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UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of BARNETT & CO. INC. 40 Exchange Place New York, New York File No. 8-6342	FILED MAY 25 1960 B M & F SECTION SECURITIES & EXCHANGE COMMISSION

RECOMMENDED DECISION

IRVING SCHILLER
Hearing Examiner

Washington, D. C.

May 25, 1960.

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In the Matter of	
BARNETT & CO. INC. 40 Exchange Place New York, New York	
File No. 8-6342	

RECOMMENDED DECISION

APPEARANCES:

Philip Wagner and Frank J. Evangelist, Jr., Esqs.
for the Division of Trading and Exchanges.

Richard H. Wels and Stanley Kanarek, Esqs.
of Moss, Wels & Marcus, 341 Madison Avenue,
New York 17, N. Y. for Barnett & Co., Inc.
and Stanley Barnett.

BEFORE: IRVING SCHILLER, HEARING EXAMINER

Rule IX(d) of the Rules of Practice of the Commission provides, inter alia, that all recommended decisions are advisory only and that the findings, conclusions and other matters contained therein are not binding upon the Commission.

THE PROCEEDINGS

The issue presented in these proceedings under Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") is whether it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration as a broker and dealer of Barnett & Co., Inc. ("registrant"), pending final determination of whether such registration should be revoked. 1/

By order dated April 21, 1960, the Commission instituted proceedings to determine whether to revoke or, pending final determination, to suspend registrant's registration; whether, pursuant to Section 15A(1)(2) of the Exchange Act, registrant should be suspended or expelled from membership in the National Association of Securities Dealers, Inc. ("NASD"), a registered securities association; and whether, under Section 15A(b)(4) of the Exchange Act, Stanley Barnett, president and treasurer of registrant, Maurice Lieber and Murray Libman, employees of registrant, are each a cause of any order of revocation, suspension or expulsion which may be issued by the Commission.

The order for proceedings, as amended, alleges among other things that during the period from approximately May, 1959 to approximately August, 1959, registrant, Barnett, Lieber and Libman willfully violated Section 17(a) of the Securities Act of 1933 ("Securities Act") in that

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1/ Section 15(b) of the Exchange Act provides with respect to suspension of registration as a broker or dealer:

"Pending final determination whether any such registration shall be revoked, the Commission shall, by order, suspend such registration if, after appropriate notice and opportunity for hearing, such suspension shall appear to the Commission to be necessary or appropriate in the public interest and for the protection of investors."

in the offer and sale of the common capital stock of Steuben Electronics Corporation, Inc. ("Steuben"), by use of the mails and means and instruments of transportation and communication in interstate commerce, registrant Barnett, Liebman and Libman directly and indirectly employed devices, schemes, and artifices to defraud, obtained money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices and a course of business which would and did operate as a fraud and deceit upon the purchasers; that registrant, Barnett, Lieber and Libman willfully violated Section 10(b) of the Exchange Act and Rule 17 CFR 240.10b-5 promulgated by the Commission under said section; that registrant willfully violated Section 15(c)(1) of the Exchange Act and Rule 17 CFR 240.15c1-2 promulgated by the Commission under said section and Barnett, Lieber and Libman caused, aided, abetted, counselled, commanded and induced such violations by registrant. 2/ The order further alleges that registrant is permanently enjoined by an order of the U. S. District Court for the Southern District of New York, entered on or about March 15, 1960 from engaging in and continuing with the sale of securities.

2/ Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 17 CFR 240.10b-5 and 17 CFR 240.c1-2(a) and (b) thereunder, as applicable in the instant case provide in essence that it shall be unlawful to use the mails or means of interstate commerce in connection with the purchase or sale of any security by the use of any devices to defraud, an untrue or misleading statement of a material fact, or any act, practice, or course of business which operates or would operate as a fraud or deceit upon a customer, or by the use of any other manipulative, deceptive or fraudulent device.

After appropriate notice, a hearing was held before the undersigned Hearing Examiner on May 2, 1960. Proposed findings of fact and conclusions of law were submitted by counsel for the Division of Trading and Exchanges and by counsel for the registrant. Although Messrs. Lieber and Libman received notice of the instant hearing, and their appearances were noted in the record, they did not participate in the hearing.[3/]

The following findings are based on the record, the documents and exhibits therein and the Hearing Examiner's observation of the various witnesses.

