UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of	
UNEEDA VENDING SERVICE, INC. 250 Meserole Street Brooklyn, N. Y. File No. 24NY-5678	
Securities Act of 1933 Section 3(b) and Regulation A	

INITIAL DECISION

SIDNEY ULLMAN
Hearing Examiner

Washington, D. C.

June 10, 1965.

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BEFORE: Sidney Ullman, Hearing Examiner.

APPEARANCES: Leonard H. Rossen, Bertram C. Singer, Stephen E. Karsh, and Lawrence Williams, for the Division of Trading and Markets.

Royall, Koegel & Rogers by Stuart A. Jackson and Donald H. Kane, 200 Park Avenue, New York City, for Uneeda Vending Service, Inc.

I. NATURE OF PROCEEDINGS

On August 20, 1964, the Commission issued an order pursuant to Rule 261 of the General Rules and Regulations under the Securities Act of 1933, as amended, ("Securities Act"), temporarily suspending a Regulation A exemption of the public offering of common stock of Uneeda Vending Service, Inc. ("Uneeda") from the requirement of registration under the Act. The order alleged that Fabrikant Securities Corp. ("Fabrikant") and Karen Securities Corp. were named as underwriters of the offering and that the Commission had reasonable cause to believe that Fabrikant had engaged in fraudulent transactions and practices in the distribution of the securities in violation of section 17(a) of the Securities Act.[1/] The order also

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1/ Section 17(a) of the Securities Act reads as follows:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly--
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> (1) to employ any device, scheme, or artifice to defraud, or
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> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
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> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

The order related specifically to the violations of subparagraph (3).

provided an opportunity to any person having an interest therein to request a hearing. 2/

Following a timely request by Uneeda, on September 14, 1964 the Commission ordered a hearing with respect to the alleged fraud in the sale of securities, in order to determine whether to vacate the temporary suspension or enter an order permanently suspending the exemption.

The Commission had also instituted proceedings against Fabrikant under the Securities Exchange Act of 1934 ("Exchange Act") on July 17, 1964, predicated on alleged wilful violations of the securities laws, including section 17(a) of the Securities Act, in connection with the sale of stock of five issues, among which was the above-mentioned offering of Uneeda stock. Upon application of the Division of Trading and Markets ("Division"), the Commission determined that common questions of law and fact were involved in

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2/ Regulation A, adopted under section 3(b) of the Act, provides for exemption from registration when an issuer offers securities with an aggregate public offering price not exceeding $300,000 provided, among other things, that the issuer files with the Commission a notification and an offering circular containing certain minimum information.

Rule 261, as applicable here, provides for the issuance of an order temporarily suspending an exemption if the Commission has reason to believe that the terms and conditions of Regulation A have not been complied with or that the offering is being made in violation of section 17 of the Act. The Rule further provides that where a hearing is requested the Commission will, after notice and opportunity for such hearing, either vacate the order or enter an order permanently suspending the exemption.

As indicated, infra, absent an exemption from registration, the offer and sale of the Uneeda stock would violate section 5 of the Securities Act.

both the Uneeda suspension proceeding and the Fabrikant proceeding. Accordingly, by order dated November 18, 1964, issued under Rule 17 of the Rules of Practice, the Commission joined the two proceedings for a hearing with respect to activities relating to the sale of Uneeda stock during the period May 25 to June 25, 1962.

By order dated November 20, 1964, the Commission ordered that the joint hearing commence on January 11, 1965 in the Commission's New York Regional Office and appointed the undersigned to preside at the hearing. By order dated November 23, 1964 the hearing was transferred to 45 Broadway, New York City.

The joint hearing was held on January 11 through January 15, on January 19 and January 28, 1965. The common questions involved the business operations, prospects, and status of Uneeda, and the sale of Uneeda stock by Fabrikant. To the extent deemed practical and consistent with the Commission's order for a joint hearing and the order of November 20, 1964, the Hearing Examiner ordered that the evidence relating to the sale of stock of the four issues other than Uneeda be withheld until completion of the introduction of evidence relating to the Regulation A proceeding.

