ADMINISTRATIVE PROCEEDING
FILE NO. 3-2182

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

BIRKENMAYER & COMPANY, INC.	File No. 8-4645
WILSON C. BIRKENMAYER	
ARNOLD L. GREENBERG	
KATZENBERG, SOUR & COMPANY	File No. 8-214
GEORGE B. SOUR	
LEE J. SPIEGELBERG	
LEONARD C. KLINE	
FRANCIS I. duPONT & COMPANY	File No. 8-510
JERRY P. OAKLEY	
JOHN F. COUGHENOUR	
HERBERT L. WITTOW d/b/a WITTOW & COMPANY	File No. 8-5933

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SECURITIES & EXCHANGE COMMISSION

INITIAL DECISION

(Private Proceeding)

Washington, D.C.
October 9, 1970

David J. Markun
Hearing Examiner

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APPEARANCES: Joseph F. Krys (Assistant Regional Administrator, Denver Regional Office), Dilworth A. Nebeker, and H. Michael Spence, for the Division of Trading and Markets.

Joseph C. Daley, of Mudge Rose Guthrie & Alexander, New York, New York, for respondent Coughenour.

Donald P. Shwayder, of Rothgerber, Appel & Powers, Denver, Colorado, for respondent Wittow.

BEFORE: David J. Markun, Hearing Examiner

THE PROCEEDING

This private, consolidated proceeding was instituted by an order of the Commission dated October 8, 1969, against eleven respondents pursuant to Sections 15(b), 15A and 19(a) of the Securities Exchange Act of 1934 ("Exchange Act"). Prior to the conclusion of the evidentiary hearing[1/] settlement offers submitted by nine of the respondents were accepted by the Commission.[2/] Accordingly, this initial decision has application only to the remaining two respondents, John F. Coughenour and Herbert L. Wittow. The remaining parties have filed proposed findings, conclusions and supporting briefs pursuant to Rule 16 of the Commission's Rules of Practice. The findings and conclusions herein are based upon the record and upon observation of the demeanor of the various witnesses.

FINDINGS OF FACT AND LAW

General

The violations alleged to have been committed by respondents Coughenour and Wittow, respectively, involve distinct provisions of the securities laws, arose out of separate securities transactions, and have no factual nexus with one another.[3/]

1/ The hearing was held in Denver, Colorado, on April 27-30 and on May 18, 1970.

2/ Securities Exchange Act Release No. 8884, May 15, 1970.

3/ The two are respondents in the same proceeding because the order for proceeding consolidated a large number of respondents whose various alleged violations involved transactions in the stock of one particular issuer.

Coughenour's Violations of Section 5(a) and 5(c) of the Securities Act of 1933

Respondent John F. Coughenour ("Coughenour") is alleged to have violated the registration requirements of Section 5(a) and 5(c) [4/] of the Securities Act of 1933, as amended ("Securities Act") by selling via jurisdictional means 60,000 shares of the stock of Worldwide Energy Company, Ltd. ("Worldwide") for a customer as to which stock no registration statement under the Securities Act had been filed or was in effect. It is also alleged that in so doing he aided and abetted violations of the mentioned provisions by others.

During the times material in this proceeding Coughenour was associated with Francis I. duPont & Company ("duPont") [5/] and employed as a registered representative in its Denver, Colorado, office.

During the early part of 1968 Coughenour sold for a customer, Doyle H. Baird ("Baird"), a total of 60,000 shares of Worldwide stock, as follows:

Trade Date	No. of Shares Sold	Price	Amount
1/15/68	9,000	4-3/8	$ 39,375
1/15/68	1,000	4-3/8	4,375
1/16/68	10,000	4-3/8	43,750
1/18/68	10,000	4-3/8	43,750
1/23/68	10,000	4-3/8	43,750
3/29/68	10,000	3-1/2	35,000
4/15/68	10,000	4-3/8	43,750
	60,000		$ 253,750

4/ Under Section 5(a), unless a registration statement in in effect, it is unlawful to sell or deliver a security by use of the mails or the facilities of interstate commerce. Under Section 5(c) it is unlawful under such circumstances and by such means to offer to sell or offer to buy any security.

5/ The duPont firm is a limited partnership with principal offices at 1 Wall Street, New York, New York, has been registered as a broker-dealer pursuant to Section 15(b) of the Exchange Act since 1940, and is a member of the New York, American, Midwest and numerous other exchanges and of the NASD.

The shares were offered, sold, and delivered, through duPont, to Birkenmayer & Company, Inc. ("Birkenmayer")[6/] and the record establishes clearly that the mails and interstate telephone facilities were employed in the course of making the sales.[7/]

The record also establishes that no registration statement has been filed or was in effect under the Securities Act with the Commission respecting the 60,000 shares of Worldwide sold by Coughenour for his customer, Baird. The foregoing facts establish a prima facie violation of Section 5(a) and 5(c) of the Securities Act by Coughenour.[8/] Since Coughenour acted on behalf of his employer, duPont, it is likewise evident that Coughenour aided and abetted prima facie violations by duPont.

Respondent Coughenour contends, however, that his sales of the Worldwide stock were exempted from the requirement of registration by Section 4(1) and Section 4(4) of the Securities Act.[9/] The

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6/ Birkenmayer has its principal office in Denver, Colorado, and has been a registered broker-dealer since 1955. It is a member of various securities exchanges and of the NASD. See p. 21 below.

7/ E.g., checks for the proceeds of the sale of Baird's Worldwide shares were delivered by U.S. Mail and Coughenour got quotes on Worldwide by phone from New York.

