ADMINISTRATIVE PROCEED
FILE NO. 3-364

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

WALDMAN & CO. (8-11460)
SEYMOUR WALDMAN
ELLIOT ROSE
BERNARD PORTNOY
FRANK ENGELMAN
JULIUS GLADSTEIN
SAMUEL LEWIS
STUART DAVIS
LOUIS PILNICK
REUBIN EHRLICH
MARTIN A. FLEISHMAN
NORMAN B. BABAT
NORMAN POLLISKY
AARON J. GABRIEL
ALLAN HARRIS

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INITIAL DECISION

Warren E. Blair
Hearing Examiner

Washington, D.C.
January 30, 1967

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INITIAL DECISION

APPEARANCES: Robert G. Willner, Michael F. Stern, and Richard F. Fleischmann, of the New York Regional Office of the Commission, for the Division of Trading and Markets:

Martin M. Frank, of Feldshuh and Frank, for Waldman & Co., Seymour Waldman, Bernard Portnoy, and Julius Gladstein.

Davis J. Stolzar, for Aaron J. Gabriel and Allan Harris.

Reubin Ehrlich, and Norman Pollisky, pro se.

BEFORE: Warren E. Blair, Hearing Examiner.

Proceedings in this matter were instituted by the Commission on November 3, 1965 pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether allegations of the Division of Trading and Markets ("Division") that the respondents, Waldman & Co. ("registrant"), Seymour Waldman ("Waldman"), Elliot Rose, Bernard Portnoy, Frank Engelman, Julius Gladstein, Samuel Lewis, Stuart Davis, Louis Pilnick, Reuben Ehrlich, Martin A. Fleischman, Norman Babat, Norman Pollisky, Aaron J. Gabriel, and Allan Harris wilfully violated and wilfully aided and abetted violations of the Securities Act of 1933 ("Securities Act") and the Exchange Act are true, and whether remedial action pursuant to Sections 15(b) and 15A of the Exchange Act is necessary.[1/]

The Division alleged, in substance, that from January 1, 1964 to November 3, 1965 respondents, singly and in concert, wilfully violated and wilfully aided and abetted violations of Section 17(a) of the Securities Act, and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder, by offering and selling stock of Development Corporation of America ("DCA") and that of United Utilities Corp. of Florida

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1/ A third question under the Order for Public Proceedings was whether, pending final determination of the remaining questions, suspension of registrant's registration as a broker-dealer was necessary. Following a preliminary hearing limited to the question of suspension, registrant's registration was suspended by the Commission. Waldman & Co., Securities Exchange Act Release No. 7828 (February 25, 1966).

("UUF") by means of an intensive "boiler room" type sales campaign which included use of various misrepresentations and omissions of material facts concerning the present operations and future activities of DCA and UUF and the prospects of financial reward from investments in the stocks of those companies. The Division also charged that registrant, wilfully aided and abetted by Waldman and Rose, wilfully violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 ("Net Capital Rule") thereunder. The Order for Public Proceedings also sets forth that the Commission's public files disclose that registrant, Waldman, Rose, Portnoy, Gladstein, Pilnick, Ehrlich, and Fleishman were enjoined from violations of the anti-fraud provisions of the Securities Act and Exchange Act in the offer and sale of common stocks of DCA and UUF by a preliminary injunction issued by a United States District Court in New York on May 13, 1965.[2/] Reference is also made to a permanent injunction entered by a United States District Court in Florida on June 1, 1965 by which Babat was enjoined from violations of the anti-fraud and registration provisions of the Securities Act and the anti-fraud provisions of the Exchange Act in the offer and sale of securities of two companies not here involved.[3/]

2/ S.E.C. v. Waldman, Rose & Company, Civil No. 65-1198 (S.D.N.Y., May 13, 1965).

3/ S.E.C. v. Bankers Intercontinental Investment Co., Limited, Civil No. 65-24-CF (S.D. Fla., June 1, 1965).

Answers which included general denials of the Division's allegations were filed by all respondents except Babat, Davis, Engelman, and Pilnick. A Commission order barring Babat, Davis, and Engelman from association with a broker or dealer,[4/] and a similar bar order against Pilnick[5/] have been entered in these proceedings.

Respondents making an appearance at the hearing and participating therein through counsel were registrant, Waldman, Portnoy, Gladstein, Harris, and Gabriel. Ehrlich and Pollisky appeared pro se, and, after being advised of their rights to counsel, decided to participate without counsel. Rose and Fleishman failed to appear at the hearing, and in consequence of that default, were barred by Commission order from association with any broker or dealer.[6/] The third day of the hearing, counsel for Lewis made a special appearance for the purpose of objecting to the hearing on the ground that it was not authorized under the Order for Public Proceeding. Upon the objection being overruled, counsel for Lewis decided to participate in the hearing by appearing whenever a witness who had some direct contact with his client was called to testify. However, on the sixth day of the hearing, counsel for Lewis moved that the proceedings as to his client be severed and discontinued because

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4/ Stuart Davis, Frank Engelman, Norman B. Babat, Securities Exchange Act Release No. 7943 (August 25, 1966).

5/ Waldman & Co. and Louis Pilnick, Securities Exchange Act Release No. 7784 (January 5, 1966).