During the course of the hearing Fabrikant consented, in the broker-dealer proceeding brought under the Exchange Act, to the revocation of its registration as a broker-dealer, and to findings of wilful violations as alleged in the order for proceedings, without admitting the allegations. Martin Fabrikant, president of the corporation, as well as several of the salesmen also named

as respondents in the broker-dealer proceeding, also consented to findings of willful violations as alleged, without admitting said allegations, and one officer consented to an order barring him from being associated with a broker or dealer.[3/] The hearing continued on the issue of suspension of the offering in the Regulation A proceeding and on the charges asserted against non-consenting respondents in the broker-dealer proceeding.

On January 19 the Division moved at the hearing to amend the order of August 20, 1964 temporarily suspending the Regulation A exemption, to allege a violation of sections 5(a) and 5(c) of the Securities Act in addition to the section 17(a) violation. The motion was predicated in part on the theory that the Regulation A exemption is conditioned upon compliance with the Regulation, and if section 17(a) was violated then ipso facto, the securities were not exempt and were sold in violation of sections 5(a) and 5(c). And in part the motion was based on the filing by the issuer of a Form 2-A report containing a date of completion of the Uneeda offering which the evidence indicated might be false or erroneous. On January 28 the Examiner granted the motion to amend to the extent that a section 5 violation would result from the violation of section 17(a) and also to the extent that a false or erroneous 2-A report might constitute a violation of the anti-fraud provisions of section 17 alleged in the order for proceedings as well as a violation

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3/ By order of the Commission dated May 14, 1965, appropriate action was taken with respect to all of said respondents and others who defaulted in the proceedings. In the Matter of Fabrikant Securities Corporation, S.E.A.R. 7600.

of sections 5(a) and (c) of the Securities Act. 4/

Throughout the hearing, which terminated on January 28, 1965 as to the joint aspects of the two proceedings, the parties were represented by counsel. Counsel for the issuer requested an initial decision by the Hearing Examiner. Proposed findings of fact, conclusions of law and supporting briefs have been submitted by counsel for both parties.

Based upon the entire record in these proceedings, including the proposed findings, conclusions, and briefs, following are the Examiner's findings of fact and conclusions of law with respect to the Regulation A suspension proceeding and his determination that the temporary suspension of the exemption should be made permanent.

4/ Rule 260 under Regulation A requires the filing of a Form 2-A report upon termination of the offering, and under Rule 261 the Commission may temporarily suspend an exemption for failure to file a Form 2-A report. The filing of a false report would be tantamount to filing no report and would invalidate a Regulation A exemption otherwise available. Cf. Lowell Niebuhr & Co., Inc., 18 S.E.C. 471 (1945). This was in part the basis for the Division's request for an amendment.

However, inasmuch as no charge of filing a false report had previously been made and, conversely, the temporary suspension by the Commission was based upon alleged fraud in the offer and sale of Uneeda stock by Fabrikant and consequent violation of section 17(a), the Examiner ruled that the proceeding should not at that stage be changed into one which might be determined against the issuer solely because of a false or erroneous 2-A report. The amendment was permitted, however, to the extent that it might possibly support a charge of fraud under section 17(a) in the offer or sale of Uneeda stock, as alleged in the order for proceedings, and, as indicated above, to the extent a section 5 violation resulted from a section 17(a) violation.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Offering

Uneeda is a New York corporation engaged primarily in the business of purchasing used vending machines and equipment, overhauling or repairing the same and selling the product to route operators, distributors and exporters. It also has distributed new vending equipment for several manufacturers in the New York metropolitan area.

On December 14, 1961, Uneeda filed with the Commission a notification on Form 1-A and certain exhibits, including an offering circular, relating to a proposed public offering of 73,500 shares of 1¢ par value common stock at $3.00 per share for an aggregate amount of $220,500, for the purpose of obtaining an exemption from the registration requirements of the Securities Act pursuant to the provisions of Section 3(b) and Regulation A promulgated thereunder.

Fabrikant was organized as a New York corporation and was engaged primarily as a securities broker and underwriter. Karen Securities Corp., also a New York corporation, was engaged in the same business.

