INITIAL DECISION RELEASE NO. 261
ADMINISTRATIVE PROCEEDING
FILE NO. 3-11309

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

In the Matter of		:
		:
OTC Live, Inc.	:	Initial Decision
and Mark A. Suleymanov	:	September 30, 2004
		:
		:

APPEARANCES: John S. Yun and Robert J. Durham for the Division of Enforcement, United States Securities and Exchange Commission

Mark A. Suleymanov, pro se, and for OTC Live, Inc.

BEFORE: Lillian A. McEwen, Administrative Law Judge

SUMMARY

Respondents OTC Live, Inc. (OTC Live), and Mark A. Suleymanov, a/k/a Mark Suleman (Mark Suleymanov or Suleymanov), did not violate Sections 5(a) and 5(c) of the Securities Act of 1933 (Securities Act). This Initial Decision dismisses all charges against Respondents.

I. PROCEDURAL HISTORY

On October 23, 2003, the Securities and Exchange Commission (SEC or Commission) initiated this proceeding, pursuant to Section 8A of the Securities Act, with an Order Instituting Proceedings (OIP). Respondents then followed with their Answer. I held a one-day public hearing on April 7, 2004, in New York, New York. The Division of Enforcement (Division) called three witnesses and the Respondents, represented by Suleymanov, a non-lawyer, called two. Ten exhibits from the Division, two exhibits from the Respondents, and one joint exhibit were admitted into

evidence. The Division filed their posthearing brief and proposed findings and conclusions of law on May 14, 2004. Respondents did not file any posthearing submissions.[1]

II. ISSUES PRESENTED

The OIP alleges that the Respondents violated the registration requirements of Sections 5(a) and 5(c) of the Securities Act by offering and selling securities on the open market without a registration statement filed or in effect and without an applicable exemption. Specifically, the OIP alleges that, in exchange for certain services, the Respondents obtained unregistered stock from a control person with a view toward distributing to the public. As a result, the securities were restricted and could not be sold to the public within a year after they were acquired. When the Respondents sold the stock on the open market shortly after receiving it, the OIP concludes, those transactions constituted an illegal distribution of securities and the Respondents became participants in an illegal distribution of securities in violation of the registration requirements. The allegations in the OIP are based on the proposition that the Respondents are underwriters under the Securities Act.

If I conclude that the allegations in the OIP are true, I must then determine, pursuant to Section 8A of the Securities Act, whether a remedial sanction is appropriate.

III. FINDINGS OF FACT

The findings and conclusions herein are based on the entire record. I applied preponderance of the evidence as the standard of proof. Steadman v. SEC, 450 U.S. 91, 102 (1981). All arguments and proposed findings and conclusions inconsistent with this Initial Decision were rejected.

The Parties

OTC Live, a New York corporation formed by Suleymanov in December 1999, remains in good standing in that state. (Tr. 111-12.) The company operates a Web site, www.otclive.com. As of the hearing date, the site exists, but the company has not conducted business since 2001 and has not updated the information on the site since early 2002. (Tr. 111, 123-25.)

Suleymanov, OTC Live's president and sole owner, is a twenty-three-year-old Russian immigrant who speaks broken English and lives with his parents. (Tr. 3, 17, 109, 146.) He graduated from Staten Island College in 2001. (Tr. 109-10.) During college, Suleymanov worked as an independent contractor for Stockton Equities Group, where he conducted data entry and maintained the company's computers. (Tr. 110.) He does not hold any securities licenses. (Tr. 17, 111.) Since OTC Live's formation, Suleymanov has operated the company on his own with occasional assistance, from his brother, Roman Suleymanov, a/k/a Roman Suleman, as an unpaid consultant. His father, Arkady Suleymanov, supports him financially and allows him to operate OTC Live from the family home. (Tr. 145-46.)

[1] Citations to the transcript of the hearing are noted as "(Tr. __.)." Citations to the Division's and Respondents' exhibits are noted as "(Div. Ex. __ at __.)," and "(Resp. Ex. __ at __.)." Citations to the Division's Post-Hearing Brief is noted as "(Div. Post-Hear. Brief __.)."

