

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-6615

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of  
REGISTRATION STATEMENT  
OF  
M-ZERO CORPORATION

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INITIAL DECISION

Washington, D.C.  
April 29, 1986

Max O. Regensteiner  
Administrative Law Judge

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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REGISTRATION STATEMENT	:	INITIAL DECISION
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APPEARANCES: James C. Kennedy and Michael A. Starr,  
of the Commission's Washington Regional  
Office, for the Division of Enforcement.

Bernard C. Lumbert, president, for  
M-Zero Corporation.

BEFORE: Max O. Regensteiner, Administrative Law  
Judge

These are proceedings pursuant to Section 8(d) of the Securities Act of 1933 ("the Act") with respect to a registration statement filed by M-Zero Corporation ("registrant"). The issues presented are (1) whether, as alleged by the Division of Enforcement, registrant failed to cooperate in the making of an examination under Section 8(e) of the Act and, if so, (2) whether a stop order suspending the effectiveness of the registration statement should issue.

Section 8(e) empowers the Commission to make an examination in order to determine whether a stop order should issue under Section 8(d) (which provides for such an order where a registration statement contains material misstatements or omissions). It further provides, in relevant part, that in making such examination, officers designated by the Commission "shall have access to and may demand the production of any books and papers of, and may administer oaths. . . to and examine, the issuer . . . or any other person, in respect of any matter relevant to the examination. . . . If the issuer . . . shall fail to cooperate, . . . such conduct shall be proper ground for the issuance of a stop order."<sup>1/</sup>

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<sup>1/</sup> As I read the Act, a stop order proceeding based on failure to cooperate rather than on alleged deficiencies in a registration statement rests on the last sentence of Section 8(e) and not on Section 8(d). Section 8(d) by its terms appears to be limited to proceedings based on false or misleading statements in a registration statement. Moreover, while the first sentence of Section 8(e) (paraphrased above) refers to Section 8(d), the last sentence (quoted above) does not. Even if I am correct in my reading of these sections, however, it does not affect the substance of the issues in this proceeding or the adequacy of the notice of those issues to registrant.

Following a hearing, the Division of Enforcement filed proposed findings and conclusions and a supporting brief. Bernard C. Lumbert, registrant's president, who represented it at the hearing, thereafter advised that because of illness he was unable to respond and he "authorized" me to proceed with issuance of an initial decision. The findings and conclusions herein are based on the preponderance of the evidence as determined from the record.

#### Findings of Fact

Registrant, which had been incorporated in August 1985, filed a registration statement on Form S-18 with the Commission's Washington Regional Office ("WRO") on October 8, 1985. The registration statement, covering a proposed offering of 5 million shares of common stock at one cent per share, did not include a delaying amendment. The WRO staff advised Lumbert, registrant's founder, president and sole employee, that such an amendment was needed. And on October 10, registrant filed an amended cover page containing a delaying amendment. Thereafter, the WRO staff advised Lumbert that the registration statement was so deficient that no comments would be provided pursuant to the informal comment procedure.

On November 15, 1985, registrant filed an amended registration statement which again did not include a delaying amendment. By letter of November 22, the

WRO advised registrant, through Lumbert, that the registration statement was "so poorly prepared" and presented such "serious disclosure problems" that no comments would be provided. The letter further stated that unless it were withdrawn, the registration statement would become effective by operation of law on December 5 and that, to avoid its becoming effective in deficient form, the WRO recommended that it be withdrawn. Lumbert was asked to advise the WRO of his intentions by December 4. In subsequent conversations with WRO personnel, Lumbert indicated that he would take some action; as of December 3, however, no action had been taken.

On that date, at the instance of the WRO, the Commission issued an Order Directing Private Examination pursuant to Section 8(e) of the Act ("the 8(e) Order"). The Order recited that staff members had reported information to the Commission tending to show that the registration statement "may" include false or misleading information concerning registrant's financial condition, its actual or prospective business operations, the identity and interests of its officers and directors and other specified matters. It stated that these alleged deficiencies, if true, could be bases for the issuance of a stop order under Section 8(d). And it directed that a private examination be made to determine whether those deficiencies

existed and designated certain staff members to conduct the examination, with authority to administer oaths and to "have access to and demand the production of any books and papers of, and examine, [registrant] or any other person."

On December 4, a staff member called Lumbert to inform him of the issuance of the Commission's order; confirming mailgrams were sent to Lumbert and to an attorney designated as registrant's counsel in the registration statement. On December 5, the registration statement became effective by operation of law, i.e., by the expiration of twenty days from the filing of the November 15 amendment.

Pursuant to the 8(e) Order, the WRO, by certified letters to registrant and Lumbert dated December 11, demanded the production of specified documents and records by December 23. The letters were ultimately returned as unclaimed. <sup>2/</sup> However, on December 17, Lumbert called the WRO. During the ensuing conversation, a staff member read the December 11 letters and attachments to Lumbert.

No documents or records were received by December

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2/ Each of the letters had been sent to the address listed for registrant in the registration statement and to two other addresses.

23. On that date, the WRO sent a further letter to Lumbert as president of registrant, enclosing the December 11 letters with their attachments. The December 23 letter, referring to Lumbert's claim in conversations with the WRO that he had been unable to pick up the December 11 letters, stated that while the WRO believed that he had not made a good faith effort to effect receipt, it was giving him and registrant until January 3 to reply to the document request. The record shows that Lumbert received a copy or copies of the December 23 letter by the next day. However, the WRO had received no documents from registrant or Lumbert by January 3.

