ADMINISTRATIVE PROCEEDING
FILE NO. 3-3083

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :

PELISSIER ASSOCIATES, INC. :

(8-14557) :

GERALD PELISSIER :

INITIAL DECISION

Washington, D.C.
April 2, 1973

Warren E. Blair
Chief Administrative Law Judge

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APPEARANCES: Martin S. Siegel and Charles B. Pearlman of the New York Regional Office of the Commission, for the Division of Enforcement.

Gerald Pelissier, pro se, and for Pelissier Associates, Inc.

BEFORE: Warren E. Blair, Chief Administrative Law Judge

These proceedings were instituted by an order of the Commission dated June 16, 1971 ("Order"), pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether the respondents named in the Order had engaged in the misconduct alleged by the then Division of Trading and Markets ("Division"), and whether remedial action pursuant to the provisions of the Exchange Act is necessary.

Prior to the commencement of the hearing, respondents Patterson, Matzkin & Co., Patterson, Matzkin & Co., Inc., Edwin M. Matzkin, and George Peck made offers of settlement which, upon acceptance by the Commission and the issuance of the Commission's Findings, Opinion and Order on March 5, 1973, terminated these proceedings as to them. [1/] By order dated December 8, 1971 the Commission noted that Pelissier Associates, Inc. ("Registrant") and Gerald Pelissier ("Pelissier"), hereinafter sometimes referred to as "respondents", [2/] had failed to file answers to the Division's allegations as required by the Order and deemed them to be in default within the meaning of Rule 7(e) of the Rules of Practice. Accordingly, on the basis of the Division's allegations,

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1/ Patterson, Matzkin & Co., Securities Exchange Act Release No. 10027 (March, 1973).

2/ Hereinafter, unless otherwise indicated, "respondents" is not a reference to Patterson, Matzkin & Co., Patterson Matzkin & Co., Inc., Edwin M. Matzkin, or George Peck.

it was found that respondents had wilfully violated and wilfully aided and abetted violations of the Exchange Act and rules thereunder, and that it was in the public interest to revoke the broker-dealer registration of Registrant and to bar Pelissier from association with any broker or dealer.[3/] On January 17, 1972 the Commission vacated the default order against respondents, finding that Pelissier's statements concerning his illness, together with other factors, warranted such action.[4/]

In substance, the Division alleged that Patterson, Matzkin & Co., Inc. ("PM") wilfully violated Section 15(c) of the Exchange Act and Rule 15c2-4 thereunder by failing to promptly deposit money received as part of the sale price of securities of SEAJAY, INC. ("SEAJAY") in a separate bank account and failing to return the funds to persons entitled thereto, and further alleged that Registrant and Pelissier wilfully aided and abetted PM's violations. Additionally, the Division alleged that Registrant wilfully violated and Pelissier wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rules 17a-3, 17a-4, and 17a-5, charging that Registrant failed to accurately make, keep current,and preserve its books and records and failed to file financial reports as required for calendar years 1969 and 1970. At the commencement of the hearing, a motion by the Division to amend the Order to

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3/ Pelissier Associates, Inc., Securities Exchange Act Release No. 9410 (December 8, 1971).

4/ Pelissier Associates, Inc., Securities Exchange Act Release No. 9454 (January 17, 1972).

also charge failure to file the financial report required under Rule 17a-5 for the calendar year 1971 was granted.

Pelissier appeared on behalf of Registrant and for himself, choosing to proceed without counsel, and actively participated in the hearing. 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, and a letter dated July 19, 1972 was received from Pelissier in which he requested that the letter be accepted, and it hereby is, in lieu of a formal brief on behalf of respondents.

The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon observation of the witnesses.[5/]

Respondents

Registrant, a New York corporation with its principal place of business in New York City, was formed in March, 1968. It has been registered as a broker-dealer under the Exchange Act since May 23, 1969. Pelissier is president of Registrant and has served in that capacity since Registrant's inception.

Fraud Violations

In June, 1969 Registrant, which had never before acted as an underwriter, was named by SEAJAY as underwriter of a proposed

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5/ Findings herein are not binding upon Patterson, Matzkin & Co., Patterson, Matzkin & Co., Inc., Edwin M. Matzkin, or George Peck.