6/ Elliott Rose, Martin A. Fleishman, Securities Exchange Act Release No. 7971 (October 7, 1966).

of his client's inability to pay for counsel to appear continuously on his behalf. Following a denial of that motion, counsel for Lewis withdrew, and for the remainder of the hearing Lewis neither appeared nor was represented.

As part of the post-hearing procedures, successive filings of proposed findings, conclusions, and supporting briefs were specified. Timely filings thereof were made by the Division, but of the respondents, only by Ehrlich, Gabriel, and Harris.

The findings and conclusions herein are based upon the record, and upon observation of the various witnesses.

Respondents

Registrant, under its present name and previous style of Waldman, Rose & Co., has been registered under the Exchange Act as a broker-dealer since May 11, 1963, and during the period in question used the mails and means and instruments of transportation and communication in interstate commerce to effect transactions in DCA and UUF stock. Subsequent to the institution of these proceedings, the National Association of Securities Dealers, Inc. ("NASD") expelled registrant from membership and revoked Waldman's registration with the association for failure to pay a fine assessed against them, jointly and severally, in connection with findings of violations of certain of the Association's rules. Waldman and Rose were general partners of registrant until March 12, 1965, at which time the registrant became a partnership of Waldman and Lucille Waldman. Respondents Babat, Davis, Ehrlich, Engelman, Fleishman,

Gladstein, Harris, Lewis, Pilnick, Pollisky and Portnoy were salesmen employed by registrant during the period in question. On the dates that registrant employed Babat, Engelman, Fleishman, and Portnoy, or during the course of that employment, each of them was or became a respondent in proceedings instituted by the Commission under the Exchange Act.[7/] In addition, Babat's securities activities prior to his employment by registrant resulted in the referred to permanent injunction against him.[8/] At the time of the entry of that injunction on June 1, 1965 Babat was still in registrant's employ.[9/]

As a result of an injunctive action filed by the Commission on April 20, 1965, a preliminary injunction was entered on May 13, 1965 in the United States District Court in New York enjoining registrant, Waldman, Rose, Ehrlich, Fleishman, Gladstein, Pilnick, and Portnoy from violating the anti-fraud provisions of the Securities Act and Exchange Act in the offer and sale of DCA

7/ Thomas F. Quinn, File No. 8-8997, January 11, 1965 (Babat, Fleishman); William Glanzman & Co., Inc., File No. 8-10312, May 27, 1963 (Engelman); Costello, Russotto & Co., File No. 3-163, May 24, 1965 (Fleishman); Fabrikant Securities Corporation, File No. 8-9565, July 17, 1964 (Portnoy).

8/ S.E.C. v. Bankers Intercontinental Investment Co., Limited, supra.

9/ An amendment to registrant's application for registration setting forth the existence of the injunction against Babat was filed June 16, 1965.

and UUF stocks.[10/] Gabriel entered the securities business in 1954, and was employed as a salesman by several broker-dealers over the years until 1958, when he activated his own securities firm under the name of Gabriel Securities, later changed to A. J. Gabriel Co., Inc.[11/] About October, 1964, Gabriel moved from a building in which he had an office for several years into an office that had been leased by registrant, and which he shared with a salesman of registrant until September, 1965. Allegedly, Gabriel was a salesman for registrant during the period in question.

Gabriel denies that he was a salesman for registrant and contends that he sublet the space he was using from registrant for the purpose of carrying on a consulting business under the name of National Business Consultants and servicing old customers of A. J. Gabriel Co., Inc. Waldman's testimony is that neither he nor Rose ever employed Gabriel in any capacity, and that Gabriel was never employed by registrant nor ever on registrant's payroll.

Gabriel's testimony is that during the summer of 1964 he repeatedly refused offers by Rose of employment as a salesman for registrant pending the outcome of an NASD action that

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10/ S.E.C. v. Waldman, Rose & Company, supra.

11/ A withdrawal of the registration of A. J. Gabriel Co., Inc. as a broker-dealer became effective on March 17, 1966.

had been taken against him and A. J. Gabriel Co., Inc., [12/] but about September, 1964 moved into space leased by registrant in order to cut down expenses. The move resulted from a conversation with Rose in which Gabriel asked if registrant had space available for him. During the discussion Rose indicated registrant was taking additional space and looking for salesmen; Gabriel suggested Seymour Forrest, who had worked for him, as a prospective salesman, and agreed to move into one of registrant's offices, sharing it with Forrest. In exchange for office space located on the floor below registrant's principal offices and for telephone service consisting of a private telephone and a second set connected to registrant's switchboard, Gabriel's payment was to be one-half the $75 per month rent on that office and an additional amount for use of the telephones. In addition, Gabriel was to pay Rose an unspecified percentage, which was to be later agreed upon, on any business Gabriel obtained through use of the telephones.