OTC Live has maintained an account at the brokerage firm J.B. Oxford & Company (JB Oxford) since January 2000. (Tr. 112-13; Div. Ex. 7.) Suleymanov, who opened the account, is the sole person authorized to transfer shares to or withdraw moneys from the account. (Tr. 115; Div. Ex. 7 at 9.) First Capital International, Inc. (First Capital), is a holding company whose primary business is developing electronic home automation and video surveillance equipment and solutions. (Tr. 26.) Its stock trades publicly on the Over-the-Counter Bulletin Board under the symbol FCAI, and the company files annual and periodic reports with the Commission. (Tr. 26-27.) At all relevant times, First Capital's chief executive officer (CEO) and president was Alexander Genin (Genin). (Tr. 25-26.)

Agreement to Promote First Capital

Beginning in spring 2001, First Capital attempted to engage several investor relations firms for the purpose of promoting its stock. (Tr. 27, 29.) Typically, whenever First Capital issued a press release, investor relations firms soliciting business immediately contacted First Capital. (Tr. 28.) If First Capital decided to retain these firms, it paid the firms with its stock, which generally came from First Capital's shareholders. (Tr. 29.) First Capital paid with stock rather than cash because the company was low on funds. (Tr. 29.) At about this time, OTC Live and Genin began discussing possible promotion of First Capital's business. (Tr. 33.)

In the summer of 2001, Genin contacted one of First Capital's shareholders, First National Petroleum Group (First National Petroleum), based in Hong Kong, about hiring investor relations firms to promote First Capital's stock. (Tr. 29-31.) Genin discussed with James Sutherland (Sutherland), head of First National Petroleum, how an investor relations firm and other promoters could boost First Capital's low stock price and increase public awareness of First Capital, specifically its home automation solutions. (Tr. 30-31.) During these discussions, Genin asked First National Petroleum to release its First Capital shares so they could be used to pay investor relations firms for their promotion services. (Tr. 31-32.) By earlier design, Genin held a written power of attorney over First National Petroleum and had written authorization to buy, sell, and make trades in First National Petroleum's brokerage account at Deutsche Bank Alex Brown LLC (Alex Brown). (Div. Ex. 5 at 5-7.) For the period ending July 31, 2001, First National Petroleum had a total of 392,500 shares of First Capital in this account. (Div. Ex. 6 at 3.)

While Genin was communicating with Sutherland, he was negotiating with Roman and Mark Suleymanov at OTC Live to promote First Capital's stock. (Tr. 30-31, 33-34.) Genin and OTC Live, in particular Roman Suleymanov, exchanged e-mails, spoke on the telephone, and communicated by fax. (Tr. 33.) Over the course of these discussions, OTC Live represented that it could reach approximately 340,000 potential investors with its promotions through several investor-related Web sites and by e-mail newsletter. (Tr. 34, 73-74; Div. Ex. 2.)

The parties' discussions culminated in two non-exclusive agreements: the Third Party Advertising and Media Relations Consulting Agreement, dated June 29, 2001 (Consulting Agreement); and a one-page fax agreement titled "Goals of The Campaign," computer dated July 5, 2001 (Fax Agreement). (Div. Exs. 2, 4.) Roman Suleymanov, on behalf of Mark Suleymanov and OTC Live, and Genin, on behalf of First Capital, signed and executed both agreements. (Div. Exs. 2, 4.) OTC Live used a contract drafted by a woman in Florida who "had the good knowledge of

the SEC laws and regulations." (Tr. 116-17.) Pursuant to these agreements, OTC Live agreed to, among other things, feature, link to the home page of, and create an advertising button for First Capital on OTC Live's Web site, as well as circulate First Capital's company information by e-mail to OTC Live subscribers. (Div. Ex. 4 at 1-2.) OTC Live further agreed to promote First Capital's stock through use of company profiles, news alerts, opinion briefs, and newsletters. (Div. Ex. 2.) These promotions were scheduled to appear on certain dates throughout July 2001 and on eleven different stock promotion Web sites, including www.otclive.com, reaching 342,000 potential investors. (Div. Ex. 2.)

Genin was not happy with the actual services performed by OTC Live. He sent only half the number of shares to the company because "they didn't do anything what they promised." (Tr. 53, 67-68.) A printout of the First Capital link to the OTC Live Web site reveals a detailed description of First Capital's business, as well as a report, recommending First Capital, from Lanzet Global Securities Corporation. (Resp. Ex. 2.) The site also links to an interview of Genin and to other sources, such as SEC filings. Graphs and diagrams are also featured, but Genin did not believe enough work had been done to promote the securities. (Resp. Ex. 2.)

