ADMINISTRATIVE PROCEEDING
FILE NO. 3-10

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
SEABOARD SECURITIES CORPORATION (8-9753)
LEON NASH
HAROLD IGNATOFF

INITIAL DECISION

Washington, D. C.
March 29, 1966

Irving Schiller
Hearing Examiner

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BEFORE: Irving Schiller

APPEARANCES: Robert M. Berson and Elliott N. Abramson, Esqs. of the New York Regional Office for the Division of Trading and Markets

Martin M. Frank, Esq., for Seaboard Securities Corporation and Leon Nash

Harold Ignatoff, pro se.

These are proceedings instituted by the Commission pursuant to Section 15(b) and 15A of the Securities Exchange Act of 1934 (Exchange Act) to determine whether Seaboard Securities Corporation (registrant), Leon Nash (Nash), Harold Ignatoff (Ignatoff), Nelson Finkelman (Finkelman) and Phillip Markowitz, also known as Mark Phillips (Phillips), singly and in concert, willfully violated and willfully aided and abetted in violations of Section 17(a) of the Securities Act of 1933 (Securities Act) and Sections 10(b), 15(c)(1) of the Exchange Act and Rules 10b-5, 10b-6 and 15c1-2 thereunder and whether any remedial action is appropriate in the public interest pursuant to Sections 15(b) and 15A of the Exchange Act. 1/ The order for proceedings alleges in substance that during the period from October 18, 1962 to October 15, 1963 registrant, Nash, Ignatoff, Finkelman and Phillips, singly and in concert, willfully violated

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1/ Section 15(b) of the Exchange Act, as applicable here, provides that the Commission shall censure, suspend for a period not exceeding 12 months or revoke the registration of a broker-dealer if it finds that such censure, suspension or revocation is in the public interest and that such broker or dealer or any person associated with such broker-dealer has willfully violated any provisions of that Act or of the Securities Act of 1933 or any rule thereunder.

Section 15A(l)(2) of the Exchange Act provides for suspension for a maximum of 12 months or the expulsion from a registered securities association of any member, or for suspension for a maximum period of 12 months or barring any person from being associated with a member thereof if the Commission finds that such member or person has violated any provision of the Exchange Act or rule or regulation thereunder or has willfully violated any provision of the Securities Act of 1933, as amended, or any rule or regulation thereunder.

and willfully aided and abetted violations of Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and certain specified rules thereunder [2/] in offering, selling, purchasing and effecting transactions in the common stock of Vista Industries Corporation (Vista), [3/] directly and indirectly employed devices, schemes and artifices to defraud, and engaged in transactions, acts, practices and a course of business which would and did operate as a fraud and deceit upon purchasers, prospective purchasers and sellers of such securities. At the commencement of the hearing the order for proceedings was amended to allege that during the period October 18, 1962 to October 15, 1963 registrant willfully violated, and Nash willfully aided and abetted violations of, Section 15(c)(1) of the Act and Rule 15c1-2 thereunder, in that they effected trans-

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2/ The composite effect of these provisions, as applicable here, is to make unlawful the use of the mails or interstate facilities in connection with the offer and sale of any security by means of a device to defraud, an untrue and 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 means of any other manipulative or fraudulent device.

3/ Vista was originally known as Trans Central Industries, Inc. The record does not contain the date on which the name of Trans Central was changed to Vista. The record reflects that in a report to stockholders dated July 3, 1963 the company changed its name to Vista. The name Vista is being used throughout this decision although it should be recognized that certain testimony and exhibits refer to the company under its prior name of Trans Central.

actions in or induced the purchase or sale of the common stock of Vista, otherwise than on a national securities exchange, by means of manipulative, deceptive or other fraudulent devices or contrivances by inducing persons to purchase and selling to such persons Vista stock at prices far in excess of and having no reasonable relationship to then current market price of such stock.

