ADMINISTRATIVE PROCEEDING
FILE NO. 3-4124

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
The Registration Statement of	:
I.M.H. - ONE	:
File No. 2-45093	:

INITIAL DECISION

Edward B. Wagner
Administrative Law Judge

Washington, D. C.
October 10, 1973

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In the Matter of The Registration Statement of I.M.H. - ONE File No. 2-45093	INITIAL DECISION

APPEARANCES: David H. Belkin and Donald J. Myers for the Division of Enforcement.

William Scott Bradbury, Arlington, Virginia for I.M.H. - ONE, International Motor Hotels, Inc., and Wiley A. Pearce.

BEFORE: Edward B. Wagner, Administrative Law Judge

These proceedings were ordered by the Securities and Exchange Commission on January 18, 1973, pursuant to Section 8(d) of the Securities Act of 1933 (Securities Act) and to determine whether the allegations set forth in the Division of Enforcement's Statement of Matters were true and in connection therewith to afford I.M.H. - One (registrant) an opportunity to establish any defenses to said allegations, and to determine whether a stop order should issue suspending the effectiveness of the registration statement filed by registrant with the Commission on July 21, 1972. The order was amended on March 12, 1972, to include consideration of the application for withdrawal of the registration statement filed by registrant.

A public evidentiary hearing pursuant to Section 8(d) of the Securities Act was held. Thereafter, pursuant to order the deposition of Frank B. Shaw of Norfolk, Virginia was taken. Upon motion of the Division, the transcript of that deposition and certain exhibits were received in evidence, and the record was closed.

Proposed Findings Conclusions and Supporting Brief were filed by the Division in accordance with the schedule which had been established. No corresponding filing was made by registrant.

The Division's motion that, in view of registrant's failure to file, the Administrative Law Judge should adopt the Division's findings and conclusions as his decision in the proceeding has been denied, and it has been determined to consider the record in the absence of any filings by registrant.

The findings and conclusions herein are based upon the evidence as determined from the record and upon observation of the witnesses. Preponderance of the evidence is the standard of proof applied.

On July 21, 1972, registrant filed with the Commission a registration statement on Form S-11 covering a proposed sale of 13,580 partnership interests at an offering price of $1,000 per unit. The filing states that the registrant is a limited partnership which "intends to develop, own and operate Three Motor Hotels in addition to One-Hundred and Seventy-Five garden type apartments. The motor hotel developments will be located in Boise, Idaho; El Monte, California; and Norfolk, Virginia. The apartments will be developed in connection with, and as part of the El Monte, California Motor Hotel complex." (Registration Statement, face page).[1/]

Wiley A. Pearce (Pearce) is the President, Board Chairman and sole stockholder of International Motor Hotels, Inc., the corporate general partner of registrant.

The offering is to be underwritten by IMH Securities Corporation (IMH Securities). Dr. Stanley R. Sitnik (Sitnik) is a director of International Motor Hotels and President and Board Chairman of IMH Securities.

1/ Reference to the registration statement, will, unless otherwise noted, be to Amendment No. 1, filed November 17, 1972; excepting therefrom the order portion of this decision.

Subsequent to filing the registration statement, registrant received a "bed bug" letter from the staff. Such letters are sent to advise registrants that no further review of the registration statement will be made because of substantial disclosure deficiencies and is authorized by the Commission "when. . . the registration statement is so poorly prepared or otherwise presents problems so serious that review will be deferred since no further staff time would be justified in view of other staff responsibilities". Securities Act Release No. 5231 (February 3, 1972).

On November 17, 1972, Amendment No. 1 to the registration statement was filed. Four days later, on November 21, 1972, registrant filed Amendment No. 2 to the registration statement, which invoked the language of Rule 473(b) under the Securities Act to begin the twenty-day period at the end of which the registration statement would become effective pursuant to Section 8(a) of the Securities Act. On December 11, 1972, the registration statement became effective by operation of law. Counsel for registrant sought to withdraw the registration statement by letter, dated August 28, 1973.