Regulation A offering of 100,000 shares of SEAJAY common stock at $3 per share. After various amendments had been made to the Regulation A filing, Registrant commenced offering SEAJAY stock on December 30, 1969 on a "best efforts basis, minimum 50,000 shares," with a requirement in the underwriting agreement that Registrant would deposit all proceeds of the offering "in a special escrow account at the Franklin National Bank, New York, New York in the name of Pelissier Associates, Inc., as Trustee for SEAJAY, INC., unless and until 50,000 of the shares being offered are sold within ninety (90) days of the commencement of the offering or at the termination of any mutually agreed upon extended date." If less than 50,000 shares were sold within the 90 day period (120 days if extended), the offering was to be withdrawn and the money returned to subscribers in full. Under the underwriting agreement, Registrant had the right, in its discretion, to use the services of other brokers or dealers in connection with the offering and sale of the SEAJAY stock.

In January, 1970 Pelissier requested PM, a broker-dealer located in Red Bank, New Jersey, to participate in the SEAJAY offering. At that time Pelissier indicated to Edwin Matzkin, PM's president, that 47,000 shares of SEAJAY had been spoken for and that PM's assistance in selling the last 3,000 shares needed to close the underwriting would be appreciated. That conversation was followed by one that Pelissier had on or about February 5, 1970 with PM's

vice-president in charge of sales, George Peck, in which ways and means of PM's selling enough SEAJAY stock to reach the required 50,000 share requirement were discussed. In that discussion, Pelissier stated that 47,000 shares of SEAJAY had been sold but asked if PM would undertake to sell 5,000 shares to provide a margin of safety. After some consideration, Peck committed PM on or about February 8, 1970 to become a sub-dealer in the SEAJAY offering with the understanding, which Pelissier had made clear, that proceeds from sales of SEAJAY stock were to be deposited in the escrow account at the Franklin National Bank.

In the first few days after agreeing to act as a sub-dealer, PM sold 3,000 shares of SEAJAY stock, and by April 3, 1970 it had sold a total of 7,000 shares for which payment had been received from its customers. However, the $21,000 proceeds from those sales were never escrowed in the Franklin National Bank. Instead, PM deposited $15,000 of those funds in its own regular checking account and retained the $6,000 remainder in the form of undeposited customer checks. The latter checks were subsequently returned to the customers who had given them to PM, but the $15,000 was lost in the course of PM's business operations which ended with PM going into receivership in May, 1970.

It appears that PM refused to escrow the $21,000 it received from the sale of SEAJAY stock because a selected dealer's agreement between PM and Pelissier had not been executed and because Matzkin felt that without such an agreement PM would lose control

over its customers' money if it were deposited in Pelissier's escrow account. While there is a conflict in testimony as to when Pelissier first learned that PM was not escrowing the proceeds received from sales of SEAJAY stock, Pelissier, by his own admission, knew that fact no later than March 1, 1970. During that month Pelissier made numerous calls to PM on the subject of escrowing the funds, and in early April, 1970 met in his office with Peck and Richard Hartung, president of SEAJAY, to discuss the SEAJAY offering. Peck attended that meeting with a $15,000 PM check in his pocket under instructions from Matzkin that he was not to surrender the check to Pelissier unless total sales of SEAJAY had reached the 50,000 shares minimum. Hartung, who had been able to sell 15,000 shares of his company stock, brought a check for $45,000 which he intended to deposit in escrow if 50,000 shares had been sold. 6/

At the meeting, it developed that no more than $124,000 in proceeds had been received by Pelissier, PM, and Hartung. Pelissier attempted to persuade Peck and Hartung to surrender their checks by assuring them that he would receive enough money that day or the next to make up the difference needed to reach $150,000. Peck and Hartung countered with a proposal that Pelissier was to call them the next day when he had the money,at which time they would arrange to meet again. When no call was received from Pelissier,

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6/ PM had sold 7,000 shares of SEAJAY, but cancellation had reduced the figure to 5,000 by the time of the meeting.

and attempted communication with him proved to no avail, Hartung decided on the second day after the meeting to cancel the SEAJAY offering.

Approximately a month later, by letter dated May 14, 1970, Pelissier notified the Commission's New York Regulation A Unit of Hartung's cancellation of the SEAJAY offering, and the refusal of Hartung and Peck to deliver their checks to him. This was the first advice that Pelissier gave to the Commission regarding the refusal of PM to escrow or turn over to Pelissier the proceeds from its sales of SEAJAY stock. Pelissier testified that PM's refusal was brought to the attention of the National Association of Securities Dealers, Inc. ("NASD") about the middle of March, 1970 but Mr. Ford, with whom Pelissier met at the NASD, had no recollection of such conversation, and Pelissier did not reduce his complaint to the NASD to writing. Moreover, Pelissier felt that he could not terminate his relationship with PM because, as he testified, "I wanted all the help I could to culminate the issue. I had every nickel in my life on the line. So I had to sell out the bloody thing with this guy Patterson, Matzkin." 7/ Under the circumstances, it is highly unlikely that Pelissier would have complained to the NASD concerning PM's conduct in the SEAJAY offering, and his testimony to the effect that he had complained to Mr. Ford cannot be credited.