Registrant has been registered as a broker and dealer with the Securities and Exchange Commission since January 22, 1958 pursuant to Section 15(b) of the Exchange Act. Since the incorporation of registrant, Stanley Barnett has been acting as president and treasurer. He is the beneficial owner of all of the outstanding stock of the registrant. Registrant became and is presently a member of the NASD.

The gravamen of the charges against the registrant, insofar as they are pertinent to a consideration of the suspension of registrant, relate to the activities and conduct of registrant, Barnett and two of

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3/ At the outset of the hearing, Messrs. Lieber and Libman requested an opportunity to secure counsel. The Hearing Examiner explained that the instant proceeding was one directed solely against the registrant on the question of suspension of registrant's registration and no recommendation would be made by the Hearing Examiner with respect to Messrs. Lieber and Libman and that any issues presented in the Commission's order for proceedings, dated April 21, 1960 with respect to those two individuals would be the subject of further proceedings as to which it is presumed they will receive appropriate notice.

its salesmen with respect to the stock of Steuben. Generally, the allegations charge that Barnett and two of his salesmen made false and misleading statements of material facts and omitted to state material facts with respect to Steuben, the substance of which will be discussed below.

Steuben was incorporated in New York in October, 1955 under the name of Steuben Television Antenna Systems, Inc. In March, 1955, the name of the corporation was changed to Steuben Electronics Corporation. Steuben was a holding company which owned 100% of the stock of Steuben Television Antenna Systems, Inc., a Delaware corporation, which owned property and equipment used for the purpose of receiving signals from television sets and relaying the telecasts to subscribers of the system over closed circuits for which a monthly fee was paid to the corporation.

In January, 1959, Steuben Television Antenna Systems, Inc. entered into a contract with Scientific Electronics Laboratories, Inc. ("Scientific") for the acquisition of 25% of the common stock of Scientific. In March, 1959, one Edward Bobich, a New York attorney who, with a group, had acquired ownership and control of stock of Astoria Manufacturing Company, Inc. ("Astoria") began negotiations for the acquisition of Astoria by Steuben.[4/] On April 30, 1959, Steuben entered into a contract with Astoria for the purchase of 80% of the outstanding capital stock of Astoria. From May to October, 1959, Steuben paid approximately $7,000 to $8,000 on account of the said contract, the total price of which was approximately

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4/ Astoria was engaged in the manufacture of fire extinguishers, fire alarms, tire inflators and a tire inflator with a puncture sealer.

$100,000. The contract was cancelled in October, 1959. Steuben at no time acquired any stock to Astoria. During the summer of 1959 Bobich, on behalf of Steuben, conducted negotiations for the acquisition of Fay Instruments, Inc. and Aetna Tool and Machine Co. Bobich testified that such negotiations were quickly abandoned. Bobich became president of Steuben on or about May 25, 1959 at the request of Milton Shuck who, Bobich testified, owned a controlling block of Steuben stock.

The record discloses that the only connection between Steuben and Astoria and Scientific was the contracts mentioned above, neither of which was ever consummated and that Steuben never exercised control of or concerned itself with the management or operations of either Astoria or Scientific. At some time between May and August, 1959, Steuben received financial statements from the said companies, but never made them public or furnished them to the registrant or Barnett. During the period from May to October of 1959, Steuben had outstanding 1,012,000 shares of common stock.

Bobich testified that during the above mentioned period Steuben had no earnings, no income, "was subsisting on borrowed capital", had debts of approximately $150,000 and had a book value of 3¢ a share. Bobich stated that the book value was arrived at without giving any value whatsoever to the contracts to purchase the stock of Scientific and Astoria. He stated that ascribing a value to the stock of those two companies during the period of the existence of the said contracts would have increased the book value to no more than 5¢ per share.

During the period May-August, 1959, registrant sold in excess of 106,000 shares of Steuben stock. These shares were purchased principally

from Landau and Company ("Landau"). About 3,000 shares were purchased from Cauldwell Securities ("Cauldwell").