MATERIAL DEFICIENCIES IN REGISTRATION STATEMENT

Overall Impression and Description of Real Estate

As the Division contends, the overall impression given by the registration statement is that of certainty and finality,

whereas registrant's plans were highly speculative and contingent. The prospective investor is given the false impression that registrant was close to acquiring and developing various properties on which it intended to build motor hotels. The Commission statement, cited by the Division, is directly in point:

> "In the present case the prospects of the registrant are given the habiliments of strong probability, whereas, in fact, they would more properly appear in the dress of reasonably doubtful possibility." Major Metals Corporation, 2 S.E.C. 74, 77 (1937)

This false impression is fostered by the use of phraseology, such as "intends to develop, own and operate", indicating that the major problems in achieving their goals were internal rather than external, and by the excessively long and detailed delineation of the program, estimated costs and features of sites, giving the impression that acquisition of the sites was a foregone conclusion.

The false impression that any obstacles or difficulties were internal was further created by the emphasis in the section entitled, "Risks and Other Important Factors," upon inexperience of management, its fiduciary duties, compensation and possible conflicts of interest. While these factors were present, the overriding risk was that no land would be acquired, no motor hotels built and no franchises obtained. These risks were submerged by an extensive discussion of other risks which, while real enough,

were much less fundamental.[2/]

In fact, what the registrant intended to do - it is presumed - was first, to attempt to purchase real estate, then, to attempt to construct motor hotels and, in respect to such hotels, to attempt to obtain Sheraton or other franchises. All of these objectives were fraught with problems over which registrant had little or no control. Registrant merely had some possible prospects and nothing more. These basic facts are not sufficiently set forth in the registration statement and it, accordingly, is materially misleading in its overall effect. In addition, it is misleading in respect to the real estate in many specific particulars.

El Monte, California

The registration statement filed on July 21, 1972, states that registrant had entered into an exclusive agreement with the

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2/ When the fundamental risks of failure to acquire the properties and Sheraton franchises were discussed they were minimized by unduly optimistic and unjustified statements of opinion on the part of the Corporate General Partner that the properties would be acquired and the license agreements obtained. Registration Statement, p. 17, 18.

El Monte City Redevelopment Agency commencing April 25, 1972 and ending October 25, 1972 to be the exclusive developer of 15 acres of commercially oriented real estate in that city.

The first amendment filed on November 17, 1972, does not state that the "exclusive agreement" had terminated, which was the fact. It states that "[t]he Real Property selected by the General Partner for the Partnership developments is owned, in fee ownership, by or is under the direct control of City or Federal Agencies," and that "/t/he General Partner, on behalf of the Partnership. . . is currently negotiating with the appropriate governmental agencies for the purchase of the properties required for the Partnership developments." Registration Statement, pp. 17, 18. The registration statement is incorrect in stating that the general partner was negotiating for the El Monte property when, in fact, there had been no negotiations for the resale of the El Monte property and the price had not been determined.

There is also no disclosure in the registration statement of the fact that the property which is to be developed in El Monte is presently individually - owned residential property and none of it has been acquired by the redevelopment agency. Although the agency has the power to purchase the property, and if the owners refuse to

sell, can exercise its power of eminent domain, such power can only be exercised through a legally prescribed procedure of public hearings. There is no discussion of the possibility that the eminent domain process may take from six to nine months.

Boise, Idaho

The registration statement falsely states that the general partner is negotiating with the City of Boise Redevelopment Agency to procure land for the development of a hotel, since no negotiations have yet been entered into between the agency and registrant or its general partner. The record shows that negotiations will not even begin until registrant submits preliminary designs and a financing package to the Boise Redevelopment Agency.

Norfolk, Virginia

The registration statement states that the general partner is presently negotiating on behalf of the registrant with the City of Norfolk to purchase real estate which is required for the development of registrant's proposed hotel in Norfolk. In fact, no negotiations had commenced and none would commence until Pearce submitted a complete proposal including financing. No such proposal had been submitted.