8/ In the Matter of Gilligan, Will & Co., 38 SEC 388, 391, affirmed 267 F.2d 461 (C.A. 2, 1959), cert. den. 361 U.S. 896; In the Matter of Dempsey and Co., 38 SEC 371, 374 (1958); In the Matter of Elliott and Company, 38 SEC 381, 384 (1958).

9/ Section 4(1) exempt from the provisions of Section 5 of the Securities Act "transactions by any person other than an issuer, underwriter, or dealer." Section 4(4) exempts "brokers transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders."

Division contends that neither of these exemptions is available to respondent Coughenour because he is a "dealer" within the meaning of the Section 4(1) exemption and because, pertinent to both Section 4(1) and Section 4(4), Coughenour's customer, Baird, was a statutory underwriter, having purchased his Worldwide shares from Consolidated Oil and Gas, Inc. ("Consolidated") which allegedly controlled Worldwide.[10/]

These opposing contentions require an examination into the source of the stock that Coughenour sold for Baird and of the relationship between Consolidated and Worldwide.

Consolidated is a Colorado corporation incorporated in 1952. Since 1958 Harry A. Trueblood, Jr. ("Trueblood") has been an officer, director, shareholder and a controlling person of Consolidated.

Worldwide is a Canadian company incorporated in the province of Alberta, Canada, in 1952.[11/] Between September 1965 and May 1966, utilizing convertible debentures and a tender offer, Consolidated acquired about 1,300,000 shares of Worldwide stock, which constituted over 75% of the outstanding Worldwide stock.

On December 31, 1966, Consolidated owned 63.9% of the outstanding shares of Worldwide. On July 31, 1967 Worldwide had 5,000,000 shares of authorized common stock, no par value, of which 2,597,978

10/ It is well settled that the burden of establishing the availability of an exemption from the registration requirements of the Securities Act is on the person who claims such exemption. SEC v. Ralston Purina Company, 346 U.S. 119, 126 (1953); SEC v. Culpepper, 270 F.2d 241, 246 (C.A. 2, 1959); In the Matter of Dunhill Securities Corp., et al., Securities Exchange Act Release No. 8653, at p. 7 (July 14, 1969).

11/ Until changed in 1967 the corporation's name was "Cold Lake Pipe Line Company Limited."

shares were outstanding. Consolidated owned 1,301,200 shares of the Worldwide stock on August 31, 1967 (at least 50%). On December 31, 1967, and on March 25, 1968, Worldwide had 2,598,058 shares of common stock outstanding.

By virtue of its holdings of Worldwide stock Consolidated was able to place Trueblood and two other nominees, Robert B. Tenison ("Tenison") and William M. Booth ("Booth"), on the 5-man board of directors by December, 1965. Consolidated thus became a controlling person of Worldwide.

From May 1966 until August 1968 the Board of Directors of Worldwide was composed of Trueblood, Tenison, Booth, Donald W. Brink ("Brink") and Steven Schwartz ("Schwartz"). These directors had affiliations with Worldwide and with Consolidated as follows:

Name	Affiliation With Worldwide	Affiliation With Consolidated
Trueblood	President from 12/8/65 to 12/19/66, and Chairman of the Board from the latter date to 10/9/68. A Director since 1965.	A director and chief executive officer since 1958.
Tenison	A director from 9/28/65 to the present. Vice president from 10/11/65 to 12/19/66, and president from the latter date to the present.	Vice president from 1961 to 7/1/67. Began working for firm in 1959.
Booth	A director from 12/10/65 to 1/22/69.	Vice president from August 1968 to May 1969, and President from the latter date until the present. A director since August 1968.

Name	Affiliation With Worldwide	Affiliation With Consolidated
Brink	A director from 1966 to present.	A director from 1966 through April 1, 1969.
Schwartz	A director from 1966 through 1968	(none)

In late 1967 Consolidated decided to sell off 1,000,000 of its Worldwide shares by offering them to Consolidated's shareholders at $2.15 per share on a basis that allowed the purchase of one share of Worldwide for each 4 shares of Consolidated held. By virtue of its control of Worldwide through stock ownership and membership on its board Consolidated was able to, and did, compel Worldwide to register with the Commission the 1 million shares of Worldwide that Consolidated desired to sell off. Filed on September 25, 1967, the registration statement became effective on November 1, 1967, and by December 1, 1967, the offering had been sold out to shareholders of Consolidated.

Following its sale of the 1 million shares Consolidated owned about 301,200 shares of Worldwide stock and was still the largest single shareholder of Worldwide stock.[12/] Trueblood and his minor children were at that time one of the largest shareholders.

Under a written agreement dated January 12, 1968, Consolidated gave Baird 60,000 of its remaining Worldwide shares along with other consideration in exchange for his rightsin certain oil properties in Montana. In the course of negotiating this deal Baird had made it clear that he wanted the 60,000 shares of Worldwide stock that he was to

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12/ Consolidated's remaining shares represented about 11% of the total shares outstanding.

receive to be "free trading", unrestricted stock since he intended to sell the stock, his intention being to get cash or cash equivalents out of the deal with Consolidated.[13/]

The Worldwide stock Baird received under the agreement was delivered to him within about 3 days of the January 12, 1968 agreement date in six 10,000-share certificates in Baird's name. As already noted above, Baird's sales of his Worldwide stock commenced on January 15, 1968, three days after the agreement date, and were completed by April 15, 1968.