False and Misleading Statements

The evidence adduced at the hearing shows that in the sale of Steuben stock, registrant made numerous false and misleading statements over the telephone and omitted to state material facts necessary in order to make the statement made not misleading.

The representations made over the telephone by registrant's salesmen and in one instance by Barnett himself included such statements as "the stock was ready to move", the stock was "due to move up", the stock was going to increase to $20 or $25 in approximately eighteen months, Steuben was a "fast growing stock and it would go up very rapidly and might double or triple", that it would be better to "buy them /Steuben/ now before the stock would split", the stock would be listed on the Stock Exchange, "the New York Stock Exchange and the American Stock Exchange", Steuben was going to "merge with two other companies", Steuben had contracts for 40,000 antennas for pay TV and that at a meeting of the company Barnett was going to suggest that Steuben pay a 6% dividend. These statements were made by two of registrant's salesmen and by Barnett to four investors who testified at the hearing.[5/]

5/ Though not all of the said statements were made to each of the four investors who testified, each was told that the stock would rise substantially, two were told of the listing on the Exchange, one was told about the merger and one was told of the stock split and the pay TV antennas.

From the evidence presented at the hearing, all of the representations were false and misleading. Steuben made no application to the New York Stock Exchange or the American Stock Exchange for listing thereon nor had Steuben made any arrangements with respect to listing its stock on any national securities exchange. It had not negotiated for a merger nor does it appear from the record that any company had any interest in Steuben. While the record shows that Steuben had entered into two contracts to purchase stock of two companies and had paid some money on account of the purchase price, it is clear from the record that merger with those two companies or any other companies was not discussed. Neither Steuben nor its wholly-owned subsidiary had any contracts for pay TV antennas. The statements made by registrant's salesmen and Barnett that Steuben stock would double or triple, that it would go up to $20 or $25 a share were made without any apparent justification or basis. Though Steuben's books were not produced, Steuben's president (during the period the representations were made) testified that the company had no earnings, no income, no profits, no possibility of paying dividends, had an indebteness of about $150,000 and was existing on borrowed capital. Its book value never exceeded 5 cents per share. Steuben's president further testified that with over a million shares outstanding, the company's sssets would have had to increase to $25,000,000 for it to have a book value of $25 per share and that from the nature of Steuben's business at the time in question such increase was unwarranted.

Moreover, Barnett and his two salesmen failed to disclose to investors the financial condition of Steuben. Specifically, they failed to disclose that Steuben had no earnings or income, no profits, what its

debts were and its book value. These were material facts which should have been disclosed to investors to permit them to make an informed investment judgment of Steuben.

Registrant contends that it did not represent nor did it authorize its salesmen to represent that Steuben stock would go up substantially or very quickly or that it would be listed on any exchange. It made similar contentions with respect to pay TV antennas. In addition to denying it made false and misleading statements, registrant contends that the information it gave to customers was either received from the company and information it prepared and published in news-letters which it mailed to investors and prospective investors.[6/]

These contentions cannot be accepted. We consider at the outset the claim relating to information obtained from Steuben. The record shows that registrant by letter dated April 22, 1959 forwarded a letter to Steuben stating it may be interested in recommending the company stock

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6/ At the hearing, registrant also attempted to prove that another brokerage concern (Garden State Securities) had contacted customers of registrant and made representations similar to those made by registrant inferring that investors may have been confused as to which firm in fact made the representations. Suffice it to say that the investors who testified stated unequivocally that the calls they received came from registrant and they never heard of Garden State Securities. The fact that another brokerage concern may have made representations to some of registrant's customers (not the investors who testified at the hearing) was in the opinion of the Hearing Examiner irrelevant and such proof was rejected.

to its clients and requested information concerning the company. Specifically, registrant requested the following:

> "We would like to know as much as possible about the history of the company; about when and how it started; about it's present business; it's products; all facts about it's subsidiaries, if any, it's plans and prospects for the future; it's stock situation; how many shares are authorized, how many outstanding, how many in the hands of the public, and how the shares got into the public's hands."