7/ Tr. 535

Under Rule 15c2-4, PM could not, while acting as a broker-dealer participating in the distribution of SEAJAY stock, accept any part of the sale price for that stock without promptly transmitting the money received to the persons entitled thereto. Under the terms of the offering, as PM knew, the proceeds in question were required to be escrowed in the Franklin National Bank. PM's refusal and failure to escrow the money received from its sale of SEAJAY stock therefore constituted a wilful violation by PM of Section 15(c) of the Exchange Act and Rule 15c2-4 thereunder.

It is clear from the record that Registrant and Pelissier wilfully aided and abetted PM's violations of Section 15(c) of the Exchange Act and Rule 15c2-4 thereunder by allowing PM to retain proceeds from its sales of SEAJAY stock after receiving notice of PM's refusal to escrow and its intention to retain dominion over those proceeds. Pelissier had arranged for PM to act as a sub-dealer in the SEAJAY offering and respondents, under that arrangement, were responsible for PM's actions while it acted under that arrangement.[8/] When Pelissier learned that PM was refusing to comply with the escrow requirement, it should have become apparent to respondents that PM was not only breaching its agreement with respondents but also engaging in conduct violative of the Exchange Act. By not acting to terminate the arrangement

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8/ See, Restatement of Agency, Second, §5 (1957).

with PM, but electing instead not to notify the Commission and to continue the relationship in the hope of salvaging the success of the SEAJAY underwriting, respondents must be found to have assumed vicarious liability for PM's illegal conduct. 9/

Pelissier contends that "Pelissier Associates made every conceivable effort to have the $21,000 that Patterson, Matzkin and Co. had collected turned over to the custodian bank." This contention cannot be accepted in view of the absence of credible testimony that Pelissier did complain to the NASD, and of respondents' failure to notify the Commission concerning PM's illegal conduct until a month following cancellation of the SEAJAY offering. Rather, it appears that respondents' concern was to preserve the underwriting and delay notifying regulatory authorities of PM's shortcomings for as long as possible.

Pelissier further argues against the Division's position that respondents' failure to submit and execute a selected dealer's agreement with PM constituted aiding and abetting. In this, respondents are correct and it is found that the withholding of the agreement did not constitute aiding and abetting PM's violations.

On this point, the Division concedes that there is no requirement that an underwriter execute a selected dealer's agreement with a member of its selling group, but contends that respondents'

9/ Cf. S.E.C. v. First Securities Corp. of Chicago, 463 F.2d 981 (7th Cir. 1972); Brennan v. Midwestern United Life Insurance Co., 417 F.2d 147 (7th Cir. 1969).

knowledge that PM would not escrow its SEAJAY proceeds without such agreement makes withholding the agreement an act of aiding and abetting PM's violations. The Division cites no authority in support of its position, relying simply upon the testimony of Matzkin and Peck that PM would have escrowed the proceeds if a selected dealer's agreement had been executed and its view that respondents' refusal to accede to PM's wishes in this regard amounted to aiding and abetting PM's refusal and violative conduct. The fatal weakness in the Division's approach is in its failure to recognize that evidence of causal connection between the acts of respondents and those of PM does not alone suffice to establish aiding and abetting of PM by respondents. Aiding and abetting requires that assistance or encouragement be shown to have been given to the principal violator by the person charged with such conduct.[10/] Here, the respondents' persistent refusal to execute a selected dealer's contract may well have been a cause for PM's refusal to escrow, but respondents had no obligation to reduce the arrangement with PM to writing in order to persuade PM to do what it was already required to do under the law and under its arrangement with respondents. Certainly, if respondents had no obligation to enter into a selected dealer's agreement with PM, it cannot be said that a refusal to do so under the circumstances amounted to assistance or encouragement of PM's unlawful conduct.

10/ Brennan v. Midwestern United Life Insurance Co., supra.

Violation of Bookkeeping Rules

Rule 17a-3 under the Exchange Act requires every registered broker-dealer to make and keep current certain books and records specified in that rule, and Rule 17a-4 requires every broker-dealer subject to Rule 17a-3 to preserve certain of these specified books and records in an easily accessible place. As a registered broker-dealer, Registrant was subject to and required to comply with those rules.

