to take advantage of it, in this case the Issuer, and it could not be delegated to anyone else, whether that person be a State official or any other person. It should be noted, in fairness, that the Issuer's

compliance with Regulation A in connection with its employment of Tanner was not before the State authorities. Finally, Minasian did have notice that there had been a problem in connection with Tanner which a representative of the Utah Securities Commission had discussed with representatives of the Commission. Here again, Minasian did not avail himself of the opportunity to inquire further but let the matter drop.

The fact that the entire issue has already been sold to the public does not warrant the withholding of a permanent order but rather is requisite because an entire issue of stock has been placed in the hands of the public in violation of the registration requirements of the Act.

The undersigned concludes that the allegations contained in the order of temporary suspension have been established and that the notification and offering circular contain incorrect statements and omissions of material facts concerning the participation of David K. Tanner in the offer and sale of the Issuer's stock, his remuneration and the participation of Richard Minasian and the officers and directors of the Issuer, all of which made the information contained therein incomplete, false and misleading. It is further found that the terms and conditions of Regulation A have not been complied with in that the name and address of each underwriter and the amount of participation of each such underwriter have not been disclosed as required by item 5 of Schedule I; that incorrect information was furnished in response to sub-item (b) of

item 6 of the Form 1-A notification in that it was stated that none of the persons specified in paragraph (d) of Rule 252 are subject to any order, judgment or decree specified in subparagraph 2 thereof, and there was a failure to disclose that David K. Tanner was subject to a preliminary injunction of the kind specified. It is also concluded that the offering therefore was made in violation of Section 17(a) of the Act by reason of the findings made herein. Accordingly,

IT IS ORDERED, pursuant to Rule 261 of Regulation A under the Securities Act of 1933, that the exemption from registration with respect to the public offering of securities made by the Issuer, Monte Cristo Corporation, in February 1969 be, and it hereby is, 10/ permanently suspended.

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10/ Under the provisions of Rule 252(c) a suspension order will bar the use of Regulation A by the Issuer for five years. However, the Issuer will still be free to offer its securities to the public if it complies with the registration provisions of the Act by filing a registration statement. Further, it may file an application for relief from such bar upon a proper showing made pursuant to Rule 252(f). Nevada Consolidated Mines Co., Inc., Sec. Act Rel. No. 4717 (August 20, 1964). While the arguments advanced on behalf of the Issuer did not warrant the relief sought; namely, vacation of the order of temporary suspension, these factors may be considered in connection with an application under Rule 252(f) (a showing of good cause that it is not necessary under the circumstances that exemption be denied). If such an application is made, the matter will be determined on the basis of the showing made at the time. However, in the opinion of the undersigned there should be a lapse of at least one year before such relief should be afforded in view of the record.

It is noted that the Issuer previously in 1955 filed a registration statement with the Commission in connection with an offering of securities (File No. 2-11860) and that no problem has arisen with relation to its compliance with all filing and reporting requirements in connection with that registration.

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 fifteen days after service thereof on him. This initial decision, pursuant to Rule 17(f) 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 this initial decision as to him. If a party timely files a petition to review or the Commission takes action to review as to a party, <sup>11/</sup> this initial decision shall not become final as to that party.

*Sidney L. Feiler*

Sidney L. Feiler  
Hearing Examiner

Washington, D. C.  
July 15, 1970

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11/ All contentions and proposed findings have been carefully considered. This initial decision incorporates those which have been found necessary for incorporation therein.