Registrant made it quite clear it was interested in Steuben's products and its stock.

It is significant and revealing to note that Barnett, who has been in the securities business for ten years and admittedly sent the letter, did not think it important to request Steuben to furnish a financial statement of any kind and displayed no interest in ascertaining any information concerning the company's management. By letter dated May 25, 1959, Bobich replied, signing the letter as attorney.[7/] The letter gives information concerning the products manufactured by Steuben Television Antenna Systems, Inc., Astoria and Scientific and the names of some large customers of the latter two companies. The letter makes no mention of what interest Steuben had in any of the said companies. The letter did not furnish the information requested by registrant and registrant made no attempt to determine the nature of the relationship of

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7/ Bobich testified the letter was prepared by either a Charles Stahl or Ben Goldstein on behalf of Milton Shuck, the individual allegedly in control of Steuben and though he, Bobich, signed it he had no authority from the corporation to do so. Bobich further testified that on May 25 he was in Corning, New York and could not recall when, after that date, he actually signed the letter.

Steuben to Astoria and Scientific. Barnett testified he spoke to Bobich on several occasions about Steuben and in some vague unexplainable manner thought it was all one company. With this meager information, and without additional investigation, registrant undertook to recommend the stock to prospective purchasers and to publish information about Steuben (discussed below) which it furnished customers.

We now consider whether, in light of registrant's denial, the representations as testified to by investors were in fact made. On the basis of observation of the demeanor of the investor witnesses, the Hearing Examiner accepts their versions of the conversations with registrant's salesmen and Barnett. A number of factors dictate such conclusion. Though the salesmen were present in the hearing room throughout the hearing, they were never called by registrant to state what representations they purportedly made or to deny the representations which investors stated under oath were in fact made. Registrant's denial of the representations were made by Barnett who testified he personally made none of the representations claimed by investors, never instructed any salesmen to make such representations and informed salesmen that they were to make only statements furnished to registrant by the company and the information published by registrant itself. A perusal of the type of literature published by the registrant fortifies the opinion of the Hearing Examiner that the investors were telling the truth. For example, on June 1, 1959, registrant in recommending purchase of Steuben as a speculation included a table of the market activity of nine electronic stocks for the period 1958-1959. The percentage gain for these stocks shown in the table ranges from 225% to 965%. The reasons for selecting the particular

stocks was not disclosed nor was any attempt made in this literature to indicate whether the electronic companies were even in the same electronic field in which Steuben purported to be. The phenomenal market rise of the stocks depicted could have no purpose other than to whet the appetite of the potential investor. Of equal concern, in light of one investor's testimony, is the following statement:

> "/Steuben/ embarked on a program of acquiring Community Antenna, and closed circuit television systems. It is estimated that there are a million subscribers who pay $40 million a year to view free television programs."

With such a type of presentation in its literature, it is not hard to believe investors who testify they were told that Steuben stock would rise and the one investor who testified he was told by registrant's salesmen that Steuben had contracts for 40,000 pay TV antennas. 8/

Though Barnett denied stating or instructing salesmen to state that Steuben stock would rise, he finally admitted he heard at least one salesman tell an investor, "the stock is going to go up."

With respect to a representation that a stock would rise, the Commission has held that a prediction by a securities dealer or salesman to a prospective investor that a stock would go up or increase in price or would double or triple, carries an implication that there is an adequate basis for such a prediction and that there are no known facts which would make such a prediction unreliable. 9/ In the instant case,

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8/ No charge is made in the order for proceedings herein that the literature published by registrant was false and misleading and the Hearing Examiner consequently makes no finding with respect thereto.

9/ See In the Matter of Leonard Burton Corporation, Sec. Exch. Act Rel. No. 5978 (June 4, 1959).

registrant undertook to predict that Steuben stock would rise but never adequately investigated to ascertain whether there were any facts which would furnish a basis for such a prediction. Such conduct indicates that registrant was completely unconcerned with any responsibility which a broker-dealer has to ascertain material facts, the disclosure of which is necessary to render the statements made not misleading.