The registration statement does not disclose that at a meeting on June 8, 1972 Pearce and Sitnik were informed by an official of the

Norfolk Redevelopment and Housing Authority (Norfolk Authority) that the Norfolk Authority had entered into a contract with one developer for one area and was about to enter into an agreement with a prime developer for the majority of the other downtown area.

The registration statement further does not disclose that Frank B. Shaw, Director, Department of Real Estate, Norfolk Authority, wrote to Pearce on August 8, 1972 informing Pearce that the Norfolk Authority had been negotiating for some time for a large scale development and because of those negotiations was not in a position to consider Pearce's plan for a hotel in Norfolk. This letter was sent to Pearce to inform him that the proposal for a multi-use development - which included a hotel on the primary site Pearce had chosen for registrant and use of other land - had matured to the point that precluded other developers from coming in. The letter indicated that the Norfolk Authority expected to make a decision within 6 months on the above proposal by a prime developer for multi-use development. This was not disclosed in the registration statement.

On August 22, 1972 Sitnik and a Mr. Amos Camp attempted to obtain a commitment letter from the Norfolk Authority by submitting two proposed letters in draft form for Mr. Shaw to sign. Representatives of the Norfolk Authority would sign neither letter. The registration statement does not disclose registrant's failure to obtain a commitment on

land from the Norfolk Authority on which registrant proposed to build its hotel.

The letter, dated September 11, 1972, which Pearce did receive, was meant to indicate to Pearce that the Norfolk Authority was interested in Pearce's proposed project and would review it as it would review any other proposal. It did not preclude simultaneous discussions with other developers, and Pearce was aware of discussions with others. The letter was not intended to be and was never referred to as an exclusive developer agreement, although it was filed as such in connection with the registration statement.

The registration statement fails to disclose that if registrant were able to acquire property in the Norfolk redevelopment area for a hotel, it would take from 5 to 18 months before an agreement could be signed.

Sheraton Hotels

The registration statement states that the corporate general partner has received a "holding agreement" from Sheraton Inns, Inc. for the El Monte property. The material fact that a "holding agreement" is merely a letter in which Sheraton agrees not to solicit other developers - although other developers may solicit and negotiate with Sheraton - is not discussed. The registration statement further states that, in the opinion of the corporate general partner, Sheraton will issue license agreements for El Monte, Boise and Norfolk

to the corporate general partner. In view of the circumstances that actually obtained, the latter statement was either false on its face, or misleading in view of omission to state related material facts.

These omitted facts were as follows. Only one Sheraton hotel was proposed for Boise, and Sheraton had already issued a commitment letter to grant a Sheraton license in Boise to another group. The commitment had been made public, and Pearce was aware of it at the time the November 17 amendment to the registration statement was filed. The record shows that in view of the three other Sheraton hotels in the Norfolk area it was highly unlikely that another franchise would have been granted to the corporate general partner in Norfolk. An application for a Sheraton license could not be made without adequate land control documents, and registrant had no land control documents for any of its proposed sites. There was no disclosure that approximately 1/3 of applicants for Sheraton licenses are rejected and about 10% of those who receive commitment letters never begin construction.

Investment Policies

The registration statement projects a tax sheltered return to the limited partners of 8% per annum on invested capital. In view of the highly contingent nature of registrant's prospects, a statement of any specific rate of return - even though stated in terms of "intention" - is misleading. Further, no basis for such a

projection is stated. The possibility of a time delay is not discussed in connection with the projection nor is the effect of such delay upon the projection.

Financial Statement of Registrant's Corporate General Partner

Pearce, the president and sole stockholder of the corporate general partner, loaned the corporate general partner certain real property subject to encumbrances.[3/] The corporate general partner's balance sheet, contained in the registration statement, reflects this property as a fixed asset. It is listed under the caption, "Subordinated Assets". The encumbrances on the loaned property are reflected as a long-term liability. The excess of the cost basis of the properties over the mortgages is reflected in the balance sheet under "Stockholders Equity," as "Equity under Subordinated Assets agreement". This excess, approximately $56,000, represents a substantial portion of the general partner's reflected total Stockholders Equity of $191,000.