Genin concluded that "the only thing what they did, actually, to place information about our company on two sites, that they owned or related to both of those sites, which probably very few people even look at them." (Tr. 53.) Genin had expected OTC Live to profile First Capital "on certain Web sites on certain dates." However, he discovered that a profile had been done on only two sites (OTC Live and MicrocapFN), both owned and operated by Respondents. Most importantly, "nobody believed that [there] were 340,000 investors who received the profile, as stated in the contract." (Tr. 68, 132-33.) Genin believed that the contract meant that OTC Live would "release information to 340,000 investors. It doesn't say anything about e-mails." (Tr. 73.) Genin was therefore strongly displeased to find that investors were not specifically targeted. (Tr. 73-74.)

The information on the OTC Live sites included a report from Lanzet Global Securities Corporation that recommended First Capital stock. OTC Live had merely "picked up" this information from the First Capital site, pursuant to Genin's instructions. (Tr. 71-72, 80-84.) Respondents' Exhibit 2 contains accurate data gathered by Lanzet from First Capital. (Tr. 87.) Lanzet was also paid for its services by First Capital with unregistered shares. (Tr. 87-89.) As shown in Respondents' Exhibit 2, OTC Live published a "disclaimer" on its Web site in reference to the stock, stating that it had received 20,000 shares of First Capital stock"for the preparation and electronic dissemination of this report." (Tr. 72.)

Mark Suleymanov had paid a "college friend" $50 to interview Genin, and the interview was posted in June 2001 on the Web site, along with Bloomberg financial figures and information from the First Capital Web site that was merely copied and pasted. (Tr. 125-27.) The share price rose from $0.12 to $0.25 after the "profile" was posted. (Tr. 127-28, 131.) Genin then refused to send the remaining 20,000 shares to Mark Suleymanov, maintaining that they "didn't do anything for him." (Tr. 129.) Mark Suleymanov "formed an alliance with other Web sites, saying we will be paying you some form of payment, cash or stock, that the company gives us, to profile their company on their Web site" by cutting and pasting the same information furnished by OTC Live. These alliances, however, were not used for First Capital because the second installment was never

paid by Genin. (Tr. 165-66.) OTC Live is also unable to determine which of its subscribers purchased First Capital shares. (Tr. 169.)

The Consulting Agreement stated that OTC Live would be compensated with $10,000 worth of First Capital shares, "half free-trading stock and half restricted stock." (Div. Ex. 4 at 1.) Further, the agreement states the shares:

> shall be registered, unless an appropriate exemption applie[d], and without legend and titled in the name of OTC Live, Inc., and shall be accompanied by an opinion letter from licensed securities counsel that the shares were issued on [sic] compliance with all applicable federal and state securities regulations and in accordance with any rules promulgated by the [Commission], and that the shares may be sold at any time, at the discretion of [OTC Live].

(Div. Ex. 4 at 1.) The Consulting Agreement also provided that First Capital would defend OTC Live if any action relating to the issuance of the stock were to be brought against OTC Live. (Div. Ex. 4 at 1.)

In the Fax Agreement, Roman Suleymanov specified that the amount of compensation from First Capital was to be 40,000 shares in total: "20,000 free-trading shares [to be issued] before 'July 6' [and] 20,000 restricted shares [to be issued] before August 9." (Tr. 37-38; Div. Ex. 2.) Genin agreed to this specification. (Tr. 37-38; Div. Ex. 7.)

Payment of Stock for Services

By a June 20, 2001, fax from Roman Suleymanov to Genin, OTC Live sent the wiring instructions for First Capital. (Div. Ex. 3.) Genin was instructed to transfer 20,000 shares of its stock to OTC Live's brokerage account at JB Oxford. (Div. Ex. 3.) On July 5, 2001, Genin, on behalf of First National Petroleum, instructed Alex Brown to release electronically 20,000 of its First Capital shares to OTC Live's brokerage account at JB Oxford with a July 6, 2001, value date. (Resp. Ex. 1.) On July 12, 2001, JB Oxford recorded in the account that it had received the 20,000 shares of First Capital stock from Alex Brown. (Div. Ex. 8 at 4.)