Of great significance, in the opinion of the Hearing Examiner, is the fact that no financial statement of Steuben was ever requested by registrant, and no such statement ever received. The record shows that Barnett did not know, and since he instructed salesmen presumably they did not know, whether Steuben had any assets, liabilities, income, earnings, profits, losses, or what its net worth was. The literature published by registrant and sent to investors was barren of any such information. The record demonstrates that the registrant and its salesmen embarked on a campaign to sell Steuben stock irrespective of its investment worth and without knowledge of any facts relating to the foregoing matters. Registrant's failure to obtain material financial information did not prevent it from qualifying its optimistic representations and recommendations of purchase. The pattern of representations to investors in widely separated parts of the country relating to the increase in the price of the stock and the listing on the Exchange is unmistakable. Registrant's asserted reliance on the sparse information furnished by Steuben in recommending the stock to investors orally and in writing when coupled with its failure to secure information concerning the company's financial condition demonstrates a lack of understanding of a fundamental responsible

relationship between the securities dealer and customer.

Barnett's testimony regarding the firm's selling activities is most revealing:

> Q What would you tell a customer when you wanted to sell him Steuben stock? Did you tell him it would go down?
> A No, you don't tell them anything.
> Q You don't tell them anything?
> A You just say in our opinion this is a good speculative recommendation.
> Q What does that mean?
> A That in our opinion it is a good speculative recommendation.
> Q What does it mean?
> A Exactly that, in those words, that we have an opinion on the stock.
> Q What is your opinion on the stock?
> A Our opinion is that it is a good speculation, if the customer wants to speculate.
> Q What does it mean to a customer?
> A I don't really know what it means to a customer. I think each man puts his evaluation on what that means.

Again in response to questions:

> Q. Now in the ordinary course of your business in selling stock, don't you give the customer any information with respect to the company?
> A We give the information that they have already received. We just go over it, and then make any kind of a general statement.
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> * * * * * * * *
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> Q Is it your testimony now that even though he has gotten information, you merely repeat what was said in the write-up that he got?
> A More or less, yes.
> Q That is all you ever tell?
> A Yes. Specifically, that is what we do tell him. All the points of what the customer has already received.
> Q Now when you tell a customer that this is a good speculation, does he ever ask what that means?
> A No. Then the customer takes over from there and sells himself.

The testimony demonstrates a misconception of the requirements of disclosure of all of the facts necessary in order to make the statements made not misleading and enable an investor to make an informed judgment of a security.

Public Interest

Under Section 15(b) of the Exchange Act the Commission may suspend the registration of a broker-dealer, pending final determination whether such registration should be revoked, if, after notice and opportunity for hearing such suspension appears to be necessary or appropriate in the public interest or for the protection of investors.

In an attempt to ascertain if the public interest and the protection of investor's standard of the statute requires the imposition of suspension of registration, consideration is given to the manner in which registrant conducted his business and dealt with the public. During the May-August 1959 period registrant occupied offices on three different floors in a large office building in New York City. Registrant employed 10 or 12 salesmen whose sole function during the period in question was to sell only Steuben stock. All of the salesmen were hired by Barnett, who also instructed them and supervised their activities. Barnett's instruction to the salesmen was to confine their statements to the written material previously furnished customers by registrant and to information given them by Barnett, which Barnett testified he secured from the company. All of registrant's business was conducted by long distance telephone.[10/] Barnett testified he could not recall who recommended the Steuben stock to him or the source of his original interest in the company. He stated, however,

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10/ During the period registrant was selling Steuben stock it had 15 telephone numbers and 18 or 19 instruments. Registrant's telephone bill in June was $3,000 or $4,000, and in August was between $6,000 and $7,000.

that nearly all of the stock he had purchased (in excess of 100,000 shares) came from Landau and Company, whose name he obtained from the National Daily Quotation Sheets,and that such purchases were the result of negotiations between himself and Landau. As Barnett stated:

"As I sold I would negotiate to buy more."

Registrant's records show that all of the stock purchased from June through August from Landau were bought at $2.75 per share, despite the fact that Landau's quotes in the sheets were around $4 per share. Though registrant was selling the Steuben stock at around $4 per share,[11/] Barnett testified he never experienced any difficulty in purchasing from Landau at $2.75 per share, and the stock was always available at that price. Barnett made no effort to find out where Landau was getting the stock, although he admits he was curious.