The above presentation is materially misleading. The $56,000 figure is not "Stockholders Equity," since the corporate general partner is obligated to return it to the lender. An offsetting liability in the full amount of the asset should appear on the

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3/ The purpose of the loan was to permit the corporate general partner to meet certain criteria established by the Internal Revenue Service and thus have registrant taxed as a partnership rather than as a corporation.

balance sheet. The caption, "Subordinated Assets," is misleading since it is not the asset which is subordinated but rather Pearce's right to reclaim the property and registrant's obligation to return it. "Property Borrowed Under a Subordination Agreement" would be the correct caption.

The footnotes to the financial statements are materially deficient in that they do not disclose among other things, the nature of the property and the amount of revenues generated by the property.

Tax Status of Partnership

The purpose of the loan Pearce made to the corporate general partner was to meet a net worth test established by the Internal Revenue Service.[4/] The net worth test is one of the criteria for receiving from the Service an advance ruling that the entity will be taxed as a partnership. The net worth test is also applied as a continuing test.

The registration statement is materially misleading in not indicating that there is, according to unrefuted expert testimony, a substantial question whether the Internal Revenue Service would include the value of the property loaned in any net worth computations, in view of the fact that its value as an asset is counterbalanced by a

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4/ Internal Revenue Procedure 72-13.

liability to repay the property. The registration statement further omits to disclose that the absence of an advance ruling increases the risk of an audit.

There is no disclosure that in the event of an audit the Internal Revenue Service would under the circumstances be faced with a substantial issue as to whether registrant has a majority of corporate characteristics and should be taxed as a corporation.

There is no discussion of the tax risks facing an investor in the event registrant is taxed as a corporation. 5/

Finally, the registration statement falsely states that the subordinated collateral agreement provides that the loaned assets will be released at such time as the limited partners have had their original capital investment returned to them. The agreement, filed as an exhibit to the registration statement, contains no such provision.

Status of Underwriter

On the cover page of the prospectus contained in the registration statement and at page 37 of the registration statement it is stated that the securities of registrant will be offered through IMH Securities, a securities dealer and other licensed securities dealers. The registration statement is misleading in failing to disclose that

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5/ See Franchard Corporation, Securities Act Rel. No. 4710, p. 30 (July 31, 1964).

IMH Securities had not filed its application on Form B-D to become a registered broker-dealer until December 11, 1972, the very day registrant's registration statement became effective.

In view of the fact that IMH Securities was not registered with the Commission it was precluded from legally effecting any transaction in or inducing the purchase of any of the securities being offered by registrant.

Plan of Distribution

Sitnik owned all of the outstanding securities of IMH Securities and also owned and operated a registered broker-dealer, Sitnik and Co. The registration statement does not disclose that Sitnik & Co., a registered broker-dealer sole proprietorship owned by Sitnik, was to participate in the proposed public offering as a member of the selling group and that any compensation earned by Sitnik & Co. in this respect would benefit Sitnik, who was a director of the corporate general partner, personally. 6/

The registration statement falsely states that the underwriter is not an affiliated company of the general partner and that

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6/ See Free Traders, Inc., 7 S.E.C. 913, 924 (1940).

the general partner does not have any interest in the underwriter in view of the fact that Sitnik is a director of the corporate general partner and owns all of the securities of the underwriter. 7/

As set forth in detail above, the registration statement which is the subject of this proceeding is materially misleading in that it contains untrue statements of material facts and omits to state material facts required to be stated therein or necessary to make the statements therein not misleading.

WITHDRAWAL

Rule 477 under the Securities Act provides for withdrawal of a registration statement "upon application to the Commission, finding such withdrawal consistent with the public interest and protection of investors, consents thereto." Thus, there is no absolute right to withdraw a registration statement once it has been filed.

7/ See definition of "affiliated person" in Instructions to Form S-11.

The Commission has in a number of cases refused to permit the withdrawal of registration statements. See Winnebago Distilling Company, 6 S.E.C. 926 (1940): Columbia General Investment Corporation v. S.E.C., 265 F. 2d 559 (5th Cir., 1959); Resources Corporation International v. S.E.C., 103 F. 2d 929 (D.C. Cir., 1939).