On November 30, 1961, Fabrikant, through its predecessor, Capital Consultants Corp., entered into an underwriting agreement with Uneeda which, as subsequently amended, provided that:

(a) Uneeda engaged Fabrikant as its exclusive agent to sell 73,500 shares of its common stock at an offering price of $3.00 per share on a best efforts "all-or-none" basis for a period of 45 days from the effective date of the offering;

(b) Uneeda consented to the appointment by Fabrikant of Karen Securities Corp. as co-underwriter;

(c) the underwriter's commission would be, in part, 14% of the public offering price or $.42 per share, for a total commission of $30,870 and an expense allowance of $18,000, payable only if all 73,500 shares were sold to the public within the prescribed period of time;

(d) the underwriters would enter into an escrow agreement with respect to the funds to be received as subscriptions to the 73,500 shares to be offered to the public; and

(e) no stock would be delivered to purchasers unless purchasers were found for all of the stock, and that if all of the stock was not sold and paid for, then all of the funds would be returned to the purchasers.

On March 7, 1962, Fabrikant and Karen Securities Corp. entered into an escrow agreement with the Irving Trust Company which provided, in part, that the underwriters would deposit with Irving Trust Company, as escrow agent, all funds received for the purchase of Uneeda's shares of stock not later than the second business day following receipt of the same. All deposits were to be by check of the purchasers, without any deductions, and to be accompanied by transmittal letters in a prescribed form. All funds were to be held by the Irving Trust Company in special accounts in the name of Fabrikant and in the name of Karen Securities Corp., and when the total funds

received aggregated $220,500, the escrow agent, after notice of a closing from the underwriters, would deliver to Uneeda a check in the amount of $171,630 and the balance of $48,870 to the underwriters, in accordance with their instructions. Conversely, however, if the offering was terminated rather than completed, the escrow agent was to return directly to the purchasers all funds received from the underwriters.

The underwriters sent transmittal letters to the Irving Trust Company stating the name and address of each purchaser of Uneeda stock, and enclosed checks for the total amount of the stock reported as purchased. Eventually, Fabrikant instructed the registrar and transfer company for the issuer to send a total of 54,400 shares of Uneeda original issue stock to purchasers and on June 25, 1962 the registrar and transfer company transferred said 54,400 shares. Karen Securities Corp. instructed the registrar and transfer company to issue a total of 19,100 shares of original issue stock and this was done on June 25, 1962. Thus the total number of shares issued on this date was 73,500, or the amount of the offering.

Although the offering circular indicated that Fabrikant's expected sales of the offering would be 46,000 shares and Karen Securities Corp's. would be 27,500 shares, the actual participation was 19,100 shares sold by Karen Securities Corp. and 54,400 shares sold by Fabrikant. Cancellations of sales were received by both brokers during the offering period. The offering circular contained a provision to the effect that the underwriters

might overallot the shares of Uneeda stock sold. In anticipation of cancellations Fabrikant overalloted, as discussed, infra.

On January 24, 1963, a Form 2-A report dated January 22, 1963 and signed by the president of the issuer was filed with the New York Regional Office of the Commission. The report stated that the offering had commenced on May 25, 1962 and had been completed on June 25, 1962. It contained many other facts and figures concerning the offering, including a listing of other broker-dealers who participated in the distribution of the securities during the period covered by the report. The participation of one of these brokers, Banner Securities Corp., was arranged by Karen Securities Corp. and approved by Fabrikant. The participation of the other, Cohen Simonson & Co., apparently was arranged by Fabrikant.

Sales Practices of Fabrikant and its Salesmen

The testimony of several investor witnesses produced by the Division reflects gross abuse of the anti-fraud provisions of section 17(a) of the Securities Act by Fabrikant and its salesmen in offering and selling the Uneeda shares during the offering period.