To the contrary, Forrest testified that Gabriel was supposed to receive $200 per week from registrant; that Gabriel offered and sold stock of DCA and UUF to his former customers; that Gabriel identified himself to customers as Forrest or, after Forrest left registrant's employ and Ehrlich replaced him in the office, as Ehrlich; and that a girl in registrant's employ placed telephone calls for Gabriel and Ehrlich to former

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12/ A. J. Gabriel Co., Inc., Securities Exchange Act Release No. 7696 (September 3, 1965).

customers of Gabriel and to persons whose names were taken from a telephone directory. Forrest further testified that in one instance while he had Dr. C. R. on the telephone, Gabriel interrupted for the purpose of offering DCA stock to Dr. C.R. Upon Dr. C.R.'s agreeing to buy 1,000 shares, Gabriel had Forrest make out the order ticket. The commission on the sale to Dr. C.R. was paid to Gabriel by means of a check which registrant made payable to Forrest, who then cashed it and turned over the proceeds to Gabriel.[13/] Dr. C.R.'s corroborating testimony was that Gabriel broke into a conversation he was having with Forrest; that Gabriel made various favorable statements about DCA and its stock, and that upon Gabriel's finishing his sales talk, he heard Gabriel tell Forrest to "take the order from Dr. R." When Forrest came back on the telephone, Dr. C.R. gave him an order for 1,000 shares of DCA stock.

The weight of the evidence relating to Gabriel's role while occupying space in registrant's office establishes that Gabriel, pursuant to agreement with registrant's principals, acted as a salesman for registrant. Gabriel's statements that he carried on a business under the name of National Business Consultants are given credence, but such activity does not negate

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13/ Less a small amount that Forrest kept to cover the income tax payable as a result of including the entire commission as income on his tax return.

an additional and simultaneous association with registrant. That the two activities were not inconsistent is well evidenced by the fact, unbeknownst to registrant for some time, that Ehrlich, an acknowledged salesman for registrant, was devoting a substantial amount of time to Gabriel's other interests. Gabriel's denials that he was a salesman cannot be accepted in the light of his entire testimony and that of Forrest and Dr. C.R. The vagueness of the terms on which Gabriel claims registrant and he supposedly agreed for payments to registrant, the purported cash payments by him to registrant which permit of no verification, the inability of Gabriel to recall the amount of income derived from National Business Consultants which would allow a judgment to be made on whether he was deriving a living therefrom, are all circumstances which normally are not encountered when business relationships are of the kind Gabriel offers as an explanation of his presence on registrant's premises. Moreover, Gabriel's statements on material matters while on the stand which were inconsistent with or contradictory to previous statements made under oath, and his admission with respect to one previous statement that he had lied under oath lessen the credence that can be given to his version of the relationship between himself and registrant. Waldman's testimony favoring Gabriel is rejected as being inconsistent with substantial evidence indicating that registrant arranged for Gabriel's

services under an agreement whereby his association was not to be disclosed upon registrant's records.

DCA and UUF

DCA, incorporated under Florida law in February, 1960, is engaged in the development and construction of residences and communities in Florida. In 1961, DCA made a public offering of 200,000 shares of its common stock at $3 per share; since then the stock has been traded in the over-the-counter market.

DCA's net income for the year 1960 was slightly over $200,000, which declined to $178,113 for 1961, and to $30,909, or 3¢ per share for 1962. Earnings rose in 1963 to $75,587, equivalent to 10½¢ per share and again dropped the following year ending December 31, 1964 when net income amounted to $20,312, less than 3¢ per share. For the year 1965, DCA reported net income of $71,175, amounting to 10¢ per share.

In October, 1963 DCA and Alan Fink, one of DCA's promoters, entered into a contract under which Fink agreed to sell his holdings of 297,582 shares of DCA stock to DCA. In exchange, Fink received DCA's promissory note for $297,000, payable over a 20-year period in annual installments of $10,000 plus 50% of DCA's profits in excess of $10,000. The contract also restricted DCA's dividend payments during the time the note remained unpaid, providing that no dividend could be declared or paid in any year

that DCA's current obligations under the note were not met.

UUF, a utility company engaged in the development and operation of utilities systems in Florida, was a wholly-owned subsidiary of DCA until 1962 when DCA distributed 325,000 shares of UUF to DCA stockholders. Most of UUF's operations were confined to areas in which DCA had an interest in developing, and over half of UUF's business was derived from DCA.

UUF's net income for seven months ending December 31, 1962 was $8,404, or 2½¢ per share, and for the entire year 1963 amounted to $1,441, less than ½¢ per share. For the year 1964, UUF's net income declined to $778, less than ¼¢ per share, and for 1965, its earnings were slightly better than $2,000. In 1963 and 1964 stockholders' equity increased 32¢ and 6¢ per share, respectively, as a result of UUF's receiving contributions in aid of construction. These contributions, made by real estate developers, are, in effect, payments for the installation of utilities on the land being developed. The contributions are not considered as earnings by UUF and are shown on its statements of income and expense as an item separated from net income and retained earnings.

DCA's and UUF's financial statements were requested by and made available to registrant, Waldman, and Rose by Alvin Sherman, the president of both companies. In addition, Sherman acquainted Waldman and Rose with the terms of the Fink contract and had frequent conversations with them regarding the operations

of DCA and UUF and the prospects of the companies. About the end of the year 1964 Sherman specifically advised Waldman and Rose that 1964 would not be one of the "better years" for DCA and UUF, and that DCA's net income would be less than the $75,000 earned in 1963.