In the present case, Pearce and International Motor Hotels first filed a registration statement on behalf of I.M.H.-San Jose, a limited partnership organized to build a hotel in San Jose, California. Because of numerous material deficiencies, I.M.H.-San Jose received a "bed bug" letter, putting registrant on notice of such deficiencies. Representatives of I.M.H.-San Jose met with the staff to discuss the alleged deficiencies, but an amendment was never filed. Withdrawal of the I.M.H.-San Jose registration statement was sought on July 21, 1972 and permitted by the Commission.

On the same day withdrawal was sought, registrant filed the registration statement which is the subject of this proceeding with many of the same deficiencies contained in the original I.M.H.-San Jose filing. Registrant also received a "bed bug" letter. Sitnik discussed the deficiencies with the staff, and after the meeting registrant filed an amendment. Pearce and Sitnik distributed numerous copies of the registration statement and first amendment to persons in the various redevelopment authorities, to many broker-dealers and to others. Registrant did not wait for staff comments but sought effectiveness pursuant to Section 8(a) of the Securities

Act. The registration statement became effective on December 11, 1972, and shortly thereafter, registrant was informed of the staff opinion that the registration statement was materially misleading. Registrant did nothing to correct the deficiencies.[8/] The Commission then authorized the commencement of this proceeding on January 18, 1973. Thereafter, by letter dated January 29, 1973, registrant sought to withdraw its registration statement.

The situation presented is very similar to that described in the Winnebago case, supra., cited by the Division, where two registration statements had been filed containing many of the same deficiencies and the first registration statement had been withdrawn with Commission consent. In that case, in refusing to permit withdrawal of the second statement, the Commission stated:

> "Where, as here, the registration statement compounds deficiencies contained in an earlier withdrawn registration statement, it is especially important that we issue a stop order exposing the deficiencies we have found to exist." 6 S.E.C. at 936.

Although it appears that Pearce was considering withdrawal prior to the institution of this proceeding, no action was taken until afterwards. Accordingly, the statement quoted by the Division in its brief is opposite:

> ". . . it will be seen at a glance how ineffective the penalty provision would become if it be conceded

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8/ Registrant and I.M.H. Securities Corporation did file a "notice of delay of offering," dated December 15, 1972, stating that the offering would be delayed until a post-effective amendment was filed containing changes required by the NASD.

> that the registrant who has got the benefit of registration may, when charged with fraud in its procurement, withdraw and put an end to the inquisitorial powers of the Commission and escape the consequences of his wrong on the ground that no investor has suffered. In short, we think that Congress in the enactment of the statute was legislating in the public interest and not solely for the protection of a potential investor in shares of stock; that the test of the right of withdrawal is the absence of prejudice to the public or to investors and not the absence of prejudice to investors alone." Resources Corporation International v. S.E.C., 103 F. 2d 929, 932 (D.C. Cir., 1939).

As the Division contends, that registrant made no sales and is not now in operation does not render moot the purpose of this proceeding and confer upon registrant and absolute right of withdrawal. See Peoples Securities Co. v. S.E.C. 289 F. 2d 268, 272-274 (1961), distinguishing Jones v. S.E.C., 298 U.S. 1 (1936), on the basis, among others, of statutory changes and rule additions after 1936.

For the reasons stated above, it is concluded that withdrawal of the registration statement is not consistent with the public interest and protection of investors.

Accordingly, IT IS ORDERED that the application for withdrawal is denied.

Further, for the reasons heretofore stated,

IT IS ORDERED that the effectiveness of the registration statement filed by I.M.H.-One is suspended.

These orders shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice.

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen (15) 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 become final with respect to that party. 9/

Edward B. Wagner
Administrative Law Judge

Washington, D. C.
October 10, 1973

9/ All contentions and proposed findings and conclusions have been considered. This initial decision incorporates those which have been accepted and found necessary for inclusion herein.