The Division contends that in these circumstances Baird became a statutory underwriter as defined in Sec. 2(11) of the Securities Act, in that he purchased the Worldwide shares from an issuer with a view to their distribution. The record establishes clearly that Baird acquired the 60 thousand shares of Worldwide with a view to selling them publicly (rather than for investment) and that he in fact so sold them within a short time after acquiring them. He therefore took the shares with a "view to" their "distribution" within the meaning of Section 2(11). The remaining question in determining whether Biard was an underwriter is whether Consolidated, from which he purchased, was an "issuer". The last sentence of Section 2(11) defines an issuer as including "any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer." The key factual question thus becomes whether Worldwide was controlled by Consolidated at the time of the transaction

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13/ The other consideration Baird received was $100,000 in cash and 6,000 shares of Consolidated which, under the agreement, were subsequently registered so as to make them freely saleable.

with Baird in January, 1968, or whether Worldwide and Consolidated were under common control by virtue of Trueblood's being a controlling person of both.

The parties are in accord that under the decisions the question of "control" is a question of fact to be determined under the circumstances of each case,[14/] but they are in sharp disagreement over what the facts are and what inferences are to be drawn from them.

The nub of the control question here is whether in January, 1968, when Consolidated entered into its agreement with Baird, Consolidated could have compelled Worldwide to register the 60 thousand shares of Worldwide that Consolidated sold to Baird.[15/]

Respondent Coughenour concedes, as the record manifestly shows, that in September of 1967 Consolidated both had and exercised its power to compel Worldwide to register the 1 million shares of Worldwide that Consolidated desired to sell. Coughenour strongly urges, however, that following its disposition of the 1 million shares of Worldwide Consolidated lost its power to compel Worldwide to register the 301,200 shares of Worldwide that Consolidated still held.[16/]

It is concluded that the facts do not support Respondent Coughenour's

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14/ Rochester Telephone Corp. v. U.S., 307 U.S. 125, 145 (1939).

15/ SEC v. Micro Moisture Controls, Inc., 148 F. Supp. 558, 562 (S.D.N.Y. 1957), aff'd sub nom; SEC v. Culpepper, 270 F.2d 241 (C.A. 2, 1959).

16/ While not pertinent to the charges against Coughenour, the record shows that besides the sale of 60,000 shares of Worldwide in the deal with Baird, Consolidated also disposed of of all of its remaining Worldwide shares by May 16, 1968. Consolidated sold 120,000 shares through Katzenberg, Sour (see footnote 2 above) between May 3 and May 6, 1968, and 121,200 shares through Birkenmayer (see footnote 2 above), of which 26,200 shares were sold on 12-18-67 and the balance between 4-11-68 and 5-16-68. None of these shares were registered.

contention and that, to the contrary, Consolidated continued to be a controlling person of Worldwide during the period January through April, 1968, and that it in fact had the power to have compelled Worldwide to register Consolidated's remaining Worldwide shares at any time during that period. Numerous facts in the record require this conclusion.

First of all, as already noted above, Consolidated continued to be the largest single holder of Worldwide stock even after it disposed of the 1 million shares.[17/] Moreover, Trueblood and his minor children, John and Katherine, owned some 98,993 shares of Worldwide after Consolidated sold the 1 million shares. The remaining shares of Worldwide were so widely dispersed among shareholders that no effective challenge emerged to the existing Board of Directors, which continued to function without change in its membership until at least August of 1968.[18/]

Respondent Coughenour urges that it was in fact Tenison who controlled Worldwide after Consolidated disposed of the 1 million shares of Worldwide. In support of this contention he urges, _inter alia_, that as early as December 1966 Trueblood assured Tenison that Consolidated would dispose of essentially all of its shares of Worldwide; that under Worldwide's employment contract with Tenison he was given full control over Worldwide's day-to-day operations with only minimal

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17/ Control may exist through stock ownership even though owners do not hold a majority of the corporation's voting stock. _Thompson Ross Securities Co._, 6 SEC 1111, 1119 (1940).

18/ At the April 25, 1968 meeting, subsequent to the distribution of the 60,000 Worldwide shares by Baird through duPont, the then-existing directors were renominated by Trueblood and reelected by the shareholders.

direction by the Board of Directors; and that subsequent to November, 1967, Tenison was in control of the proxy machinery of Worldwide.

While the testimony is uncontradicted that Trueblood told Tenison as early as December of 1966 that Consolidated intended to divest itself of its Worldwide holdings, and the record shows that this expectation was part of the motivation for Tenison to move to Calgary in July of 1967, to take over the active management of Worldwide—he hoped to free himself and Worldwide of domination by Consolidated and Trueblood,—this intention to divest on the part of Consolidated (or at least Trueblood) is not controlling here since the question remains whether by the time the here-significant events occurred Consolidated had in fact, through stock divestment or otherwise, lost its control of Worldwide.

Under Tenison's employment agreement with Worldwide he was President and General Manager and was clearly in charge of the day-to-day operations of the Company. However, the Board of Directors set the general policies of the company, approved proposed acquisitions and disposals of major assets, reviewed and approved officers' expenses, had the power to dismiss officers, and the like. In short, the relationship between Tenison and his Board of Directors was not particularly unusual.[19] Respondent Coughenour's argument in effect amounts to an assertion that under the employment agreement with

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19/ The testimony establishes that during January-July 1968 Tenison chaired the meetings of the Worldwide Board, though the minutes showed Trueblood as presiding. However, this circumstance alone does not establish the control by Tenison that respondent Coughenour asserts he had.

Tenison the Worldwide Board had delegated or abandoned its usual and customary powers to Tenison; the record contains no support for the contention.[20]

Coughenour urges that control by Tenison is shown by the fact that on two occasions the Worldwide board voted, with Trueblood abstaining, to approve acquisitions proposed by Tenison that brought Worldwide into direct competition with Consolidated and thus presented Trueblood with a conflict-of-interest situation. On another occasion, an acquisition proposed by Tenison was defeated. It is concluded that respondent's argument lacks any substantial weight in light of the fact that Trueblood had stated as early as December of 1966 that Consolidated would liquidate its Worldwide holdings. Thus the vote on the two approved acquisitions was not necessarily a vote opposed to the interests of Consolidated. Consolidated had an interest in the well being of Worldwide until such time as its disposition of its Worldwide shares had been completed and presumably the Board considered the acquisitions would enhance Worldwide's position.