On June 2, 1962, Maurice Rosen, also known as Marty Rosen, then sales manager for Fabrikant and eventually one of the respondents named in the above-mentioned broker-dealer proceeding, sold 1,000 shares of Uneeda at $3.00 per share to J.P.F. The transaction was accomplished on a Saturday night, after Rosen had earlier that day represented to the purchaser that the market price of the stock would increase to $4.00 on the following

Monday, June 4. The representation of an anticipated increase in the price was fraudulent, inasmuch as the offering was still in progress and of course no transaction could lawfully be effected at a price in excess of the $3.00 offering price.[5/] Rosen also represented, without knowing the salary of J.P.F. (a post office clerk), that his profit from the transaction would equal a year's pay. Pressured into this transaction during that Saturday afternoon, J.P.F. met Rosen that night and turned over a check for $3,000 in order to obtain the advantage of the "lower" price. Rosen advised the purchaser that inasmuch as this was a new issue he was expected to hold the stock for at least 30 days, and a promise to this effect was extracted. The confirmation of this sale was mailed by Fabrikant on June 4, 1962. Two days later, still during the offering period, as will be seen in a discussion which follows, Rosen sold J.P.F. 200 more shares of Uneeda at $4.00 per share, as broker, charging a commission of $22.[6/] Rosen urged the purchase at $4.00 per share in return for the "favor" to J.P.F. in letting him in at $3.00 in the earlier purchase. At no time did J.P.F. receive an offering circular with respect to the Uneeda offering.

5/ That the offering was still in progress on June 4 is discussed, infra.

6/ Other transactions with Fabrikant as to which this witness testified occurred after the offering period now under consideration and are not discussed in this decision. This same situation also exists with respect to the testimony of other witnesses who made purchases both during the Uneeda offering period and at other times.

Rosen had earlier telephoned W.L.C. at Camden, New Jersey, in May 1962, and persistently urged the purchase of Uneeda stock despite repeated protestations of W.L.C. that he was not interested and could not afford to buy the stock. Rosen stated that Uneeda was undergoing a large expansion project in Europe, and that he would not be surprised if the stock doubled in value within 90 days. He also told the witness that since there was not stock available at that time he would sell him some of his own shares. Over a period of two or three weeks Rosen telephoned W.L.C. approximately six times in an effort to effect a sale. Although the witness refused to buy, he nevertheless received in the mail a confirmation from Fabrikant for 100 shares of Uneeda, bearing execution date May 28, 1962. In or about November or December 1962, W.L.C. received in the mail the stock certificates although he never paid for the purchase. He was never contacted or requested by Rosen or any other representative of Fabrikant to make such payment. 7/

Rosen had also telephoned A.C.K. in May 1962, and advised that Fabrikant was coming out with a new issue of Uneeda Vending stock which had a terrific potential and would be oversubscribed. However,

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7/ The issuer contends that the testimony of W.L.C. should not be considered in this proceeding inasmuch as no purchase by the customer was effected. However, the gravamen of the offense of violating section 17(a), lies, of course, in the misrepresentations and omissions which occurred in the offer of the securities.

he advised, he would let the witness buy as many shares as he could get for him. Rosen also advised that a large contract was being signed, which would provide Uneeda with the exclusive rights with respect to machines vending Coca-Cola and Pepsi-Cola in Great Britain, as a result of which substantial profits would accrue. The witness acceded to the sales pitch and thereafter received a confirmation for the purchase of 200 shares, with an execution date of May 28, 1962.

Herbert Patlis, a salesman employed by Fabrikant, telephoned J.K. on or about May 20, 1962, suggesting the purchase of 100 or 200 shares of Uneeda. Patlis represented that Uneeda had contracts for the servicing of vending machines in Europe, that Uneeda's earnings should be approximately $1.00 per share and that in his opinion the price of the stock would rise to $6.00 or $7.00 per share. He also represented that the Fabrikant firm had an excellent record of backing its stock issues and holding up the prices. During this conversation J.K. ordered 300 shares of Uneeda.

Patlis also called one M.B., advising that Fabrikant was a very successful underwriter and was coming out with a new issue of Uneeda stock which was bound to go to $4.00 or $5.00. After numerous and persistent solicitations by Patlis, M.B. ordered 500 shares, for which he received a confirmation bearing execution date May 28, 1962.