Offer and Sale of DCA and UUF Stock

From about July, 1964 to May, 1965 transactions, mostly on a principal basis, in DCA and UUF stocks accounted for 80% to 90% of registrant's business. Salesmen were instructed to concentrate their efforts on those securities, and were paid unusually large commissions on their sales. Registrant's operations were those of a "boiler-room" in which salesmen, using high-pressure techniques, sold highly speculative stock by means of repeated telephone calls to persons unknown to them.[14/] Investors, many of whom could ill-afford to take the risk of loss inherent in a purchase of DCA or UUF stock, were induced to buy through misrepresentations and extravagant predictions concerning the operations and earnings of DCA and UUF and of a rapid rise in the market price of the stocks. Misrepresentations were also made regarding the risk of loss involved in a purchase of DCA or UUF stocks, the listing of DCA stock on the American Stock Exchange, and the

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14/ See Hamilton Waters & Co., Inc., Securities Exchange Act Release No. 7725 (October 18, 1965).

prospects of a dividend in the form of cash or stock of a DCA subsidiary. Other "boiler-room" techniques employed by registrant and its salesmen were their insisting upon hasty decisions by customers without concern for the customers' investment needs, making of inconsistent recommendations which were based upon the salesmen's interest in selling DCA and UUF stocks rather than upon the intrinsic merits of those securities or the customers' circumstances, switching of a customer's investment from one stock to another without apparent reason, sending of "wooden tickets" which purported to confirm purchases of securities which were not ordered, and charging customers excessive prices for their purchases.

Babat attempted by telephone to induce J.H., with whom he had no previous contact, to purchase DCA stock by representing that DCA was a good investment on which money could be made in a hurry, and that the price of the stock would go up in a couple of days. Although J.H. refused to buy, he received a confirmation from registrant for a purchase of 100 shares of DCA stock. Davis induced one of his customers, A.M., to purchase DCA stock by stating that DCA was building a 300-unit apartment house, owned two hotels, would spin-off stock of a subsidiary, American Hardware Company, to DCA stockholders, and expected to earn 50¢ to 60¢ in the next year. A second customer, Mrs. H.L., was told by Davis in the course of repeated telephone

calls to her that DCA was practically without risk, that he could practically guarantee that she would make money on it, that her profit would be sufficient to pay for her car repairs and another vacation, and that DCA stockholders would be given stock in a hardware company. At Davis' request, Rose also telephoned Mrs. H.L., telling her that DCA was an excellent investment and implying that only good friends of the salesmen were being allowed to purchase that stock. During the course of eight or ten telephone calls to Dr. H.T. in early 1964, Engelman tried to sell DCA and UUF stocks by representing that UUF stock priced at $2 would be $3 in four to six weeks because of the limited number of shares outstanding, that UUF was expected to earn 20¢ per share for the year, and that the price of DCA stock was due to rise. Although Dr. H.T. refused to order either of the stocks, he received a confirmation of purchase on both stocks from registrant.

By means of numerous telephone calls toward the end of 1964 and in the first half of 1965, Fleishman sold three customers DCA or UUF stock. R.M., who was called five or six times, was told that UUF was a gas and electric public utility, was buying up other companies, would become as large as Florida Power and Light, and had earnings of 6¢ or 7¢ per share which would be ten times greater within a few years. In selling 200 shares

of DCA and 100 shares of UUF stock to E.B., Fleishman stated in the course of a number of telephone conversations that DCA would be applying for a listing on the American Stock Exchange within 45 to 60 days, that the stock would shortly double to $6, that DCA's earnings were 45¢ to 50¢ per share for 1964, that DCA stockholders would receive stock in a hardware or utility company being purchased by DCA, and that UUF earnings were good and would be better the following year. In February, 1965, Fleishman caused E.B. to sell his DCA stock and buy an additional 115 shares of UUF stock by representing that the market for DCA stock would be going down. J.M., a third purchaser, who later canceled his order, testified that in May, 1965, Fleishman represented that DCA's earnings had multiplied many times and would be $1 in 1965, that DCA would be paying a dividend in 1965, and that the price of the stock, then $5, would be around $10 by the end of the year.

Gladstein sold UUF stock to W.G. with representations that UUF would have a very good price rise within six months to a year, and that the absence of dividends would be more than compensated by the increase in price. A few months later, W.G. sold the UUF stock in order to buy DCA stock which Gladstein stated to

be a more promising situation for a price rise than UUF, and on which dividends could be expected. Another customer, Dr. M.S., was told that UUF was a good growth stock whose price would rise in a short time, and that DCA stock was a good investment, a growth stock whose price would go up in a matter of months. J.C. purchased DCA stock in October, 1964 after being told by Gladstein that DCA would make 12½¢ in 1964 and 62½¢ in 1965, that the company had a large government contract for 1965, that hardware stock DCA owned would be spun-off, and that the price of DCA stock would rise to $4.50 in about three weeks. A second purchase of DCA stock was made by JC the next month upon Gladstein's assurances that the government contracts previously spoken about would be coming in and that the price of the stock would increase. Representations to B.I., who purchased UUF stock in early 1964 after receiving numerous telephone calls from Gladstein, were that UUF stock had fantastic potential and in a short time would increase in price to $14, and that UUF was to merge with another company whose name he could not disclose. Gladstein tried unsuccessfully to induce B.I. to purchase DCA stock by telling him that the stock would increase to about $5, and that he couldn't lose money on it. Gladstein was also unsuccessful in his attempts to persuade L.T. to buy DCA stock which Gladstein represented to be a stock that would probably be listed on the American Stock Exchange and would go up to $7 by the Spring of 1965. Although L.T. never ordered stock from Gladstein, registrant mailed a

purchase confirmation for 100 shares of DCA stock to him.