After appropriate notice hearings were held before the undersigned hearing examiner. Proposed findings of fact and conclusions of law and briefs in support thereof were filed by the Division of Trading and Markets and by registrant and Nash. 4/

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

Registrant, a Florida corporation, is registered as a broker-dealer pursuant to Section 15(b) of the Exchange Act and maintained its offices in the City of New York during the period it sold Vista stock, Nash has been, and is, president, director and owner of more than 10% of the securities of registrant. Finkelman was employed by registrant as a registered representative from approximately October 1962 until May 1963 and Phillips was so employed from

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4/ Finkelman and Phillips failed to appear at the hearings held herein. On August 9, 1965 the Commission, noting that the two respondents were deemed in default under Rule 17 CFR 201.6(e), rendered its Findings, Opinion and Order barring Finkelman and Markowitz from being associated with a broker or dealer (Securities Exchange Act Release No. 7674).

approximately August 1962 until June of 1963.[5/] Ignatoff became a registered representative at registrant in approximately June of 1963 and is still so employed. Registrant is a member of a National Association of Securities Dealers, Inc. (NASD), a national securities association registered pursuant to Section 15A of the Exchange Act.

Fraudulent Sale of Vista Stock

The record establishes that from October 1962 to October 1963 registrant sold 108,350 shares of common stock of Vista to the public. During the said period registrant, its registered representatives and Nash engaged in a sales campaign to sell Vista stock and made untrue statements of material facts and omitted to state material facts to purchasers of the common stock of Vista and engaged in acts, practices and a course of business which operated as a fraud and deceit upon purchasers of the said securities.

Seventeen investor witnesses testified as to the representations made to them. All of such witnesses were told that Vista stock would increase in price by the use of such phrases as Vista would rise in a couple of days, or that in a couple of weeks it would be up to 87¢, or that it would rise a couple of points at which time the

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5/ The record in these proceedings contains evidence as to the conduct and activities of Finkelman and Phillips during the period they were employed by registrant. Such evidence will be considered in this decision as against registrant.

investor would be told when to sell the stock, or that it would rise to 1-1/4, or as high as 3-3/4, or that it would almost double in a few weeks, or that it could be guaranteed that Vista would increase to $2 a share, or that the investor would realize a profit on his investment, or that as soon as it hit the over-the-counter market it would go to between $3 and $6 a share and that the stock would "take off," or that Vista was a good stock, it would make money and that the investor could expect a good capital gain appreciation. Two witnesses were told that Vista would be listed, one of which witness being told that there was a possibility of getting the stock on the American Stock Exchange. Six of the investor witnesses who testified they were sold Vista stock during the period October through December 1962 were either told nothing of the type of businesses being conducted by Vista or that Vista was in the wholesale distribution of foods or that Vista had entered into an agreement with a large well-known food concern to distribute and sell their products to institutions in the New York area. The remaining eleven witnesses who were sold Vista stock between the period February 1963 to September 1963 were told that Vista had recently acquired an interest in films featuring either Buck Rogers or Flash Gordon, that a contract had been or was about to be concluded with Station "WPIX," a New York television station or that such films had been or would be sold in foreign countries and that with the entry of Vista into the film business the company's earnings would increase or if the films caught on there might be additional profits which would result in a rise of

the price of the stock. In addition, some of these witnesses were told that Vista, through one of its subsidiaries, had recently undertaken the distribution of frozen lobsters which also would increase the company's earnings. One witness was told Vista owned property in Tennessee, that oil had been discovered on such property and that there was a good possibility oil could be found on the Vista property. Twelve of the investor witnesses were told nothing concerning Vista's financial condition. Two of the five remaining witnesses were promised financial statements but never received any, another was told that Vista was making money, a fourth was told that Vista had good earnings and the fifth was told that Vista was in good financial condition and would pay a dividend. Eight witnesses testified they were never informed that Vogels Dairy Products, Inc. (Vogels) was a subsidiary of Vista, two investors were told that Vogels was a subsidiary, another that Vogels was a good company and still another that it was making money. Ten of the investor witnesses were told nothing of Save-More Paks, Inc. (Save-More), another wholly owned subsidiary of Vista, although one witness was told that Save-More was a subsidiary and another told that its earnings were increasing. Nine witnesses testified they were never told that Charles Frozen Foods, Inc.(Charles) was a wholly owned subsidiary of Vista and two witnesses stated that they were told only of the existence of Charles. Seven of the investor witnesses who purchased in 1963 were told that Vista had acquired an interest in either Buck Rogers or Flash Gordon films or