Stuart Israel telephoned M.H.G. early in May 1962, and stated that Uneeda was then earning 30 cents per share, that the company had an exclusive contract with Coca-Cola for the maintenance and repair of all Coca-Cola vending machines in Europe, that this contract guaranteed the company earnings of $1.00 per share and that the stock would rise from $3 to $12 or $14 in six months. The witness bought 100 shares and received a confirmation dated May 28, 1962. Thereafter, he was further solicited by Israel and although he did not agree to buy stock, he received a confirmation for the purchase of 200 shares of Uneeda original issue stock. He returned this confirmation, but thereafter bought 30 shares at $4 per share, for which he received a confirmation with execution date of June 13, 1962.

Israel had other transactions with investor witnesses who testified at the hearing. On June 4, 1962, J.K. was advised by Israel that Uneeda was negotiating or had negotiated an exclusive contract with Coca-Cola to sell its product in Europe, and was then earning $1 per share. J.K. was also told that Fabrikant expected the stock to go to about $8 per share quickly. He bought 50 shares on June 4.

On or about June 6, 1962, Israel telephoned C.M. and advised that Uneeda would be selling rebuilt Coca-Cola machines in the European market, that its stock might be listed on the American Stock Exchange, and that the price would rise 3, 4 or 5 dollars within six months and about 20 dollars and perhaps higher in a year or so, because of the potential of the European market. He also stated that the company anticipated a million dollar contract in the European market. Two days later, on June 8,

1962, the witness bought 100 shares of the stock at $4 per share, paying $11 in commission on the transaction.

Henry Kalish, one of the salesmen, solicited J.H.K. by telephone, on or about May 25, 1962, advising that Fabrikant was coming out with a new issue at $3 per share which would most definitely go to $5 within two months. He represented that Uneeda had stong contracts in Europe for guaranteed business and that its earnings should approximate $1 per share for the first year. He also stated that the Uneeda stock could be controlled very easily by Fabrikant, since it was Fabrikant's issue and only a few shares would be outstanding. J.H.K. agreed to buy 200 shares with the understanding that he would be morally free to sell the stock whenever he desired, and Kalish suggested that if he should decide to sell in the near future, the sale should be executed through another brokerage firm. Although J.H.K. received in the mail a confirmation for the purchase of 200 shares of Uneeda stock, bearing execution date May 28, 1962, when he appeared at Fabrikant's offices on the settlement date of June 4, 1962 and advised Kalish that he had already sold the stock through another brokerage firm, Kalish attempted to rescind the transaction. J.H.K. never received the shares of stock despite further efforts to make payment and complete the purchase on that day.

D. Richard Engel, another of Fabrikant's salesmen, telephoned G.R.S. shortly prior to June 6, 1962, advising that although the Uneeda stock was trading at $4 per share he had set aside certain shares for his customers at the offering price of $3. Shortly thereafter, Engel visited G.R.S. at his office and guaranteed that G.R.S. would make a profit if he bought the stock. He also advised that Fabrikant controlled the stock issue, that the $3 price was for Engel's old customers and people to whom he owed favors, and that the purchase would enable the witness to make up for prior losses suffered through having followed Engel's recommendations. G.R.S. agreed to buy 100 shares at $3 per share, and received a confirmation with an execution date of June 6, 1962.

Status and Prospects of Uneeda and its European Business

The representations of the salesmen concerning Uneeda's earnings, its contracts with the Coca-Cola Corporation, the potential for successful operation in the European market and the prospects for a rise in the price of Uneeda's shares were entirely groundless and unfounded. They constituted misrepresentations of material facts and were part of a pattern of fraud and deceit used by Fabrikant in the sale of the securities.

Some of Uneeda's problems and the uncertainties of its prospects for success were discussed by William G. Raoul, president of Cavalier Corporation, of Chatanooga, Tennessee, who testified that his company is one of the leading manufacturers of vending machines used for dispensing Coca-Cola and has done business with "the Coca-Cola Company" for many years. Cavalier manufactures coolers and sells them to contract