In soliciting A.A. to purchase DCA stock, Pilnick represented during a series of telephone calls that DCA had earned 12½¢ per share in 1963 and was expected to earn more in 1964, that DCA stock had a book value of $6 or $7 per share, and that the stock of a hardware company owned by DCA which would be spun-off might well go to $5 per share. Another customer, J.R., was told by Pilnick that DCA stock would go up from its then price of 2-1/8 to 5 or 6 in a short time, that in relation to earnings the price of DCA stock was low, that DCA earnings would be better in 1964 than in 1963, and that a stock dividend might be paid when DCA spun off a subsidiary. Following his purchase, J.R. received further telephone solicitations from Pilnick in which he was told that the price of DCA was rising, that a stock dividend was coming out in a few months, and that DCA had received a million dollar contract to build a hospital in Florida which would yield DCA a 17% net profit margin. In selling DCA and UUF stock to three of his customers, Portnoy projected price rises which would bring a profit of $100 within a couple of months, double or triple the purchase price, or go to $6 to $10 per share. In addition, Portnoy told E.R. that DCA was building apartments for retired people, told L.C. that UUF would probably have earnings of 25¢ or 30¢, and told A.I. that DCA was supposed to be listed on the American Stock Exchange, and that

A.I. would not lose money with DCA. The DCA stock purchased by A.I. in July, 1964 was sold in February, 1965 to pay for UUF stock which was bought at 5-5/8 on Portnoy's representations that UUF stock would move up faster than DCA stock, that the price would be going to $10 or $12 within three to six months, that UUF's earnings were 12¢ to 15¢ and would go to 50¢ or 60¢, and that UUF was a safe investment which he guaranteed. Mrs. F.T., a widow whose husband had met Portnoy, received a confirmation from registrant addressed to her husband who at that time had been deceased for eleven months. The confirmation purported to confirm a purchase on September 4, 1966 of 200 shares of DCA stock, which Mrs. F.T. denied she had bought.

Repeated telephone solicitations were also used by Lewis to sell stock to his customers. DCA was represented to J.P. as a company whose 1964 earnings would exceed those of 1963 by a tremendous margin, and on whose stock there was a good possibility that dividends would be paid. Lewis also predicted that the then price of 2-3/4 for DCA stock would go up to 6 or 6¼ by the end of 1964 and that by then the stock would be listed on the American Stock Exchange. Following J.P.'s first purchase, Lewis continued to urge further purchases because DCA was proceeding according to expectations. As a result, J.P. sold another stock to obtain money to buy more DCA shares in October, 1964. During November, 1964 Lewis continued to press J.P. to make additional purchases despite J.P.'s several refusals to do

so because, as he told Lewis, he could not afford further investment in DCA stock. R.S., who told Lewis that he was using his son's money hoping to accumulate enough for the son's college education, bought DCA stock in October, 1964 when Lewis assured him that DCA had the character of a utilities company, had earnings of between 13¢ and 18¢ in 1963, and was putting up apartment buildings in Florida which would raise the value of the stock. Further representations inducing R.S. to purchase were that the price of 2-3/4 would go to 6 by July, 1965 and that the stock would be listed on one of the exchanges. A third customer, S.G., bought DCA stock in November, 1965 upon Lewis' statements that DCA was constructing an apartment building, had control of a utility company "which controlled the utilities at Cape Kennedy," and would pay a substantial dividend on its stock in January, 1965. Lewis also told S.G. that DCA stock would double in value by January 1, 1965, and that he could then sell half of his shares, receive all of his investment, and still own the other half. S.G. agreed to purchase only if Lewis verified his statements, but when he received a purchase confirmation two or three days later decided to pay for the stock confirmed even though he had not ordered it. Lewis also offered, but S.G. refused to buy, stock in the utilities company described by Lewis as being controlled by DCA and controlling the utilities at Cape Kennedy.

Ehrlich made frequent telephone calls to N.E. about December, 1964 to persuade him to buy DCA stock, representing that DCA had built numerous apartment buildings and planned to build a hospital and an office building in Florida. After N.E. had purchased DCA stock, Ehrlich had further conversations in which he told N.E. that a spin-off was pending before the S.E.C., and that a report was due shortly which would show DCA's earning power to be 60¢ to 70¢ a share and which, Ehrlich hoped, would create enough interest in the stock to cause it to rise to $7. Ehrlich also induced N.E. to buy UUF stock by telling him that UUF was in the "building line" and dealt with different builders in installing sewage and water drain lines. A sale of DCA stock was made by Ehrlich to H.Z. in early November, 1964 by means of representations that DCA had acquired a substantial area of land which it was going to develop and that with the beginning interest of other brokers in DCA stock, there was a chance of the stock going up two points. After H.Z. had made his purchase, Ehrlich again spoke to him and that time told him about a potential spin-off of a hardware company by DCA in 1965. Mrs. B.B., who eventually ordered DCA and UUF stock from Ehrlich, told Ehrlich during their first telephone conversation that she was interested

only in listed securities. To quiet her concern about DCA and UUF stocks being over-the-counter securities, Ehrlich told her that he was concentrating on these two stocks because he had found out everything about them and that they were not speculative, and would not balloon up and burst. Mrs. B.B. was persuaded to purchase UUF stock in February, 1964 by Ehrlich's statements made in the course of many more telephone solicitations that UUF was a thin issue in which a Canadian syndicate was interested, that more money could be made in UUF stock than DCA, that the price of UUF stock was "going to sky-rocket," and that a hospital had been constructed which needed gas and electricity. After a number of further telephone conversations, Ehrlich induced Mrs. B.B. to buy DCA stock in April, 1965 with representations that the same Canadian syndicate that had been interested in UUF was interested in DCA; that there was little DCA stock available, which caused the price to go up whenever orders were placed; that DCA had grown about four times over the last year; that its business was about four times the amount of the previous year. Mrs. B.B. made a second purchase of DCA stock in May, 1965 upon receiving a call from Ehrlich informing her that DCA was in great demand, but that he was advising a woman leaving for Israel to sell. Ehrlich went on to say that he would like Mrs. B.B. to buy some of that stock because she could make money on it but that she must make up her

mind very quickly.