20/ The record contains no substantial evidence indicating that the Worldwide Board was any more or less active after Tenison moved to Calgary, Ontario, in July, 1967, than it had been before. In particular, Trueblood, though he on May 10, 1968, had told Tenison orally that he would resign from the Worldwide board assertedly because the proposed new acquisitions by Worldwide would bring Worldwide into the same business that Consolidated was in, and thus present Trueblood with a conflict, remained active on the Board. Thus, Trueblood attended meetings of the Worldwide Board. on February 10, 1968, April 26, 1968; May 10, 1968 and July 29, 1968. At the annual meeting on April 25, 1968 it was Trueblood who nominated the slate of directors that was elected. Moreover, Trueblood participated in Worldwide business otherwise than through attendance at Board meetings, e.g. by signing a circulated resolution of the Board as late as August 12, 1968. Trueblood

(continued)

Under all the circumstances presented by this record it does not appear that the voting of the Board members on the proposals for acquisitions is particularly significant on the question of control.

Lastly, concerning Coughenour's contention that subsequent to December 1967, Tenison controlled the proxy machinery, the short answer is that Tenison held the proxies on behalf of management, i.e. the Board of Directors, and not on his own behalf.[21/]

Although both Trueblood and Tenison testified, as noted by respondent Coughenour, that in their opinions Tenison controlled Worldwide during the times here material, it is clear from their testimony that the concept of control they had in mind in so testifying related to being in charge of the day-to-day affairs of the Company rather than to the kind of control here relevant, i.e. the power to have compelled Worldwide to register the remaining 301,200 Worldwide shares that Consolidated held.[22/] In fact, Tenison's testimony makes it clear that if Consolidated and Trueblood had wanted the shares registered they could have had that done simply by asking:

> Question: (by counsel for respondent Coughenour) "and now, if they had tried to force you to file a registration statement from January 1967 through September of 1968 would you have done it.?"

20/ (Continued) continued to draw salary (which in April, 1968 had been reduced from $12,000 to $6,000 per annum) until his resignation in October 1968. On the entire record, it is concluded that Trueblood in fact exercised a controlling influence on Worldwide and was a controlling person and part of a control group of Worldwide from December 10, 1965 until his resignation as chairman of its Board of Directors on October 9, 1968.

21/ Though the proxies were solicited in Tenison's name, they were on behalf of management (Ex. 16). At the April 25, 1968, meeting, the proxies were employed to reelect the same Board of Directors.

22/ Or the 60 thousand shares acquired by Baird, which were a part of the 301,200 shares still held by Consolidated after their disposition of the 1 million registered shares.

Answer:

" I can't answer that; really I don't know. They wouldn't have forced us to -- I mean, by arrangement we might have but --".
[Trans. pp. 569-570]

The record is quite clear that had Consolidated wanted Worldwide to register the shares here under discussion it could readily have mustered a majority on the Worldwide Board. Trueblood obviously would have voted for it.[23/] Tenison, likewise, would have voted for it both because of his close ties to Trueblood[24/] and because his self interest would have dictated his going along with any measure legally necessary to accomplish the complete disposition by Consolidated of its Worldwide shares. Booth, also, who had been put on the Worldwide Board by Consolidated and Trueblood, and who had strong ties with Trueblood[25/] would have voted with Trueblood on such an issue.[26/] Brink, who was also a director of

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23/ Evidently the only reason registration was not sought was that Trueblood on his own, without referring the question to his counsel who customarily advised him on such matters, had concluded that registration was not necessary.

24/ Tenison had known Trueblood since 1942 when they attended college together. It was through Trueblood that Tenison had become a director, vice president, and later President of Worldwide.

25/ The two were college roommates and fraternity brothers at the University of Texas. Trueblood picked Booth for appointment to the Worldwide board on the strength of Consolidated's ownership of Worldwide shares. That the close relationship between the two continued during all times here material is suggested by the fact that Booth later, in August 1968, was named vice president and a director of Consolidated and in May of 1967 became its President.

26/ This is not to suggest that on matters involving business judgment Booth or other directors would not exercise their independent judgment, as they did, e.g., on questions of acquisitions of new companies.

Consolidated, would also likely have voted with Trueblood on the issue.[27/]

Having concluded that in fact Consolidated controlled Worldwide[28/] during the times here material (January-April, 1968) it follows that Consolidated was an "issuer" within the meaning of Section 2(11) of the Securities Act. This being so, Baird, who acquired his 60 thousand shares of Worldwide from such issuer with a view to their public sale, became a statutory underwriter under Section 2(11).[29/] This fact bears critically on respondent Coughenour's claims to exemptions.

The exemption claimed by Coughenour under Section 4(1) of the Securities Act is not available to him because his was a transaction by a "dealer" within the meaning of that section. Section 2(12) of the Securities Act defines the term "dealer" to include a broker who engages for all or part of his time in the business of offering, buying selling or otherwise dealing or trading in securities issued by another person. The duPont firm, for whom respondent Coughenour worked, was clearly a dealer under this definition and the transaction therefore was not exempt under Section 4(1). There is no support for respondent Coughenour's contention that the definition of "dealer" in Section 2(11) does not apply to the term "dealer" as used in Section 4(1).

27/ Although Brink was on the Worldwide board as a representative of the interests of Central Securities, a major shareholder of Worldwide, and not because of his connection with Consolidated, there is nothing in the record to indicate that the interests of Central Securities were such that to protect them Brink would have had to oppose registration of the Consolidated shares had Trueblood et al proposed such registration.