bottlers of the Coca-Cola Company. Mr. Raoul testified that although the Coca-Cola Company approves or disapproves each of the models of machines manufactured by Cavalier and authorizes the company to advertise approved machines in the Coca-Cola bottler magazine, this is substantially the extent of the relationship that has persisted over the years between Cavalier and the Coca-Cola Company. No contract of any kind exists between the two companies or between Cavalier and any of the Coca-Cola bottlers. Mr. Raoul also testified that there are in this country five or six manufacturers of vending machines which dispense Coca-Cola bottled beverages, three of which, Westinghouse, Vendo and Cavalier, are major suppliers. Cavalier has the largest share and together the three largest companies have about 85% of such business in the United States. He further testified that although any company can manufacture a vending machine for the purpose of dispensing Coca-Cola beverages without receiving permission or authorization from the Coca-Cola Company, the bottlers are loyal to their source of supply and for over thirty years there has been little change in their purchasing practices. In part, he testified:

> "Others have come into the picture and came out of it through failure of their machines . . . The bottler could buy from anyone, but he tends to buy from the people he has known through the years."

Uneeda came to Cavalier Corporation early of 1962 and advised that they had been investigating the market in Europe, particularly in England, and interested Cavalier in an effort to develop business on the Continent and in the British Isles. Arrangements were made whereby Cavalier sold

machines to Uneeda for shipment and sale by the latter to Europe. However, the number of machines sold to Uneeda was minimal. From February 1962 through June 1962, Uneeda's purchases from Cavalier approximated only $5,000 worth of coolers, spare parts and coin mechanisms. It is apparent from Raoul's testimony that the relationship consisted for the most part of efforts to develop business in a substantial volume but without any success.

Mr. Raoul also testified that Cavalier had previously had an agent which represented the firm in all overseas foreign markets, but the agent had developed no business in Europe. Some of the reasons for the difficulty in developing substantial business of this kind in the European market were detailed by Raoul during the course of his direct and cross examination. He stated that the bottlers in England refused to put up money to finance the purchase of vending machines and, more importantly, that they would not make a major or substantial selling effort. And the market for soft drinks could not be developed without strong promotion by the bottlers. He stated, for example,

> "When you call on a Coca-Cola bottler in Europe he gives you coffee to drink and that, there, tells you more about that market than anything I know."

Mr. Raoul also testified that factory workers in Europe make it a practice to put the machine's Coca-Cola bottles into their lunch boxes, bring them home and have their wives turn them back to the stores for cash refunds.

He also discussed the problem of large coins, particularly in England, modification of voltages, and several other problems which convince him that there is small chance for development of a successful vending machine operation of a kind which Uneeda was proposing to create in the foreign market.

It is clear from the testimony of this witness that there was no valid basis for predictions of successful operation by Uneeda in the European market.

The negative aspects of Uneeda's efforts to develop a successful foreign operation do not suggest that we disregard the limited hopes for success which existed during the early stage of Uneeda's negotiations with Cavalier. Even after the fact of failure, Mr. Raoul testified, somewhat more affirmatively:

> "We had the feeling that some business would be done, and in the course of time it might be developed. But it certainly wasn't going to happen very quickly."

Similarly, Mr. Bicker, an attorney who gave up the practice of the law in order to join Uneeda and promote its operations, testified:

> "We had hopes, we had aspirations, we had dreams, we had all of these things. We had reason to speculate that it would [make a profit]. If we hadn't, we wouldn't have been involved."

But Mr. Bickler also testified that Uneeda never had a written contract with the Coca-Cola Company, and of course there was nevery any prospect of such a contract. Nor was there a basis for representations

that Uneeda was undergoing a large expansion project in Europe, that the company's successful operations were assured, that it had strong contracts in Europe for guaranteed business, that it anticipated receiving a million dollar contract, that the stock might be listed on the American Exchange, or for the other material misrepresentations listed above in the discussion of the sales techniques of Fabrikant and several of its salesmen.

It was also a fraudulent technique for the salesmen to omit to mention to the prospective customers the negative aspects of Uneeda's business and prospects, to suggest that the stock was in short supply or that the issue would be oversubscribed, and to omit to state, especially to customers who did not receive an offering circular, that based upon the 157,500 shares to be outstanding on completion of the offering the per share earnings were approximately 12 cents for the year 1961, a fact which was known or should have been known to Martin Fabrikant and each of his salesmen.