Ehrlich does not question the truth of the testimony given by N.E. and H.Z., arguing only that both customers were satisfied with his methods of doing business and with their purchases and sales. With respect to Mrs. B.B., Ehrlich characterizes her as a very sophisticated investor and asserts that her testimony is not worthy of belief and that it constitutes "a bitter, vicious attack" against him. However, whether a customer is satisfied with his broker or his securities transactions is not determinative of the issue of fraud,[15/] and the fact that a customer may be sophisticated would not excuse the perpetration of fraud upon him.[16/] The other contentions relating to Mrs. B.B.'s testimony are rejected as unsupported by the record, the nature of her testimony, and her observed demeanor while on the stand.

Pollisky sold UUF stock to Mrs. A.Z., a widow of very limited means, by representing that an investment in UUF would provide an opportunity for her to make a good profit, that UUF's earnings would increase, and that the stock might rise two points in six months or so. Mrs. A.Z. informed him that she was a widow without much income and that she could not afford to lose

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15/ Hughes v. S.E.C., 174 F. 2d 969, 974 (D.C. Cir. 1949).

16/ See Hamilton Waters & Co., Inc., supra, at 6 of cited release.

money, whereupon Pollisky assured her that UUF was a good investment on which she would not lose. In selling 100 shares of DCA stock by telephone to Mrs. D.R., with whom he had no previous contact, Pollisky stated that the price of DCA, then around 3, would rise to 6 in about six months, and that if she"wanted to get it when it was good, to get in right away." Immediately after her purchase Pollisky again called Mrs. D.R. and told her that she should buy more DCA stock because "it was still going up, and doing very well." Repeated telephone calls to R.A. in March, 1965 were made by Pollisky to induce R.A. to buy 400 shares of UUF at 5-3/4. In the course of the conversations with R.A., Pollisky represented that because registrant controlled large blocks of the stock, UUF stock would double in price in two weeks to a month, that UUF earnings would "appreciate quite a bit," that UUF was greatly expanding its business, and that R.A.'s satisfaction with UUF stock would be the basis for future business between them. Shortly after the UUF purchase, Pollisky attempted to interest R.A. in DCA stock, but R.A. refused to place an order, saying that he was not interested until he found out what happened on UUF. Although he had not placed an order for DCA stock, R.A. received a confirmation for purchase of 200 shares of DCA stock from registrant.

During conversations with Mrs. H.B. by telephone and at her place of work in a supermarket, Harris persuaded her to

purchase DCA stock in July, 1965 at a price of 5½. Mrs. H.B., who had never purchased stock before, and who, as Harris knew, had very limited means, was told by Harris that DCA was a good stock for her, that as a friend he was advising her to buy, that the stock would go up and she would make money, and that the stock was not speculative. Mrs. R.K., a 70 year old lady who Harris knew to be a substitute school teacher, bought DCA stock at 5½ in July, 1965 because Harris assured her that DCA stock was a good investment for her, that the Hartford Fund had approximately 40,000 shares of DCA stock, that she would make money on DCA, and that the stock was not speculative but a safe investment. Mrs. R.K.'s understanding was that when a fund buys shares such as the Hartford Fund was represented to have done, "the corporation must be pretty good."

Granting the contention of Harris' counsel that the testimony of Mrs. H.B. and Mrs. R.K. was vague and even confused in certain respects, nevertheless on salient points to the extent indicated herein their testimony was direct, positive, and credible. The denials by Harris that he made the representations attributed to him by these witnesses are rejected. Such denials lose credibility when considered in context with his other testimony, especially in light of his admission that he repeated to customers whatever Waldman told him about DCA.

As earlier noted, Gabriel interrupted a telephone conversation between Forrest and Dr. C.R. for the purpose of selling

DCA stock to Dr. C. R. Gabriel induced Dr. C. R. to purchase by statements that DCA was a low-priced stock that was going up in a very short time, and that DCA would shortly spin-off a hardware company. Gabriel also stated that he had just returned from Florida and expressed the opinion, based upon a personal check of the situation while there, that DCA "was a good situation to get into." Telephone conversations Gabriel had with other customers, which Forrest overheard, included statements by Gabriel that DCA was an excellent stock, that it would be $10 "in no time," that DCA was expected to spin-off American Hardware Corporation which was DCA's hardware division, that DCA had a contract to build a veterans hospital at Vero Beach, and was building a hotel in Miami. With respect to UUF, Forrest heard Gabriel say that the market for UUF was very thin, that there were only 40,000 shares, that the stock should go to $10, and that the earnings of UUF should continue to increase.