28/ The record also establishes that both were under common control in view of the relationship of Trueblood to each and the common directorships.

29/ SEC v. Saphier, et al., 1 SEC Jud. Dec. 291 (S.D.N.Y. Dec. 19, 1936).

30/ See Loss, Securities Regulation, Vol. II, p. 558, 2d Ed.

Nor can Coughenour rely on any exemption under Section 4(1) of his principal, Baird, since Baird, as concluded above, was a statutory underwriter and therefore himself not entitled to an exemption under Section 4(1).[31/]

Respondent Coughenour's claim to exemption under the terms of Section 4(4) of the Securities Act on the theory that he only executed his customer's unsolicited sales order fails for the reason that Baird was not just an ordinary customer[32/] but was, as concluded above, a statutory underwriter. In a series of releases the Commission has emphasized that Section 4(4) does not exempt brokers executing sales by underwriters.[33/]

The Commission's Rule 154 under the Securities Act, in which the Commission defined the term "brokers' transactions" as used in Section 4(4) in connection with transactions by a broker acting as agent for a controlling person is inapplicable to the factual situation here presented since the respondent broker here sold for a statutory underwriter (Baird) rather than for a controlling person. There is at present no rule comparable to Rule 154 covering sales by a broker for a customer who turns out to have been a statutory underwriter.

31/ In view of this conclusion it is unnecessary to consider whether Coughenour would, in any event, be entitled to rely upon an exemption of Baird's if Baird in fact had one.

32/ Baird's 60,000 shares represented 2.3% of the outstanding shares of Worldwide.

33/ See Securities Act Releases 4445, 4669, 4818, 4997.

The recent "Wheat Report" 34/ comments on this disparity in treatment of unsolicited brokers' sales for controlling persons as compared with such sales for underwriters and proposes a solution through rule broadening as follows:

> "Under the present Rule 154, if the broker selling for the account of a controlling person is unaware of circumstances indicating that his principal is engaged in making a distribution, the broker escapes liability even though his principal may have violated the '33 Act.[Citing U.S. v. Wolfson, C.C.H. Fed. Sec. L. Rep. (current) para. 92,328 (C.A. 2, December 27, 1968).] If, however, the broker sells securities for the account of a shareholder who is, in fact, an underwriter of the securities under Section 2(11), the broker, however innocent, is also an underwriter. No rule exists which grants the broker absolution in such a case. It is the Study's recommendation that Rule 154 be revised to protect a broker under both sets of circumstances if, after reasonable inquiry of his customers, he has no grounds for believing and does not believe that the customer's sale amounts to a "distribution" under Rule 162."

Respondent Coughenour argues, in effect, that his was a "brokers' transation" covered by the exemption in Section 4(4) so long as he can show that he made due inquiry of his customer Baird and reasonably concluded that Baird was not an underwriter or involved in a distribution. While the law is otherwise, as concluded above, where, as here, the broker's customer is an underwriter, the defense would fail even if the law were as contended by respondent (as it would be, for example, if the broadened Rule 154 suggested by the "Wheat Report" were in effect) because the record establishes that in fact Coughenour failed to make due inquiry.

34/ Disclosure to Investors (the "Wheat Report"), CCH No. 5213, p. 224 (1969).

At the time the initial sale was executed for Baird, Coughenour had no knowledge of Worldwide. He asked Baird if the stock was free to sell and was assured that it was. Coughenour didn't ask Baird how many shares he held or how he acquired them. He made no effort to ascertain how many shares of the stock were outstanding. On January 11, 1968, a day before the first transaction, Baird's attorney, H. Harold Caulkins ("Caulkins") phoned Coughenour. While Caulkins had no recollection as to what the call was about,[35/] Coughenour testified that in the course of the call he asked Caulkins if Baird's Worldwide stock was free to sell and was assured that it was. Caulkins testified that at that time he had made no sufficient inquiry to have enabled him to give a legal opinion on the free tradeability of the stock but that he had been told by Douglas Hoyt ("Hoyt"), who represented Consolidated in the negotiations with Baird, that it was free to sell. It is concluded that Coughenour did inquire of Caulkins whether the stock was free to sell and that Caulkins responded not by giving a legal opinion of his own but merely by reporting that Hoyt[36/] represented the stock as freely saleable.

Since the transactions involved large units of a stock unfamiliar to Coughenour, he was not entitled to rely upon the self-serving statement of his customer[37/] or upon the belief of Hoyt as related by

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35/ His records showed that he placed a call to Coughenour on that date on behalf of his client, Baird, whom he represented in Baird's transaction with Consolidated.

36/ Hoyt was an officer of Consolidated. Though an attorney, he was not the attorney whom Trueblood and Consolidated consulted on such questions.

37/ SEC v. Mono-Kearsarge Consolidated Mining Co., 167 F. Supp. 248 (D. Utah 1958).

Caulkins. As stated in Securities Act Release No. 4818, respecting Rule 154:

> "The broker is at least obligated to question his customer to obtain facts reasonably sufficient under the particular circumstances to indicate whether his customer is engaged in a distribution or is an underwriter."