both and that such films would be shown on television or were informed that such films would be distributed in foreign markets. None of the investor witnesses was told anything concerning the financial condition or the earnings of Vista or any of its subsidiaries nor were any financial statements of Vista or any of its subsidiaries ever furnished to any of the investor witnesses.

We now turn to a consideration of Vista and its operation to ascertain what, if any, basis existed for predictions of a rise in the price of the stock made to the investors or other representations concerning the company's earnings. The following facts concerning Vista's financial condition and the results of the operations of its subsidiaries are not disputed by respondents. Vista was incorporated in March of 1959. In April of 1960 it acquired all of the outstanding stock of Vogels and 145 Reade Street Corp (Reade Street), a corporation which owned the property on which Vogels was located and from which the subsidiaries were operated. On or about the 1st of January, 1961, Vista acquired all of the outstanding stock of Charles and in the same year acquired 100% of the stock of Save-More.[6/] For the year ended 1961 Vista sustained a net operating loss of $5,312 and its accumulated earned surplus deficit totalled $36,331. For the year ended 1962 its net operating loss

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6/ The record reflects that Vista had acquired a 50% interest in Save-More in 1960 and the remaining 50% in 1961.

amounted to $7,171 and its accumulated earned surplus deficit totalled $43,503. For the year ended 1963 Vista had a net operating income of $1,290 and an accumulated earned surplus deficit of $42,212. From 1961 through 1964 each of Vista's subsidiaries either lost money or their earnings had been decreasing. Thus, for the fiscal year ended September 30, 1961 Vogels earned $8,374, for the fiscal year ended September 30, 1962 it earned $7,154 and for the fiscal year ended September 30, 1963 it earned $1,561. For the year ended 1961 Save-More had a net operating loss of $7,522 and had an earned surplus deficit of $9,524; for the year ended 1962 it had a net operating loss of $1,041 and an earned surplus deficit of $10,566 and for the year ended 1963 it had a net operating loss of $8,192 and an earned surplus deficit of $18,758. For the year ended 1961 Charles had a net operating loss of $20,181 and an accumulated loss of $35,241.[7/] For the fiscal year ended April 30, 1961 Reade Street earned $1,347 before taxes; for the fiscal year ended April 30, 1962 it earned $609 before taxes; for the fiscal year ended April 30, 1963 it earned $511 before taxes and for the fiscal year ended April 30, 1964 it earned $3,231 before taxes.[8/] The testimony shows that the Flash Gordon film was acquired either in the latter part of

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7/ The record does not contain financial information concerning Charles for any years subsequent to 1961.

8/ The record discloses that on July 1, 1963 Reade Street sold its building and land realizing a long-term capital gain of about $8,623, which is included in the earnings for the fiscal year ended April 30, 1964.