Registrant's efforts to obtain information about Steuben to give to his customers has been detailed above, to which should be added that Barnett testified he employed an attorney, John J. Sullivan, to give him a legal opinion that Steuben stock could be puclicly sold.[12/] Sullivan reported to Barnett that he made an investigation of Steuben and "examined the books and minutes of the company" but did not tell Barnett anything of Steuben's financial condition, nor did Barnett ask whether the company was making or losing money. Again, reference to Barnett's testimony in this

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11/ Barnett's explanation of his $4 selling price is that it was the market price as reflected in the sheets. This explanation, in light of Barnett's constant purchases at 2-3/4ths, is unbelievable.

12/ Barnett gave no satisfactory explanation as to why it was necessary to obtain a legal opinion as to the saleability of the Steuben stock.

regard is significant.

Q Didn't you ever think it was necessary or important to tell your customers whether the company was making money?

* * * * * * * * *

A If I can get that information, yes, I do think it is important.

* * * * * * * * *

Q Did you make any effort to get that information to give to your customers with respect to Steuben stock?

A Specifically, no.

Q At any time between May and August of 1959, did you make any effort to obtain any financial information with respect to the Steuben Company?

A No, I did not.

With respect to Barnett's supervision of his salesmen, he testified he talked with them on occasion and "by listening to what they were saying" on the telephone. He testified he spent most of his day travelling from one floor to another, spending between 5 and 30 minutes listening to his salesmen constantly trying to sell Steuben stock. When pressed as to whether salesmen were using high pressure in selling Steuben stock, Barnett testified they used "very low pressure" or what he called a "soft sell", which meant "actually letting the persons sell themselves". The Hearing Examiner cannot help but conclude that registrant's activities in utilizing a dozen salesmen to sell one stock by means of constant long distance telephone calls without any knowledge of the financial condition of the company whose stock it was recommending to investors, or even making any effort to secure such information and representing that the stock would rise substantially and would be listed on an exchange, can be characterized in the words used by Judge Chase of the United States Court of Appeals in

the Second Circuit as "boiler room".[13/]

The Hearing Examiner has gone to some length to describe registrant's operations as it appears in the record, recognizing, of course, that suspension of a broker-dealer pending a hearing on revocation is a sanction not to be lightly considered. The Hearing Examiner is of the opinion, and so finds, that the record contains a sufficient showing of misconduct to indicate the likelihood that after hearings on the issue of revocation registrant will be found to have committed willful violations or any other grounds prescribed with respect to revocation in Section 15(b)[14/] will be established, and that revocation will be required in the public interest. Such a showing of misconduct, including fraudulent representations to investors, is evident in the record. In this connection, the Hearing Examiner is satisfied that the record aptly demonstrates, and he so finds, that registrant through Barnett, and at least two of its salesmen, made fraudulent representations with respect to the stock of Steuben and failed to disclose material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

13/ U. S. v. Rollnick et al., 91 F 2d 911, 915 (1937). See also Timbers and Pollack "Extradition From Canada to the United States for Securities Fraud: Frustration of the National Policies of Both Countries", 24 Fordham L. Rev. 301 (1955).

14/ Under Section 15(b) there is no requirement that suspension be based upon findings of willful violations or other grounds specified with respect to revocation. A.G.Bellin Securities Corp., Securities Exchange Act Release No. 5966 (May 18, 1959); Peerless-New York Incorporated, Securities Exchange Act Release No. 6293 (February 26, 1960).

Registrant's denial of the fraudulent representations is completely unsupported, and in view of the testimony of the investor witnesses the testimony of Barnett with respect to the denials cannot be accepted. Registrant as a broker-dealer engaged in recommending to investors the purchase of Steuben stock had a duty to exercise reasonable care to obtain such basic information as the financial condition of Steuben, its earnings and net worth, and make such information available to its customers. Registrant failed to make the type of investigation which in the light of registrant's responsibilities to its customers is deemed essential. Registrant's asserted reliance on statements furnished by Steuben did not discharge the duty to exercise reasonable care, since it is quite evident the information it received was far short of the kind of information essential to permit investors to make an informed judgment.