Counsel for Gabriel and Harris contends that the testimony against Gabriel is biased and unbelievable and that the charges against Gabriel and Harris being essentially criminal in nature must be proved beyond a reasonable doubt. Neither of these contentions has merit. As previously noted, the testimony of Forrest and Dr. C.R. indicating that Gabriel was a salesman for registrant was given credence. The testimony of Forrest and Dr. C.R. relevant to Gabriel's sales practices is also credited,

and that of Gabriel and Ehrlich in that regard is rejected. While the evidence indicates that Forrest and Dr. C.R. have a bias against Gabriel, and that such bias was a factor in their willingness to testify against him, it does not appear that their bias prevailed over their oath to testify truthfully. With respect to the quantum of proof required to support findings against respondents, it is noted that the Exchange Act specifically provides that a "finding of the Commission as to facts, if supported by substantial evidence, shall be conclusive,"[17/] and that the "substantial evidence" test has been applied in judicial review of Commission findings in proceedings under the Securities Act.[18/] Further, the Administrative Procedure Act prescribes "substantial evidence" as the gauge to be used by the courts in determining whether agency findings are to be set aside.[19/]

Each and every one of the noted representations used by respondents in offering and selling DCA and UUF stock was false in its entirety or misleading in character, and the

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17/ Section 25(a), 15 U.S.C. 78y(a).

18/ Oklahoma-Texas Trust v. S.E.C., 100 F. 2d 888, 894 (10th Cir. 1939); Wright v. S.E.C., 112 F. 2d 89, 94 (2d Cir. 1940). See also Harris Clare & Co., Inc., Securities Exchange Act Release No. 8004 (December 9, 1966).

19/ Section 10(e)(5), 5 U.S.C. §1009(e)(5).

opinions and projections expressed were either without any basis or lacked sufficient justification.

In strong language, the Commission has repeatedly inveighed against the use of predictions of specific and substantial price increases within relatively short periods of time with respect to a speculative security, stating that such predictions cannot be justified, and identifying them as a "hallmark" of fraud. [20/] Respondents' predictions bear witness to the verity of the Commission's conclusions. DCA's and UUF's earnings were not and have never been sufficient to support predictions of a price rise in the stocks of those companies, and this is especially true in regard to price rises which were supposedly to take place within days or months. Nor were there any future prospects for these companies upon which the respondents could reasonably rely for a justification of their opinions that the price of the stock would rise, earnings increase, or dividends be paid. Sherman, president of DCA and UUF since their inceptions, was in constant communication with Waldman and Rose during the period in question and told them that 1964 would not be "one of DCA's better years." He denied that there was any basis for representing with respect to DCA that it would have earnings such as respondents predicted, intended to pay

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20/ See Floyd Earl O'Gorman, Securities Exchange Act Release No. 7959 (September 22, 1966); Hamilton Waters & Co., Inc., supra; Albion Securities Company, Inc., Securities Exchange Act Release No. 7561 (March 24, 1965).

dividends or to spin-off a hardware company. Moreover, dividend payments were restricted during the life of the Fink note, and DCA's earnings were not such as to indicate any possibility of dividend payments being made as early as 1965. The record further establishes that DCA's book value was never higher than $2.25 during the period in question; that DCA did not have a controlling interest in or operate a utilities company which supplied utilities for Cape Kennedy, an increase in orders of four times those of 1964, a subsidiary named American Hardware Corporation, or two hotels in Miramar, Florida; that DCA was not building apartment houses on Cape Kennedy; that DCA never had a contract to build a veterans hospital; that Hartford Fund did not hold DCA shares; and that DCA had neither listed nor applied for listing of its stock on the American Stock Exchange. UUF did not engage in any merger negotiations with another company, did not contemplate payment of any dividend, and did not control, own, or operate most of the utilities at Cape Kennedy. No Canadian syndicate was interested in buying UUF, and UUF did not necessarily benefit from DCA's contracts, as UUF was involved only in DCA's subdivision developments.

The false statements, unjustified opinions and predictions, and failures to disclose material facts concerning the operations and financial results therefrom of DCA and UUF constituted a fraud upon purchasers of those stocks by respondents.

Registrant's pattern of operation and the conduct of Waldman, Rose, and respondent salesmen (Gabriel so included) establishes that during the period in question respondent salesmen joined and participated in a scheme conceived by Waldman and Rose under which registrant was used by them as a vehicle to offer and sell stocks of DCA and UUF to the public through an intensive "boiler-room" campaign. Undoubtedly Waldman and Rose were aware of the methods being utilized by their salesmen, for they were the source of much of the misinformation that was relayed to customers. By their inaction after being informed regarding the use of certain unsavory sales practices, Waldman and Rose evidenced their acquiescence and participation in the actions of their salesmen. In addition, Waldman and Rose affirmatively implemented and encouraged the scheme by employing girls with attractive telephone voices to make "cold calls" to locate prospects for the salesman, by paying unusually high commissions to the salesmen, and by engaging salesmen having backgrounds of previous association with "boiler-rooms," or who were respondents in other proceedings before the Commission. The similarity of the representations used by the salesmen in inducing purchases of DCA and UUF stocks, their proximity to each other, the previous relationships between the salesmen, and their acceptance of the unusual inducements to work for registrant are adequate to show a joining and participation in

the fraudulent scheme of Waldman and Rose. Registrant, Waldman, and Rose are also accountable for the frauds committed by virtue of the duties imposed upon them as employer and supervisors of the respondent salesmen. 21/