1962 or early in 1963 by a corporation known as Tele-Vista Films, Inc. (Tele-Vista) in which Vista had an interest. Although the record discloses that the cost of acquiring the rights to the Flash Gordon film series was $177,000, of which $111,000 was still due and payable on December 31, 1964, it does not reflect whether Tele-Vista realized any profit or loss for the period.[9/] The rights to the film series known as Buck Rogers was acquired in the spring of 1963 by Film Shows, Inc. (Film Shows), which was owned by Vista and four other persons. Although the record indicates that the cost of acquiring the film series was $42,000 and up to December 31, 1964 Film Shows had received about $25,500 from sales of the films and an additional $20,900 in commissions from Tele-Vista there is no evidence in the record as to whether Film Shows made a profit or a loss in connection with the Buck Roger film during the period registrant was selling Vista stock.[10/]

9/ There is some evidence that up to December 31, 1964 Tele-Vista had received $86,790 for sales of the said film and had paid $20,950 in commissions to accomplish such sales. There was no evidence, however, as to any other expenses incurred and hence no determination could be made as to whether the company made or lost money and no evidence appears in the record as to any profit or loss in connection with the Flash Gordon Films.

10/ Film Shows was organized on April 19, 1963. There is evidence in the record that for the taxable year beginning on such date to March 31, 1964 Film Shows had a net operating loss of approximately $3,700. The record, however, fails to show the company's earnings or profits during the period registrant sold Vista stock to customers.

It is apparent from the record that immediately prior to and during the period registrant was selling Vista stock that company was losing money, that its accumulated earned surplus deficit at the end of 1963 was in excess of $42,000 and that two of its subsidiaries were sustaining continuous losses and the earnings of the remaining two were constantly decreasing. It is obvious that the predictions to stockholders who were sold securities in 1962 concerning price rise and other representations made concerning the operations of Vista, were utterly without foundation or basis in fact.

With the acquisition of the film rights to Buck Rogers and Flash Gordon in 1963 it appears that registrant and its salesmen had great hopes Vista's earnings would increase and the representations made to prospective purchasers of Vista stock in 1963 were primarily on the strength of such acquisitions. However, there was no basis for the optimism by registrant and its salesmen concerning possible future earnings of Vista because of the acquisition of the films. Since the acquisition of the film rights was a new and untried venture and Vista's management had no experience in this field there was no information available which could lead registrant or its salesmen to conclude that Vista's earnings would increase or that the price of its stock would rise. The representations that Vista's earnings were good or would increase as a result of the films were thus without reasonable basis. Registrant and Nash urge that prior to undertaking the sale of Vista stock Nash made an investigation of Vista as a

result of which he determined to offer it to customers. They point to the fact that Nash and two of his salesmen visited Vista's premises in the City of New York about a week prior to the commencement of registrant's sales to customers, spoke with Vista's officials concerning its business, received a copy of a 9-month interim consolidated financial statement which showed that Vista had a profit of about $5,450, and at Nash's request received 500 copies of a brochure. About two months after such visit registrant requested and received 500 copies of a second brochure from the company. An analysis of the information received by registrant and its salesmen at Vista's plant and from the brochures fails to furnish any possible basis for the unwarranted representations made to customers. The visit to the plant consisted of viewing the building which was occupied by Vogels Dairy, seeing the warehousing and refrigerating facilities for the dairy products, being told that Save-More had a freezing plant in Cedarhurst, Long Island, being told that Vogels, the principal subsidiary, had a small profit, that two of the other subsidiaries were losing money, that the management was acquisition minded, that they were looking for companies that make profits, the name of any such company not being stated, and receiving a hand-written copy of an unverified consolidated balance sheet as at September 30, 1962 together with a profit and loss statement from January 1 to September 30, 1962 which reflected a net profit for the 9-month period of approximately $5,450. None of the brochures received from Vista contained information concerning earnings, results of

operations by any of the subsidiary companies or any financial information whatsoever.[11/]

Registrant and Nash further urge in essence that they believed Vista's operations "had turned the corner" and they believed the company's operations would be profitable.