While testifying, Pelissier admitted that Registrant never had made or kept current most of the required books and records, and further testified that he was unsure of the whereabouts of certain of the books and records and could not produce others because they were in the possession of his former accountants, his former attorney, or his former wife. Pelissier further testified that his endeavors to obtain such books and records as might have been in the home of his former wife were unsuccessful.

It is manifest from the record that Registrant while engaged in business as a broker-dealer under the direction and control of Pelissier failed to keep certain books and records which were required to be made and kept current by Rule 17a-3, and that those of Registrant's books and records that were in existence and were required to be preserved under Rule 17a-4 had not been preserved in an easily accessible place. Under the circumstances, it is concluded that Registrant wilfully violated and Pelissier wilfully

aided and abetted violations of Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder.

Violations of Rule 17a-5

Under Rule 17a-5 of the Exchange Act, the first report of financial condition to be filed by a broker-dealer must be filed as of a date not less than one nor more than five months after the effective date of its registration and the report must be filed not more than 45 days after the date as of which the report speaks.

By letter dated September 2, 1969 the Commission's New York Regional Office reminded Registrant of the requirements of Rule 17a-5, and of the time limits imposed by the rule. Despite this reminder, the first financial report which reflected Registrant's financial condition as of June 30, 1969 was not filed until September 30, 1969, ninety-two (92)days after the date of the report. The New York Regional Office called Registrant's attention to the failure of the report to comply with Rule 17a-5 by letter dated April 2, 1970, and cautioned Registrant against future failures to comply with the time requirements of Rule 17a-5.

It further appears from the record that Registrant failed to file a report of financial condition for calendar year 1970, and that no report of Registrant's financial condition was filed for calendar year 1971.

In view of the foregoing it is concluded that Registrant wilfully violated and Pelissier wilfully aided and abetted violations

of Section 17(a) of the Exchange Act and Rule 17a-5 thereunder as alleged in the Order for Proceedings as amended at the commencement of the hearing.

Public Interest

Respondents' wilful violations require consideration of the sanctions which are necessary in the public interest. In this connection, the Division views the conduct of respondents to be such as requires a revocation of Registrant's registration and a bar against Pelissier's association with any broker-dealer. On the other hand, Pelissier believes that no sanction should be imposed.

It is apparent that Pelissier fails to recognize the seriousness of the long-continuing violations of the bookkeeping and financial reporting rules that Registrant committed. Both Pelissier's testimony and his statement in his letter of July 19, 1972 that "[t]he Commission's real complaint against me, which parenthetically took most of the time of the hearing,was that Pelissier Associates aided and abetted the violations of the securities law by Patterson, Matzkin and Co.," reveal that shortcoming, and indicate the unlikelihood that respondents will observe the Commission's rules applicable to the conduct of a broker-dealer business. Further, it appears that the NASD had reason to take action against Registrant for net capital violations that occurred in 1969 and 1970 and for bookkeeping violations that were found to exist on two occasions in early 1970.

That action resulted in an NASD decision dated March 3, 1971 which suspended Registrant's membership and Pelissier's registration with the NASD for 30 days and fined them $1,000. Because of failure to pay the $1,000 fine, Registrant was expelled from membership and Pelissier's registration with the NASD revoked on July 22, 1971.

While Pelissier's illness between September, 1970 and October 1971 mitigates the failure to file financial reports and to keep proper books and records in that period, there appears to be no excuse for the actions of respondents in aiding and abetting the fraud committed by PM in the SEAJAY offering nor for the violations of the bookkeeping and reporting rules prior to that illness and subsequent to Pelissier's recovery of his health. Under the circumstances, it is concluded that the registration of Registrant should be revoked and that Pelissier should be barred from association with any broker or dealer. But serious as Pelissier's misconduct was, it does not appear that the public interest would be jeopardized if he were permitted after six months to return to the securities business in an adequately supervised position.[11/]

Accordingly, IT IS ORDERED that the registration of Pelissier Associates, Inc., as a broker-dealer is revoked, and that Gerald Pelissier is barred from association with any broker or dealer,

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11/ 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.

except that after six months from the effective date of this order Gerald Pelissier may become associated with a registered broker-dealer in a non-supervisory capacity upon an appropriate showing to the staff of the Commission that he will be adequately supervised.

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

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
Chief Administrative Law Judge

Washington, D.C.
April 2, 1973