The facts that Coughenour customarily traded relatively large quantities of stock for Baird and that Baird had been a customer of his for many years and that Baird was a substantial investor with a good reputation do not excuse Coughenour's failure to have made more diligent inquiry under all the circumstances present here.[38/]

Section 15(b)(7) of the Securities Exchange Act of 1934 ("Exchange Act"), as amended, and Section 15(b)(5)D and E referred to therein, require that a violation by a person associated with a broker-dealer shall have been wilful if sanctions are to be imposed against him. It is well established that a finding of wilfulness under Section 15(b) of the Exchange Act does not require an intent to violate the law and that it is sufficient that a respondent intentionally engaged in conduct which constitutes a violation.[39/] By this test Coughenour's violation of Sections 5(a) and 5(c) of the Securities Act was clearly wilful.[40/]

38/ A respondent is held to have knowledge of those facts which he could have obtained on reasonable inquiry. He is not entitled to rely on self-serving statements of sellers. He cannot close his eyes to obvious signals. SEC v. Mono-Kearsarge Consolidated Mining Co., 167 F. Supp. 248, 259 (U.S.D.C. Utah, 1958). In failing to make due inquiry Coughenour ignored the instructions available to him in duPont's office procedures manual (Ex. 45), which he never consulted in the course of making the sales for Baird.

39/ Dunhill Securities Corporation, Exchange Act Release No. 8653, July 14, 1969; Tager v. SEC, 344 F.2d 5, 8 (C.A. 2, 1965) and cases there cited.

40/ Coughenour's testimony establishes that he knew he was selling Worldwide (Continued)

Respondent Coughenour argues that to impose on him the burden of proving that Sections 5(a) and 5(c) of the Securities Act have not been violated would constitute prejudicial error in view of the denial of his motion for a more definite statement and for a pre-hearing conference.

The motions referred to were filed on April 24, 1970, with the hearing scheduled to commence on Monday, April 27, 1970. They were therefore denied as not timely filed. Respondent does not suggest that the denial of these motions precluded his presenting a proper defense and the record establishes there was no such prejudice. As to the burden of proof, it is clear, as developed above, that the Division has the burden of proving a violation whereas the respondent has the burden of establishing any applicable exemption. Actually, the conclusions reached above that the exemptions claimed under Section 4(1) and Section 4(4) of the Securities Act are unavailable to respondent Coughenour do not turn upon any question of who has the burden of proof. On the critical issues of Consolidated's control, Baird's status as an underwriter, and other matters relevant to availability of the exemptions, the record affirmatively establishes through evidence (most of which the Division introduced) the facts leading to the conclusion that the exempting sections are not available to respondent Coughenour. Thus, Consolidated's control is affirmatively established by the evidence and not because of any failure by Coughenour to show the absence of control.

40/ (Continued)
stock for Baird and that he knew or should have known that the stock was unregistered since no section 10 type prospectus was delivered in connection with the sales.

Wittow's Violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 Thereunder.

Respondent Herbert L. Wittow ("Wittow"), doing business as Wittow & Company, is charged with having wilfully violated, and with having wilfully aided and abetted violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder[41/] by actions under an agreement with Birkenmayer & Company, Inc. ("Birkenmayer") and Arnold L. Greenberg ("Greenberg"), its vice president, whereby Wittow ostensibly purchased stock for its own account from customers of Birkenmayer while in fact the purported purchasers were subject to an immediate buy-back agreement by Birkenmayer; the stock was sold at prices below the prevailing market price; and secret profits were derived from the transactions by Wittow and Birkenmayer. It is further alleged that the existing arrangement and its attendant circumstances were not disclosed to the selling customers.

Wittow, whose office is in Denver, Colorado, has been registered as a broker-dealer pursuant to Section 15(b) of the Exchange Act since 1957 and is a member of the NASD.

Birkenmayer, a corporation whose principal office is in Denver, has been registered as a broker-dealer since 1955 and is a member of the Pacific Coast, Midwest, Philadelphia-Baltimore-Washington, and Salt Lake Stock Exchanges, the New York Produce Exchange and the NASD.

41/ Section 10(b) as here pertinent makes it unlawful for any person to use or employ in connection with the purchase or sale of a security any manipulative device or contrivance in contravention of rules and regulations of the Commission prescribed thereunder. Rule 10b-5 defines manipulative or deceptive devices by making it unlawful for any person in such connection: "(1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of

At the times here material Greenberg was Vice President of Birkenmayer and its principal trader.

Between February 1, 1968 and June 25, 1968, Birkenmayer, through Greenberg, acting as principal or agent, executed sales of stock of Worldwide for the account of Harry A. Trueblood, Jr., and his two minor children, John and Katherine, as follows:

Trade Date	Name of Account	No. of Shares	Broker acting as Principal or Agent
2/1/68	Harry	10,000	P
3/18/68	Harry	2,000	A
4/1/68	Harry	1,000	A
4/1/68	John	2,000	A
4/1/68	Katherine	2,000	A
4/18/68	John	5,000	P
4/18/68	Katherine	5,000	P
4/23/68	John	3,920	P
4/23/68	Katherine	3,920	P
6/10/68	Harry	5,000	P
6/11/68	Harry	5,000	P
6/11/68	Harry	5,000	P
6/11/68	Harry	10,000	P
6/14/68	Harry	6,000	P
6/17/68	Harry	4,000	P
6/17/68	John	2,114	P
6/17/68	Katherine	2,114	P
6/25/68	Harry	493	P
		74,561	

Between December 18, 1967 and May 16, 1968, Birkenmayer, through Greenberg, acting as principal or agent, executed sales of Worldwide stock for the account of Consolidated as follows: 42/

Trade Date	No. of Shares	Broker acting as Principal or Agent
12/18/67	26,200	P
4/11/68	10,000	A
4/18/68	10,000	A

41/ (Continued)
the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . . ."

42/ The Worldwide stock sold by Consolidated at Birkenmayer was part of the 301,200 shares of Worldwide remaining after the November 1967 1,000,000 share offering.