Prior to the transfer of the 20,000 shares to OTC Live, Genin had not filed a registration statement with the Commission. (Tr. 51; Div. Ex. 1.) At that time, even though Genin expected Respondents would eventually sell the shares, he did not believe he was required to register them with the Commission. (Tr. 51, 60.) Genin represented to Respondents that the shares were "free trading shares" to be sold at anytime. (Tr. 60-61.) Genin believed that registration was unnecessary because (1) the First Capital shares were originally "purchased on the open market" by First National Petroleum and (2) were "not in certificate form." (Tr. 60-61.) At that time, Genin did not believe the shares were restricted in any way and represented such to Respondents. (Tr. 64-65.)

Despite certain covenants in the Consulting Agreement, Genin failed to provide Respondents with an opinion letter from "licensed legal counsel" stating that the "free trading" First Capital shares were registered and could otherwise be sold immediately on the open market. (Tr. 53; Div. Ex. 4 at 1.) Suleymanov never expected Genin to provide an opinion letter for the "free

trading" shares but expected an opinion letter for the 20,000 restricted shares. (Tr. 118-19.) Suleymanov, likewise, never expected Genin to register the 20,000 shares with the Commission as he accepted Genin's representation that these shares were "free trading" (i.e., already registered) and not restricted in any way. (Tr. 119, 132.) Suleymanov also never determined whether First Capital had filed a registration statement for the shares. (Tr. 121-23.)

Subsequent Sales of First Capital Stock

A short time after the transfer of shares, Suleymanov telephoned his broker at JB Oxford to confirm that the transfer was complete. (Tr. 120.) The JB Oxford broker asked Suleymanov when he would like to sell and did not express any reservations as to the marketability of the shares. (Tr. 120.) Over the Internet, Suleymanov then authorized JB Oxford to sell the 20,000 shares of First Capital stock piecemeal. (Tr. 119-20.) On July 23, 2001, OTC Live sold its first block of First Capital stock from its JB Oxford account amounting to 500 shares at $0.23 per share. (Div. Ex. 8 at 4.) Subsequent sales were conducted on August 2, 3, 20, and 21, 2001, for 450, 2,050, 13,000, and 4,000 shares, respectively, at prices ranging from $0.22 to $0.15 per share. (Div. Ex. 8 at 7.) By August 21, 2001, OTC Live no longer owned any First Capital stock. (Tr. 120; Div. Ex. 8 at 5,7.) When Mark Suleymanov gave the order to JB Oxford to sell the First Capital shares, he did not tell them whom to sell them to, and Mark Suleymanov does not know who purchased them, although he assumes they were sold on the open market. (Tr. 170-71.)

OTC Live received $3,285 ($3,077 after deducting commissions) from the sales of the 20,000 shares of First Capital stock. (Tr. 121.) A registration statement never was filed prior to any sale of the stock. (Tr. 132; Div. Ex. 1.) Suleymanov relied on Genin's opinion and that of OTC Live's broker at JB Oxford that the shares could be sold expeditiously without restriction. (Tr. 132.)

CONCLUSIONS OF LAW

Registration and 4(1) Exemption Under the Securities Act

Sections 5(a) and 5(c) of the Securities Act require registration for any sale or offering of securities through use of the mails or interstate commerce unless the offer or sale is exempt from the registration provisions. The registration requirements apply even to resales of securities by persons other than the original issuer of the securities. SEC v. Chinese Consolidated Benevolent Ass'n, 120 F.2d 738 (2d Cir. 1941). No showing of scienter, that is, mental state embracing intent to deceive, manipulate, or defraud, is necessary to establish a violation of Securities Act Section 5. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976); SEC v. Softpoint, Inc., 958 F. Supp. 846, 859-60. (S.D.N.Y. 1997), aff'd, 159 F.3d 1348 (2d Cir. 1998). Once the Division has established a prima facie case of a violation of Section 5, the burden of establishing an exemption from the registration requirements rests on the person claiming it. Robert G. Leigh, 50 S.E.C. 189, 192 & n.4 (1990) (citing SEC v. Ralston Purina Co., 346 U.S. 119 (1953)).

The issue here is whether Respondents' offer or sale of securities was, in fact, exempt from the registration requirements. An exemption from Section 5 registration is provided in Section 4(1) for "transactions by any person other than an issuer, underwriter or dealer." The intent of Section 4(1) was to place an exemption in the Securities Act for "routine trading transactions between

individual investors." Rule 144 of the Securities Act, Preliminary Note; see also Owen v. Kane, 48 S.E.C. 617, 619 (1986); H.R. Rep. 73-85, at 15-16 (1933) (discussing Section 4(1)'s distinction between distribution and trading).