Besides the misrepresentations made by its salesmen, registrant engaged in further fraudulent activity by mailing "wooden tickets" purporting to confirm purchases of unordered DCA and UUF stock, 22/ and by charging investors excessive prices for their purchases without disclosing that such prices were not reasonably related to market price. 23/ In addition to investors who testified that they had received confirmations from registrant on unauthorized purchases of DCA and UUF stock, the extremely high rate of cancellations of orders experienced by registrant 24/ indicates that registrant resorted to the use of "wooden tickets" as a sales technique. The record also discloses that on at least 187 sales of the 264 sales of DCA

21/ Shearson, Hammill & Co., Securities Exchange Act Release No. 7743, p. 30 (November 12, 1965); Reynolds & Co., 39 S.E.C. 902, 917 (1960).

22/ R.A. Holman & Co., Inc. v. S.E.C., CCH Fed. Sec. L. Rep. ¶91,816 at 95,788 (2d Cir. September 21, 1966); Shelley, Roberts & Co., 38 S.E.C. 744, 751 (1958).

23/ J. A. Winston & Co., Inc., Securities Exchange Act Release No. 7337 (June 8, 1964); W. T. Anderson Company, Inc., 39 S.E.C. 630 (1960).

24/ During the year 1964 over 35% of registrant's sales, accounting for nearly 20% of all shares of DCA stock, were cancelled, and over 30% of its sales of UUF stock representing more than 21% of all shares of that stock sold, were cancelled.

stock effected in 1964, registrant's prices ranged between 5% and 60% of its contemporaneous cost in a same day transaction, and that in connection with 120 of 188 sales of UUF stock in 1964, registrant charged a price that was 7.1% to 100% greater than its contemporaneous cost in a same day transaction. The prices charged by registrant were clearly excessive and cannot be considered as bearing a reasonable relationship to the market price for those stocks as determined by registrant's contemporaneous cost.[25/] Sales at prices not reasonably related to the prevailing market price constituted a fraud upon those customers.[26/]

It is concluded that in the offer and sale of DCA and UUF stock, registrant, together with or aided and abetted by the individual respondents, wilfully violated Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder.

Violation of Net Capital Rule[27/]

The uncontradicted evidence is that on December 31, 1964 registrant's net capital as computed under the Net Capital Rule

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25/ See J. A. Winston & Co., Inc., *supra.*

26/ *Ibid.*

27/ Rule 15c3-1, 17 CFR 240.15c3-1.

was a deficit amount of $3,775, and that registrant required $4,636 of additional capital to comply with the Rule's requirement that aggregate indebtedness of a broker-dealer not exceed 2,000 per centum of its net capital. By effecting securities transactions on or about December 31, 1964 while out of compliance with the Net Capital Rule, registrant wilfully violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder. In consequence of their being registrant's principals when the net capital violation occurred, Waldman and Rose are found to have wilfully aided and abetted registrant's violation of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.[28/]

Public Interest

In view of respondents' wilful violations, it is necessary to determine the remedial action appropriate in the public interest with respect to those respondents, registrant, Waldman, Ehrlich, Gabriel, Gladstein, Harris, Lewis, Pollisky, and Portnoy, as to whom no final determination has been made by the Commission. After careful consideration of the character and extent of the violations involved and of the nature of the preliminary injunction issued against certain of the respondents,[29/] it is concluded

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28/ Reynolds & Co., supra.

29/ S.E.C. v. Waldman, Rose & Company, supra.

that the public interest requires that the registration of the registrant as a broker-dealer be revoked, and that Waldman, Ehrlich, Gabriel, Gladstein, Harris, Lewis, Pollisky, and Portnoy be barred from association with any broker or dealer.

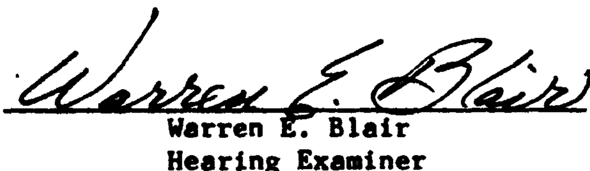
In reaching these conclusions the backgrounds and records of the respondents, as well as the mitigating factors submitted by some of the respondents, have been duly weighed. Offsetting the mitigating factors, however, is the callous indifference of all of the respondents to fundamental honesty, much less to the high degree of fair dealing imposed upon those desiring to engage in the securities business, which they displayed in the conception and operation of the scheme in which they participated. It is clear that nothing less than the indicated sanctions would suffice to protect the investing public from the danger of further injury at the hands of these respondents.[30/]

Accordingly, IT IS ORDERED that the registration as a broker and dealer of Waldman & Co. is revoked, and that Seymour Waldman, Reubin Ehrlich, Aaron J. Gabriel, Julius Gladstein, Allan Harris, Samuel Lewis, Norman Pollisky, and Bernard Portnoy are each barred from association with a broker or dealer.

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

30/ All proposed findings and conclusions submitted by the parties have been considered, as have their contentions. To the extent such proposals and contentions are consistent with this initial decision, they are accepted.

Pursuant to Rule 17(f) of the Rules of Practice, this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.



Warren E. Blair
Hearing Examiner

Washington, D.C.
January 30, 1967