Trade Date	No. of Shares	Broker acting as Principal or Agent
4/24/68	10,000	P
4/25/68	11,600	A
4/26/68	16,100	A
4/26/68	1,600	A
4/29/68	10,700	A
5/1/68	4,100	A
5/2/68	1,100	A
5/3/68	4,800	A
5/16/68	15,000	A
	121,200	

A number of the foregoing sales of Worldwide (or portions thereof) which Trueblood had directed be handled as agency sales, and which were confirmed 43/ as agency sales to the sellers, were sales made to Wittow. 44/ In connection with each of these sales to Wittow, Greenberg, on behalf of Birkenmayer, entered into an oral agreement with Wittow, whereby Wittow agreed to purchase all or a portion of the Worldwide stock being sold as principal with the understanding that Birkenmayer would repurchase the stock from Wittow within a few days at a higher price. Pursuant to these arrangements confirmations were exchanged

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43/ Confirmations were exchanged by mail.

44/ These included the sales on 4-1-68 of 1,000 shares for Harry, 2,000 shares for John, and 2,000 shares for Katherine and all or portions of the amounts sold for Consolidated on the following dates: April 11, 1968, April 18, 1968, May 1, 1968, May 3, 1968, and May 16, 1968.

between Birkenmayer and Wittow reflecting the following transactions:

Sales to Wittow				Stock Repurchased by Birkenmayer			
		Price				Price	
Date	No. of Shares	Per Share	Total	Date	No. of Shares	Per Share	Total
4/1/68	5,000	4-3/8	$ 21,875	4/1/68	3,000	4-7/16	$ 13,312.50
				4/1/68	2,000	4-7/16	8,875
4/11/68	10,000	4-1/4	42,500	4/11/68	5,100	4.27	21,777
				4/15/68	4,900	4.27	20,923
4/18/68	10,000	4-3/8	43,750	4/18/68	2,000	4.40	8,800
				4/18/68	8,000	4.40	35,200
5/1/68	4,000	5	20,000	5/2/68	4,000	5.02-½	20,100
5/3/68	1,400	5	7,000	5/6/68	1,400	5-1/16	7,087.50
5/16/68	11,500	6-3/4	77,625	5/16/68	6,400	6.80	43,520
				5/17/68	5,100	6.80	34,680
TOTALS	41,900		$212,750		41,900		$214,275

In these "transactions" between Birkenmayer and Wittow the Worldwide stock was never delivered to Wittow nor was payment for the stock made by him. The sales and repurchases were simply paired off and Wittow in each transaction received a check for the difference between his "purchase" price and the price at which Birkenmayer repurchased the shares. In this series of paper transactions Wittow realized a total of $1,525.00 in what was for him a completely riskless operation.

Wittow does not normally handle "principal" transactions and had no familiarity with Worldwide prior to his dealings with Birkenmayer. Wittow agreed to the arrangements as a "favor" to Greenberg. Greenberg

selected Wittow as the partner in the arrangements because Wittow could deliver clean tax confirmations on foreign securities and because in the past he had extended Wittow minor business courtesies.

Greenberg told Wittow that the reason he needed Wittow's cooperation in the arrangement was that he had a mandatory agency sell order from the customer. Greenberg never told Wittow who his customer was and Wittow never asked or otherwise learned the identity of Greenberg's customers.[45/]

During the time that Birkenmayer was selling Worldwide stock for Consolidated and the Truebloods on a commission basis, Birkenmayer was also executing principal trades in, and was a market maker for, Worldwide.

On each of the days that Birkenmayer, acting as agent, sold Worldwide stock to Wittow, Birkenmayer, through its vice-president Greenberg, was also selling Worldwide stock as a principal trader. The volume and price of Birkenmayer sales in principal trades in Worldwide on those days and the amount and price of Birkenmayer's sales for Trueblood, his minor children, and Consolidated to Wittow on the same days were as follows:

Sales of Worldwide Stock by Birkenmayer as Principal			Sales of Worldwide Stock by Birkenmayer as Agent for Accounts of Truebloods and Consolidated	
Trade Date	No. of Shares	Price	Price	No. of Shares
4/1/68	1,100	4-3/8	4-3/8	5,000
	1,000	4-1/2		
	12,450	4-5/8		

45/ Greenberg told Wittow he had an order to sell at a limit price less commission. Greenberg also told Wittow that his customer was aware that Birkenmayer might buy back some of the stock.

Sales of Worldwide Stock by Birkenmayer as Principal			Sales of Worldwide Stock by Birkenmayer as Agent for accounts of Truebloods and Consolidated	
Trade Date	No. of Shares	Price	Price	No. of Shares
4/11/68	7,500	4-1/2	4-¼	10,000
4/18/68	12,300	4-½	4-3/8	10,000
	7,000	4-5/8		
	10	4-3/4		
5/1/68	3,080	5-1/8	5	4,000
5/3/68	1,200	5	5	1,400
	1,500	5-1/8		
5/16/68	200	6-3/4	6-3/4	11,500
	7,415	6-7/8		
	160	7		

Thus, on three of the six days that Birkenmayer, as agent for Trueblood or Consolidated, sold Worldwide stock to Wittow, all of his sales for his own principal account were at higher prices than the price he gave to Trueblood and Consolidated. On two of the other three days over 90% of Birkenmayer's principal sales were at prices higher than those given to the agency trades and on the remaining day over 50% of the principal trades were at higher prices than those given to his agency customers.

From the foregoing it is quite evident that Birkenmayer did not obtain the best prevailing market prices for its customers — the Truebloods and Consolidated — in handling the agency sales of Worldwide stock. Greenberg fixed the price of the ostensible sales to Wittow at the minimum limit price fixed by Trueblood[46/] and made no independent

46/ Before placing these orders Trueblood was told what Birkenmayer's bid and offer quotes, as a marketmaker, were. Since the Birkenmayer bid prices were below what Trueblood wanted to get for the stock (The Consolidated Board had authorized sales at not less than $4 a share) he set a specific minimum price close to the offer side of the market at which Birkenmayer was to sell the stock "less commission".

check of the market to determine the highest price he could obtain for his customers. Greenberg also fixed the prices at which Birkenmayer "repurchased" the stock.