The term "underwriter" is defined in Section 2(a)(11) of the Securities Act, in applicable part, to mean "[a]ny person who has purchased from an issuer with a view . . . to the distribution of any security." Suleymanov contends that the 20,000 shares of First Capital stock that he received from Genin for services, pursuant to the Consulting Agreement, were unrestricted and could be freely traded at any time. He argued at the hearing that he sold the First Capital stock through his broker in good faith reliance on Genin's and his broker's representations that the shares could be offered and sold without running afoul of the securities laws. He contended that he never intended to circumvent any applicable securities laws and that he was not an underwriter.

The Division contends that the Respondents qualify as underwriters as a result of acquiring shares of an issuer's stock with a view to selling the stock to the public; the relevant analysis, thus, is whether Respondents purchased stock from an issuer with a view to distribution. (Div. Post-Hear. Brief at 14.) The Division claims that as a matter of law Respondents were underwriters who did not qualify for exemptions. The Division concedes that Section 4(1) of the Securities Act exempts from registration all transactions by any persons other than an issuer, underwriter, or dealer. It contends, however, that because Respondents failed to argue or attempt to prove that the 20,000 First Capital shares were exempt from registration, under S.E.C v. Ralston Purina Co., 346 US 119, 126 (1953), the potential applicability of Section 4(1) of the Securities Act is now moot. (Div. Post-Hear. Brief at 10.) I disagree.

The Division makes much of the fact that Suleymanov did not raise the issue of underwriter status. It ignores the special responsibility that the administration of justice has when confronted with a pro se respondent, especially one of Suleymanov's age, experience, English proficiency, and financial situation. Justice requires that obvious issues be raised on behalf of the unrepresented accused. See Speaker v. Dep't of Educ., 13 M.S.P.R. 163 (Aug. 27, 1982) (explaining that the court may raise issues sua sponte where the appellant is pro se and "is unlikely to formulate the argument artfully"); Barolini v. Commonwealth Fin. Group, Inc., 1995 WL 581190 (Sept. 27, 1995) (explaining that when cases involve pro se litigants, it is appropriate for a presiding officer to play an active part in highlighting relevant issues developing the factual record). Moreover, Suleymanov stated at the hearing that he was not an underwriter.

Underwriters

The Division's proof as to Respondents' underwriting activities consists of the OTC Live contract and the description of the "campaign." (Div. Ex. 2, 4.) It fails to recognize what became obvious to Genin in the instant case. (Tr. 53-79.) There was no "campaign," and OTC Live did not fulfill its contract. The only Web site data in the record shows that instead of persuading buyers who were ready to purchase, OTC Live merely posted data and material from other sources on its Web site and another affiliated Web site, which reached an unknown number of browsers who accessed the sites for free. (Tr. 160-175; Resp. Ex. 2.) Thus, the sites were a mere source of information rather than for advertisement or persuasion. No touting or promotion of securities occurred in the instant case.

Respondents are not underwriters in the traditional sense of the term. See generally U.S. v. Morgan, 118 F. Supp. 621, 650-80 (S.D.N.Y. 1953). Typically, that role is played by an investment banking firm, such as Merrill Lynch or Goldman Sachs, which underwrites or insures an initial public offering when it buys shares from the issuer and, in turn, takes the risk of having to sell those shares to individual or institutional investors to recover its investment. Louis Loss & Joel Seligman, Securities Regulation 317-380 (3d ed. 1989); see also Rule 144 Notice of Proposed Rule Making, Securities Act Release No. 33-5186 (Sept. 10, 1971). Securities Act Section 4(1), however, "by its terms exempts only 'transactions' not classes of persons" and Section 2(a)(11)'s definition of an underwriter reaches "any person" who has purchased from an issuer with a view to distribution. United States v. Wolfson, 405 F.2d 779, 782 (2d Cir. 1968) (deeming brokers underwriters under the Securities Act). While the Securities Act may focus primarily on the initial offerings of securities, the statute's plain meaning also includes within its ambit so-called secondary transactions or resales of securities. Geiger v. SEC, 363 F.3d 481, 484 (D.C. Cir. 2004).