Violations of Section 17(a)

There can be no doubt that the misrepresentations and omissions listed above relate to material facts and reflect a pattern of fraudulent activity by the underwriter. The Commission has held that a prediction by a securities salesman of a rise in the price of a stock implies an adequate foundation for making such prediction. Leonard Burton Corporation, 39 S.E.C. 211 (1959). It has also been stated that predictions of a price rise under circumstances similar to those discussed above are a "hallmark of

fraud", and that the deceptive and fraudulent character of unfounded statements recklessly made, even though presented as opinions or predictions, is enhanced where, as here, they are made in conjunction with demonstrably false statements of fact. Alexander Reid & Co., Inc., 40 S.E.C. 986 (1962). Cf. Best Securities, Inc., 39 S.E.C. 93 (1960).

At the least, the optimistic representations and predictions of the several salesmen were entirely unwarranted when measured by the requirements of full and adequate disclosure imposed by the Securities Act upon the broker-dealer and his salesmen employees.

The record clearly demonstrates that throughout the offering period Uneeda's prospects for successfully extending its business operations into Europe were uncertain and speculative, and there was no basis or justification for the predictions, misrepresentations and omissions described above.

Present Control of Uneeda

Martin Fabrikant is now the president of Uneeda and the beneficial owner, directly or indirectly, of approximately 42,000 shares of the common stock, which he bought from Mr. Bickler in 1963. He also holds 25,000 warrants for the purchase of an equal number of shares of Uneeda stock at $3 per share. He is a controlling stockholder of Uneeda.

Responsibility of the Issuer

The responsibility of the issuer of an offering made under Regulation A for the underwriter's non-compliance with Rule 261 and the violations of the anti-fraud provisions of Section 17(a) of the Act has been declared by the Commission in numerous decisions. In Utah-Wyoming Atomic Corporation,

36 S.E.C. 454 (1955), the Commission, speaking of fraudulent activities of an underwriter, said:

> "In our opinion the issuer's lack of participation or knowledge does not dispose of the question before us. The exemption from the necessity of complying with the requirements of the Act which is granted with respect to a security is a conditional one based on compliance with express provisions and standards. In the event of non-compliance [Rule 261] provides that we may permanently suspend the exemption, thereby rendering the exemption unavailable as a vehicle for further sales of a security as to which false information has been circulated, whether by issuer or underwriter."

Cf. Homestead Gold Exploration Corporation, Securities Act Release No. 4770, March 17, 1965; Decorative Interiors, Inc., Securities Act Release No. 4661, January 8, 1964; Loss, Securities Regulation (2 ed.) 627. See also Antilles Electronics Corporation, Securities Act Release No. 4676, March 10, 1964, where the Commission, in permanently suspending a Regulation A exemption said:

> "It is not necessary to find willfulness or that the issuer rather than the underwriter was the prime cause of non-compliance with [the provisions of Regulation A]."

Where control of the issuer and ownership of its stock has been transferred to the wrong-doing underwriter of an offering or to its president, as here, the public interest would even more certainly require Commission action to make the Regulation A suspension permanent.

Date of Completion of the Offering, and the Form 2A Report

Much evidence was introduced and much argument made in the briefs of the parties with respect to the completion date of the offering and the accuracy or inaccuracy of the June 25, 1962 date reported in the Form 2-A filed by the issuer. Ironically, the issuer now contends that the date was incorrect - that the offering in fact was completed on June 4, 1962 - and conversely, the Division asserts that the reported date is correct. The irony in the situation is that the failure to file an accurate Form 2-A report, as noted in footnote 4, supra, has sometimes been urged by the Division as a basis for suspending a Regulation A exemption.

However, the matter is not of great import in this proceeding. The order charges fraud "during the offering period" and, as indicated above, some of the evidence relates to transactions which occurred after June 4, 1962. As stated by the Division in its brief:

> "The significance of establishing the date Fabrikant completed its end of the offering is for the purpose of determining what witness testimony can be evaluated and used. Obviously, therefore, we would want to have the latest date that can be established in order to have the maximum amount of our proof appropriately considered."