On January 6, the WRO sent another letter to Lumbert, this time demanding that, pursuant to the 8(e) Order, he appear at the WRO on January 17 in order to testify. However, Lumbert did not appear at the WRO on that day.

On January 27, Lumbert called the WRO and agreed to appear for testimony on February 4. He was told that he was expected to produce the documents that had been previously demanded of him and registrant, and a confirming letter was sent to him.

On February 4, Lumbert appeared at the WRO. While expressing a willingness to answer questions, he repeatedly refused to be sworn. He variously stated that he had come "for an informal chat, not for a deposition under oath"

(Div. Ex. 37, p. 3); that staff counsel asking him to take the oath "got to be kidding. Are you authorized to give oaths?" (Id. at 7); that he did not see "the need to be under oath" (Id., at 10); and that "it should be obvious" to counsel if he was not "an idiot" that Lumbert would not be sworn (Id. at 15). Counsel read into the record Section 8(e) of the Act and the Commission's 8(e) Order and advised Lumbert that the staff intended to seek a stop order on the basis of his and registrant's failure to cooperate.

At the conclusion of the "hearing," Lumbert handed counsel a letter addressed to the latter. It stated, among other things, that not "a whole lot of effort" had been spent on the document request because counsel was conducting a vendetta, not an investigation; that since the registration statement had become effective on December 5, there was nothing counsel could do about it unless a "PUBLIC" investigation were conducted (capitals in original); and that the staff, having chosen not to respond (presumably with comments) to the registration statement, would not be given documents that were only being requested for harrassment.

The instant stop order proceedings were instituted on February 21, 1986.



Discussion and Conclusions

The facts recited above are undisputed. They show that notwithstanding repeated demand for the production of documents and records from registrant and Lumbert, nothing was produced. And notwithstanding repeated demands that Lumbert testify under oath, he refused to do so. Prior Commission decisions make it clear that failure of a registrant to produce its books and records during a Section 8(e) examination or the refusal of its principal officers to testify constitute a failure to cooperate within the meaning of that Section and as such are grounds for the issuance of a stop order. <sup>3/</sup>

As noted, registrant filed no proposed findings or brief. However, Lumbert was given full opportunity during the course of the hearing to present any contentions he wished to make, and he advanced a number of them. The thrust of some of the contentions is difficult to discern, but they appear to encompass the following arguments: (1) the 8(e) Order was not in fact issued or authorized by the Commission; (2) registrant and Lumbert had no duty to cooperate because the examination was private rather than public; (3) the WRO staff was

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3/ Augion-Unipolar Corporation, 44 S.E.C. 613 (1971); Blimpie Corporation of America, 44 S.E.C. 558 (1971). Cf. Decorative Interiors, Inc., 41 S.E.C. 811 (1964).

required to use a "warrant" or subpoena and could not proceed by simple demand for documents or testimony; (4) the 8(e) Order was never furnished to Lumbert; (5) the WRO staff acted improperly in not according "merit review" to the registration statement and, without alleging any improprieties, placing the burden of producing documents on registrant; and (6) registrant has become essentially defunct and has not effected and will not effect any public offering or sale of stock.

These arguments are totally lacking in factual or legal merit. The 8(e) Order in evidence, which is Division Exhibit 7, contains the Commission's seal and the attestation of the Commission's Records Officer that it is a copy of such order issued by the Commission on December 3, 1985. Lumbert's arguments seeking to cast doubt on the authenticity of the Order are nothing more than unsupported allegations. His apparent argument that a private examination does not give rise to a duty to cooperate is simply unfounded. The fact is that, in part for the protection of the examination's target, examinations like investigations are normally conducted privately.<sup>4/</sup> There is nothing in the provisions of Section 8(e) regarding failure to cooperate that distinguishes between public and nonpublic examinations. Likewise, there is nothing in that Section to indicate that staff officers conducting an examination

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<sup>4/</sup> See 17 CFR 202.5. See also Augion-Unipolar Corporation, 44 S.E.C. 613, 618 (1971).

must issue a "warrant" or subpoena rather than proceeding by simple demand for records or testimony. Lumbert's suggestion that this was an improper procedure because it precluded him from moving to quash and from knowing the penalties for noncompliance is without merit. Had he wanted to object because he deemed the document demand too broad or for other reasons, he could have expressed his objections rather than in effect thumbing his nose at the Commission. And in December 1985 Lumbert was apprised, both orally and in writing, of the provisions of Section 8(e), including the consequences of a failure to cooperate.


With respect to Lumbert's claim that he was not shown the Section 8(e) Order, the record shows that he would have been furnished a copy upon request, but that he never requested one. Moreover, at the February 4 "hearing," a copy of the Order was tendered to Lumbert, who responded that he was not interested in reading it. Staff counsel subsequently read it into the record.

Regarding Lumbert's further arguments, the question of whether and to what extent the registration statement was deficient is not before me. I have neither the authority nor the responsibility to second-guess those staff members responsible for determining how a registration statement should be processed or to go behind the Commission's 8(e) Order. Finally, registrant's assertedly

defunct status is not a reason for withholding issuance of a stop order.

On the basis of the foregoing findings and conclusions, IT IS ORDERED that the effectiveness of the registration statement filed by M-Zero Corporation is hereby suspended.

This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Commission's Rules of Practice. Pursuant to that rule, this initial decision shall become the final decision of the Commission as to each party that has not filed a petition for review pursuant to Rule 17(b) within fifteen days after service of the initial decision upon it, unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision. 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.

  
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Max O. Regensteiner  
Administrative Law Judge

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