Determining underwriter status for purposes of Securities Act Section 2(a)(11) requires analysis of the unique facts of each case. See Wheaten v. Matthews Holmquist & Associates, Inc., 858 F. Supp. 753, 757 (N.D. Ill. 1994); Leiter v. Kuntz, 655 F. Supp. 725, 728 (D. Utah 1987). Sellers of securities, despite their intentions, may inadvertently become underwriters. See SEC v. Guild Films Co., 279 F.2d 485 (2d Cir. 1960); Chinese Consol., 120 F.2d 738. In Guild Films, a controlling shareholder pledged as collateral for a loan from two banks a substantial block of securities, which bore a restrictive legend on the face of the securities. When the shareholder defaulted on the loan, the banks sold some of the unregistered securities despite their knowledge of the restrictive legend proscribing such a sale. The trial court deemed the banks underwriters under then Section 2(11) of the Securities Act (now 2(a)(11)) and enjoined them from selling the securities to the public without a registration statement or valid exemption in effect. Dispositive in the Second Circuit's affirmance of the trial court's ruling was that "[each] bank knew that [it] had been given unregistered stock and that the issuer had specifically forbidden that stock to be sold." Guild Films, 279 F.2d at 490. The court found unmoving the banks' arguments that by accepting the securities in good faith they were entitled to sell the stock free of restrictions. Id. Additionally problematic for the court was that at no point did the banks ever intend to retain the stock for investment purposes upon a default by the shareholder; rather, "from [the pledgor's] prior unfulfilled promises, the banks should have known that immediate sale was almost inevitable." Id. Of course, there is no proof that Respondents in the instant case sold securities with restrictive legends on them.

There is considerable support, however, for the view that a good faith pledgee who sells unregistered shares at a foreclosure sale is not an underwriter. A.D.M. Corp. v. Thompson, 707 F.2d 25, 26-27 (1st Cir. 1983) (then-circuit chief judge Stephen Breyer disagreeing with "dicta" in Guild Films); Getz v. Cent. Bank of Greencastle, 147 Ind. App. 356 (1970) (bank did not directly or indirectly participate in the distribution of cattle feeding agreement). This support also includes a litany of SEC staff no-action letters declining to bring enforcement actions in similar good-faith-pledgee scenarios, which resulted in the sale of unregistered securities. See Russell Ranch, SEC No-Action Letter, 1995 WL 476256 (Aug. 11, 1995); Angelo K. Tsakopoulos, SEC No-Action Letter, 1993 WL 31695 (Feb. 5, 1993); Sec. Pac. Bank Ariz., SEC

No-Action Letter, 1992 WL 159159 (June 26, 1992); Albuquerque Fed. Sav. & Loan Ass'n., SEC No-Action Letter, 1987 WL 108519 (Oct. 26, 1987); Harbor Properties Inc., SEC No-Action Letter, 1983 WL 28691 (Sept. 22, 1983).

The element of good faith may also play a role in the definition. For the pledgee banks, they accept from pledgors in good faith unregistered, restricted stock as collateral for loans. When the pledgor defaults on the loan, they seek recoupment of their loan through sale of the collateral or risk losing out on the value of the loan. The good faith pledgee never intends to participate in a public distribution of unregistered securities, nor would it ordinarily know that it was participating in one—thus, the concept of an inadvertent underwriter. For Respondents, their good faith might have caused them to become inadvertent underwriters. In exchange for investor relations services, OTC Live and Suleymanov received stock from First Capital that by agreement was to "be registered, unless an appropriate exemption applie[d]," and were to be "issued [in] compliance with all applicable federal and state securities regulations." (Div. Ex. 4 at 1.) Respondents relied on the representations and contractual obligations of Genin as well as the word of JB Oxford's broker that the First Capital shares could be sold expeditiously without restriction. Although the 20,000 shares in question were transferred electronically, there is no evidence in the record, as was present in Guild Films, that the First Capital shares bore a restrictive legend, or in any way indicated that they were unregistered. In addition, I found both Mark and Roman Suleymanov credible at the hearing. Suleymanov in good faith attempted to ensure compliance with the securities laws, and he erred in unwittingly placing his trusting in Genin.

Further, the fact that Suleymanov and OTC Live intended to sell the securities as soon as they received them should bear little on the outcome of the instant case. In the good faith pledgee context, a bank realistically never intends to "invest" in the company to which it loans money. If the loan is not repaid, invariably the bank will foreclose and distribute.