In this connection, therefore, the Division urges that the offering was not completed until June 25, 1962, when the escrow agent received $220,500, the full amount called for in the sale of the 73,500 shares under this "all or none" offering. The issuer contends, conversely, that when 73,500 shares were sold by Karen Securities Corp. and Fabrikant the offering was completed, and it urges that Fabrikant's records show

that this occurred on June 4, 1962.

The Hearing Examiner rejects the June 4 date for several reasons. Firstly, the evidence indicates that on June 5, 6 and 7, Fabrikant continued to sell Uneeda original issue stock at the offering price and without commission or tax, under confirmations carrying the legend that the purchaser was buying a new issue for which a prospectus was enclosed. This was done in accordance with and under the authorization of the offering circular's provision for overallotment of shares, and in anticipation of cancellation of some of the "sales" previously made. Moreover, as the Division points out, the funds from some of these later sales were transmitted to the escrow agent as proceeds of the offering, expressly so denominated, and eventually were paid to the issuer and underwriters by the escrow agent on June 25, 1962. And some of the earlier "sales" were never completed and yielded no proceeds to the offering. These factors, among others, are adequate basis for rejecting the contention of the issuer that the sales totalled 73,500 shares on June 4, that the offering was on that day completed, and that the sales on June 5, 6 and 7 were short sales from Fabrikant's trading account rather than part of the offering. 7/

7/ Other sales were made by Fabrikant on these dates at prices in excess of the offering price and with commission charges and taxes included. It would appear that Fabrikant's sales practices were, to say the least, lacking in a desired measure of consistency during this period.

The above conclusion obviates the need to discuss the effect of the participation as a member of the selling group of Banner Securities Corp., or of the return for insufficient funds of its check for $12,000, which was apparently not made good to the escrow agent until June 25, 1962. Cf. Lewisohn Copper Corporation, 38 S.E.C. 226 (1958).

The overallotment aspect is one of several which distinguishes this situation from the facts in Edgerton, Wykoff & Company, 36 S.E.C. 583 (1955) and makes inapplicable the conclusion reached there with respect to the completion of the distribution. In any event, the plethora of misrepresentation, omission and fraudulent activity by Fabrikant and its salesmen prior to June 4, as recited above, amply supports the conclusion reached in this decision. The issuer's effort to exclude from consideration those transactions occurring on the subsequent dates is not only unsupported by the facts but also would not serve to mitigate the offenses, even if sustained.[8/]

Violations of Sections 5(a) and 5(c)

As indicated above, the order was amended to include a charge of violation of section 5(a) and 5(c) insofar as such violations would result from the section 17(a) violations originally charged. The Hearing Examiner concludes that inasmuch as the conditional exemption afforded by Regulation A has not been complied with, it follows that the securities sold in the offering were non-exempt securities and were sold in violation of sections 5(a) and 5(c). Cf. Batten & Co. v. S.E.C.,(C.A.D.C., April 16, 1964); S.E.C. v. Searchlight Consolidated Mining Co., 112 F. Supp. 726 (D. Nev., 1953).

Commission Action

On the basis of the record and the foregoing findings, the Hearing Examiner concludes that Fabrikant and its salesmen engaged in

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8/ Conversely, however, although the offering may have been completed prior to June 25, 1962, there was no proof of fraud or section 17(a) violation in using that date in the Form 2 A Report.

transactions, practices and a course of business in the offer and sale of Uneeda stock which operated and would operate as a fraud and deceit upon the purchasers; that Fabrikant used the mails and other instruments of communication in interstate commerce in connection with such offers and sales; and that such activities were in violation of section 17(a) of the Securities Act and of Rule 261 thereunder and in violation of sections 5(a) and 5(c) of the Act. The violations were substantial, serious and flagrant. Even apart from the fact that Martin Fabrikant is an owner and person in control of the Uneeda stock and the owner of warrants, it is clear that the temporary suspension order should be made permanent by order of the Commission.[9/]

Respectfully submitted,

Sidney Ullman
Hearing Examiner

Washington, D. C.

June 10, 1965.

9/ To the extent that the proposed findings and conclusions submitted to the Hearing Examiner are in accord with the views set forth herein they are accepted, and to the extent they are inconsistent therewith they are expressly rejected.