The manner in which registrant conducted its business by means of long distance telephone calls, with little or no supervision of salesmen and selling only one security at a time raises serious question as to whether it should be permitted to deal with public investors. Registrant does not appear to understand or appreciate the responsibilities of a broker-dealer to investors. In this latter connection, it is noted that registrant consistently paid $2.75 per share for the Steuben stock notwithstanding that the alleged market price of the said security if a true market really existed, was quoted at approximately $4 per share, at which price registrant was selling to investors.[15/] Though no charge is made of fraud in connection with the prices charged to investors and no such finding is made herein, the Hearing Examiner must recognize in considering the protection of investors standard of Section 15(b) that the Commission has consistently held that it is a fraud and deceit upon customers to charge prices not reasonably related to current market prices without disclosing that fact[16/] and that a dealer's own contemporaneous costs are the best evidence of current market prices, in the absence of countervailing evidence.[17/] Barnett offered no explanation or any special

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15/ Charles Hughes & Co., Inc., 13 S.E.C. 676 (1943), aff'd 139 F 2d 434 (C.A. 2, 1943), cert. denied 321 U.S. 786; W. T. Anderson Company, Inc., Sec. Exch. Act Rel. No. 6177 (February 9, 1960).

16/ In fact one investor testified he had purchased a block of Steuben stock from registrant at $4 and was called again and told by registrant's salesman that though the stock had risen to $4-1/2 or $4-3/4, he could obtain an additional block for the investor at the price of $4. The investor thereupon instructed registrant to sell the stock he had bought at $4 so that he could make a profit. At registrant's request he immediately mailed his certificate which registrant sold for less than $2 per share.

17/ Paul Carroll Ferguson, Sec. Exch. Act Rel. No. 6009 (July 7, 1959); Samuel B. Franklin & Company, Sec. Exch. Act Rel. No. 5915 (March 24, 1959).

circumstances warranting a higher than normal mark-up, such as special services rendered for customers or unusual expenses (unless the huge telephone bill is considered an unusual expense). The record shows that Barnett had a ready market at $2.75 per share available to him for all the shares of Steuben he cared to purchase. Under the Exchange Act the Commission is given ample authority to suspend the registration of brokers and dealers. Such authority should be invoked in cases where brokers and dealers make it a practice of operating in the manner indicated herein. In order to protect investors, such brokers and dealers should not be permitted to have further dealings with the public.

CONCLUSIONS

The sole issue presented is whether registrants as a broker-dealer should be suspended as necessary or appropriate in the public interest or for the protection of investors pending final determination of whether such registration shall be revoked. Since it has been found above that the record contains a sufficient showing of misconduct to indicate that after a hearing on the revocation issues there is a likelihood that registrant will be found to have committed the violations alleged in the Commission's order, suspension of registrant's registration is required. However, there is no intention that the findings recommended herein be construed as a determination on any issue other than suspension at this time. The issues which are the subject of further proceedings are not considered in this decision.

It is recommended that the Commission issue an order forthwith under Section 15(b) of the Exchange Act finding that it is necessary and appropriate in the public interest and for the protection of investors to

suspend the registration as a broker and dealer of Barnett & Co., Inc. pending final determination of whether such registration should be revoked. 18/

Respectfully submitted,

Irving Schiller
Hearing Examiner

Washington, D. C.

May 25, 1960.

18/ The Division of Trading and Exchanges and registrant have submitted proposed findings of fact and conclusions of law. To the extent that the proposed findings are in accord with this recommended decision, they are sustained and to the extent they are inconsistent with such views they are overruled.

The Division of Trading and Exchanges has requested a finding that registrant was permanently enjoined by an order of the United States District Court for the Southern District of New York on or about February 16, 1960 from engaging in and continuing certain conduct and practices in connection with the sale of securities. The Hearing Examiner is of the view that such a finding is unnecessary in the instant suspension case and such matter should be reserved for consideration by the Commission at the time the revocation proceedings are before it.