I find inapposite Guild Films, wherein the court found persuasive that the banks as pledgees were well aware of the restrictions on the stock when they accepted the stock as collateral. Accord McClure v. First Nat'l Bank of Lubbock, Tex., 497 F.2d 490 (5th Cir. 1974); SEC v. Nat'l Bankers Life Ins. Co., 334 F. Supp. 444 (N.D. Tex. 1971). Other cases rely on similar grounds for deeming sellers of securities underwriters. See Geiger v. SEC, 363 F.3d 481, 486 (D.C. Cir. 2004) (seller aware affiliate had not paid for shares and therefore did not qualify for exemption); United States v. Lindo, 18 F.3d 353, 355 (6th Cir. 1994) (sellers fraudulently instructed banks to remove restrictive legends to satisfy loans); Charles F. Kirby, 79 SEC Docket 1081, 1091 (Jan. 9, 2003) (substantial block of a little-known security provided sufficient warning for the trader); Leigh, 50 S.E.C. at 195 ("customer's delivery of a large block of an obscure stock in restricted form . . . provided obvious 'red flags'" for inexperienced broker-dealer). The Respondents in the instant proceeding, however, were not afforded the luxury of such ample warnings.

The Division's Contentions

The Division was instructed at the hearing to cite controlling authority for the proposition that an Internet stock advertiser is an underwriter. (Tr. 157-59, 172-73.) The Division in its

brief relies heavily on a recent case decided by an administrative law judge (ALJ) that may contain similar facts. (Div. Post-Hear. Brief at 2, 12-13, 16-17.) In Lorsin, Inc., 82 SEC Docket 3415 (May 11, 2004), an ALJ granted the Division's motion for summary disposition, sanctioning respondents with cease-and-desist orders and disgorgement. The ALJ deemed the Web site companies and providers underwriters for purposes of Section 4(1) of the Securities Act, despite mitigating factors such as lack of restrictive stock legends and false representations from issuers that the stock was "free trading" (i.e., already registered). 82 SEC Docket at 3421-25. There was no hearing and the initial decision does not describe in any detail the contents of the Web sites or the sophistication of the parties involved. Although the facts may be similar, based on the conclusions stated herein, I respectfully disagree with the outcome and conclude that I am not bound by the decision. See Starbuck v. City & County of San Francisco, 556 F.2d 450, 457 n.13 (9th Cir. 1977) ("The doctrine of stare decisis does not compel one district court judge to follow the decision of another.").

Finally, the Division argues that Lorsin is consistent with other precedents "holding a person who receives shares from an issuer—in exchange for goods or services—with the intention of selling those shares is an 'underwriter.'" (Div. Post-Hear. Brief at 13.) This contention addresses the issue of whether, for purposes of Section 2(a)(11) analysis, Respondents' exchange of services amounted to "a purchase." That term is not defined in the Securities Act and Respondents are not typical underwriters.

An analysis of the Division's cited authorities reveals that the facts in the instant case are easily distinguishable. In Quinn and Co. v. SEC, 452 F.2d 943 (10th Cir. 1971), cited by the Division, the Tenth Circuit agreed with the Commission that White was an underwriter. He had exchanged his logging equipment and gas well interests for unregistered shares of Mountain stock with a view to resell to the public shortly after his acquisition of the securities from the president of Mountain. I find that White was deemed "a purchaser" because he exchanged a salable commodity for the shares. In the instant case, Genin and his company obtained nothing from Respondents that could be resold, because a mere service had been provided in the exchange. Similarly, in SEC v. Pig 'N Whistle Corp., 359 F. Supp. 219 (N.D. Ill. 1973), the Holiday Lodge was sold to the Pig 'N Whistle Corporation in exchange for unregistered shares of its stock. The owner of the Holiday Lodge was held to be an underwriter as a result of the transfer of a valuable commodity. In the instant case, the services of OTC Live could not be resold.

In Pinter v. Dahl, 486 U.S. 622, 639 (1988), the Court's distinction between an investor and a promoter in the context of unregistered securities turns on financial involvement, benefits from promotional activities, and the extent of involvement in the planning stages of the offering itself. In Geiger, 363 F.3d at 487, the court agreed with the Commission that a salesman was an underwriter when he sold unregistered shares and falsified documents because he found a buyer, negotiated the terms, and facilitated the resale in an unlawful distribution. In contrast, Respondents in the instant case merely disseminated facts, and the sale was consummated via a brokerage account.