Neither Greenberg nor Wittow ever advised Trueblood of the existence, nature, or purposes of the arrangement between Birkenmayer and Wittow or that the sham sales and repurchases were being made or had been carried out under the arrangement.47/

The arrangements between Birkenmayer and Wittow operated as a scheme to defraud in that the intended and actual result of the arrangement was to do indirectly what was prohibited directly by the customer. What purportedly were customary arm's length agency transactions were in fact sham transactions engineered for the benefit and profit of Birkenmayer and Wittow and to the financial detriment of the customers, who received less than the prevailing market price. Wittow was a knowing and indispensable participant in the scheme.

In the effectuation of this scheme Birkenmayer and Wittow, in the language of the charges, made untrue statements of material facts and omitted to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading.

47/ Although Greenberg had told Trueblood that Birkenmayer might "buy back" some of the Worldwide stock he was selling for Trueblood in the agency transactions, to which Trueblood responded that "he could not care less" so long as he received the minimum limit price he had fixed, there is nothing in the record suggesting that Trueblood in authorizing the sales wanted, or contemplated getting, anything other than the best available market price. Significantly, Greenberg never told Trueblood he had in fact bought any of the stock back or under what arrangement he did so, or that on the dates he sold to Wittow,Birkenmayer had sold at higher prices out of its trading account.

The scheme operated as a fraud and deceit upon the purchasers.

Wittow contends that since Trueblood was not his customer, there was no duty on his (Wittow's) part for full disclosure concerning the Birkenmayer-Wittow arrangement. But Wittow knew that the arrangement was in contravention and in defeasance of the customer's mandatory agency sell order and was therefore himself under a duty to make full disclosure if he was to play his (indispensable) role in the scheme [48/] and profit therefrom.

Besides violating Section 10(b) of the Securities Act and Rule 10b-5 thereunder in his own right, it is clear under the above findings that Wittow also aided and abetted violations of such provisions by Birkenmayer and Greenberg.

Wittow's violations were clearly wilful since he knew that the arrangements with Birkenmayer were contrary to the mandatory agency orders of the customer. [49/]

Conclusions

In general summary of the foregoing, the following conclusions of law are reached:

(1) Respondent John F. Coughenour made use of the mails and means and instruments in interstate commerce to offer for sale, sell, and deliver after sale the common stock of Worldwide Energy Company Ltd. for which no registration statement under the Securities Act had been

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48/ In the Matter of Moore and Co., et al., 32 SEC 191 (1951).

49/ See footnote 39 above concerning the test of wilfulness under Section 15(b) of the Exchange Act.

filed with the Commission or was in effect and thereby wilfully violated Sections 5(a) and 5(c) of the Securities Act. Coughenour also aided and abetted violations of these sections by his then employer.

(2) Respondent Herbert L. Wittow wilfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by participating with another broker in an arrangement under which there were sham purchases of Worldwide stock by Wittow from the other broker, which was acting as agent for its customer, at prices below the then-prevailing market, and subsequent "repurchases" of such securities by the other broker which failed to disclose to its customers the existence of such arrangement and its surrounding circumstances or the profits that were derived therefrom by Wittow and the other broker. Wittow also wilfully aided and abetted violations of these same provisions of law and rule by such other broker and its vice president.

PUBLIC INTEREST

The Division urges as to both respondents that "meaningful" and "substantial" sanctions be imposed in the public interest but makes no specific recommendations.

Coughenour urges that even if a violation is found suspension beyond two days is not indicated. In determining the sanction appropriate to Coughenour's violation there have been considered all the facts urged in defense or mitigation including, most notably, the fact that during 15 years employment in the securities industry he has evidently incurred no prior violations and the fact that he did make some, though by no means sufficient, inquiry into the free-tradeability of the Worldwide stock. Under all the circumstances it is concluded that a 7-day suspension

of respondent Coughenour is appropriate and sufficient in the public interest.

Wittow urges that because he is a one-man operation any suspension of his right to do business would impose especial hardship. In determining a sanction appropriate to his violation there have been considered all the mitigative factors urged and disclosed by the record, including the facts that in 12 years in the securities business he has not incurred any prior violations of the securities laws and the fact that, although he was a willing and knowing participant in the unlawful scheme, he did not originate it and, so far as appears, was motivated to participate in the arrangement more as an accommodation to Greenberg than he was by a desire to profit. Under all the circumstances it is concluded that a 14-day suspension of respondent Wittow is appropriate and sufficient in the public interest.

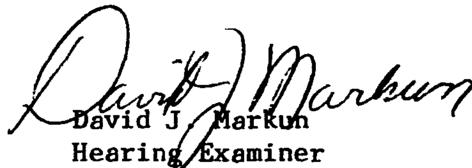
ORDER

Accordingly, IT IS ORDERED that John F. Coughenour is hereby suspended from being associated with any broker or dealer for 7 calendar days, and

IT IS FURTHER ORDERED that the registration as a broker-dealer of Herbert L. Wittow, doing business as Wittow and Company, is hereby suspended for 14 calendar days and Herbert L. Wittow is suspended from being associated with any broker or dealer during such 14-day period.

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

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not within fifteen (15) 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.[50/]



David J. Markun
Hearing Examiner

Washington, D.C.
October 9, 1970

50/ To the extent that the proposed findings and conclusions submitted by the parties are in accordance with the views herein they are accepted, and to the extent they are inconsistent therewith they are rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the issues presented.