Respondents Were Not Underwriters.

Based on the foregoing, I cannot conclude that OTC Live and Mark Suleymanov were underwriters when they received 20,000 shares of First Capital stock from Genin and subsequently instructed their broker to sell them. At no time were Respondents attempting to circumvent the securities laws. Based on Genin's representations, the contract, and the advice of his broker, Suleymanov reasonably believed he was in full compliance and wanted merely to be compensated for advertising First Capital stock on OTC Live's Web site. At no time did he intend to act as a conduit for unregistered First Capital stock, nor was he providing an outlet for the stock. Because the shares were not in certificate form, there is no evidence that a restrictive legend accompanied the shares provided by Genin. Under these circumstances, to conclude that these Respondents violated the registration requirements of Section 5 would be tantamount to holding a good faith pledgee in violation of Section 5 for selling collateralized stock it accepted bearing no restrictive legends, when a pledgor defaults on a loan. Such a holding would be inconsistent with precedent.

The OTC Live Web site was operated by two immigrant brothers who have difficulty reading, writing, or speaking English, let alone mastering the gray areas of the rules governing secondary distributions, which have been labeled by several legal commentators as unnecessarily complex and contradicting, and a trap for the unwary. The brothers' computer expertise allows them to cut and paste data that they post on a Web site. They operate their Web site from their family home, where Suleymanov is supported by his parents. The Web site merely provided information about a company with which Respondents had no prior history or relationship. The buy recommendation on their site was a cut and paste of a report that they had not generated. It has not been alleged anywhere in the pleadings that their conduct violated Section 17(b) of the Securities Act in any way, which requires parties to disclose fully any receipt of securities as consideration for services. Further, the Division has cited no persuasive authority for the proposition that a Web site company and its owner, providing advertising for a company in exchange for stock, thereby purchase from an issuer and become underwriters under Securities Act Section 4(1).

In short, the evidence shows that neither Respondent was an underwriter. Their relationship to the issuer was, in fact, too tangential, and the services they provided were far too removed from the ultimate purchasers of the securities that were advertised or ultimately sold. No money or physical object of value ever passed from Respondents to the issuer. The Division has not convinced me that the facts of this case necessitate a ruling that these Respondents were statutory underwriters under Section 4(1) of the Securities Act and thus in violation of Section 5.

Finally, in the alternative, if the Commission concludes that Respondents violated Section 5 of the Securities Act, a cease-and-desist order would not be appropriate. The D.C. Circuit in WHX Corp. v. SEC, 362 F.3d 854, 861 (D.C. Cir. 2004), averred that "the risk of future violation cannot be the sole basis for its imposition of [a cease-and-desist] order, as the SEC's standard for finding such a risk is so weak that it would be met in (almost) every case." The Division attempts to dispel any WHX Corp. reservations by pointing out that Respondents (1) still have an operating Web site, (2) acted willfully in not demanding a legal opinion and not

making further inquiry into the shares, and (3) need to be knowledgeable of the securities laws, despite relying on Genin and the broker.

OTC Live and Suleymanov, however, are just the sort of respondents the WHX Corp. court had in mind. They did not profit greatly from their actions, the behavior was isolated, they are unsophisticated, and the activities did not harm the public greatly. Further, Respondents' Web site has not been updated for two years and they have not made money from it since 2001. (Tr. 123-25.) Beyond the risk of future violation, the remainder of the KPMG factors used in justifying an order to cease and desist weigh in favor of Respondents. See WHX Corp., 362 F.3d at 861; KPMG Peat Marwick LLP, 74 SEC Docket 384, 436 (Jan. 19, 2001).

CONCLUSION

Based on the foregoing, I conclude that the sale of the 20,000 unregistered First Capital shares by JB Oxford from the OTC Live account was not a violation of Sections 5(a) and 5(c) of the Securities Act because the Respondents were not underwriters within the meaning of Sections 4(1) and 2(a)(11) of the Securities Act. Therefore, the allegations in the OIP must be dismissed.

CERTIFICATION OF RECORD

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I hereby certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on June 1, 2004.

ORDER

Based on the findings and conclusions set forth above, IT IS ORDERED that the proceeding against Respondents OTC Live, Inc., and Mark A. Suleymanov be, and it hereby is, DISMISSED.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Lillian A. McEwen
Administrative Law Judge