The Commission has repeatedly held and the Courts have stated that unfounded predictions as to future levels or price increases of a stock unsupported by any reasonable basis of fact are a "hallmark of fraud."[12/] In the instant case it is clear from the record

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11/ The first so-called brochure registrant received was a letter which stated that existing refrigeration and freezing equipment was valued at approximately $35,000, that the company had 32,000 feet of warehousing facilities, that it concluded a contract for the distribution of frozen foods for another large food concern, that the company intended to expand and concluded by thanking the stockholders for their support during the company's past difficult periods. The second brochure received early in 1963 stated that Vista owned Vogels, Safe-More and Reade Street and described in general that Vogels was a purveyor of dairy products, that Save-More engaged in the sale and distribution of portion-control fish, meats and allied products and Reade Street owned the premises in which Vogels was located. Mention was made that a joint venture had been entered into for the purchase of a "well-known moving picture serial dealing with the space age." The cost of the joint venture was stated as $42,000 and the brochure concluded by indicating that stockholders will be advised further "as developments can be revealed." The third brochure dated July 3, 1963 for the first time mentioned Film Shows, Inc. and the film serial Buck Rogers. The brochure concluded that Vista's "roots are in the food field - basic to the expansion of America" and stated that stockholders would be kept informed "as events unfold."

12/ Hamilton Waters & Co., Inc., Securities Exchange Act Release No. 7725 (October 18, 1965); Mac Robbins & Co., Inc., Securities Exchange Act Release No. 6846, p.15 (July 11, 1962), aff'd sub nom Berko v. S.E.C., 316 F. 2d 137 (C.A. 2, 1963).

that the so-called investigation made by registrant was insufficient in terms of securing facts which would furnish a basis for the representations made. The interim consolidated financial statement received by registrant showed an unusually small profit when measured against the totality of the operations conducted by Vista's subsidiaries and considering the fact that the said statement on its face showed that Vista had issued and outstanding 2,025,000 shares of its stock, should have been sufficient to raise a red flag warning that the company was far from successful and certainly not one which warranted a representation that the price of its stock would double or even rise in the foreseeable future. Moreover, an interim consolidated financial statement reflecting a small profit does not furnish the basis for an assumption that such profit will continue or increase by the end of the year particularly where the company was entering into a new and untried venture without experience or know-how management. None of the salesmen told investors that it had information that two of Vista's subsidiaries were sustaining continual losses and that the earnings of two other subsidiaries had been steadily declining. Nothing was said to investors of registrant's inability to obtain current financial information concerning the operations of any of Vista's subsidiaries.

It is evident from the record that the written material received contained no information concerning Vista's operations which could possibly serve as a basis for salesmen making the

unwarranted representations predicting an increase in the price of Vista stock or the payment of dividends.[13] A salesman who expresses an opinion about future market prices, dividends or listing on an exchange impliedly represents that he has adequate basis for such belief. Absent such basis, he violates his duty to deal fairly with customers and his implied representation is fraudulent.[14]

Registrant's assertion that it believed Vista would be successful is without merit. Faith in the ultimate success of the business enterprise is not the measure of responsibility under the Federal securities laws and it is inconsistent with the principles of fair dealing and violative of the securities laws for a broker to induce purchases of securities by means of representations unsupported by a reasonable factual basis and without disclosure of known or reasonably available information necessary to provide the investor with a fair picture of the securities being offered.[15] As succinctly stated by the Courts, honest belief that an enterprise would eventually succeed cannot excuse willful misrepresentations by which investors' funds are obtained. United States v. Painter, 314 F. 2d 939 (C.A.4, 1963).

The real clue as to the basis used by Nash and registrant in determining to offer Vista stock to prospective customers is furnished by Nash himself who testified that in the latter part of 1962

13/ See Footnote 11, supra.

14/ Aircraft Dynamics International Corp., Securities Exchange Act Release No. 7113 (1963).

15/ D. F. Bernheimer & Co., Inc., Securities Exchange Act Release No. 7000 (January 23, 1963).

the "market broke," at which time he was looking for a "cheap number." Upon learning that Vista could be purchased in the latter part of October at approximately less than 50¢ and that it had sold the previous year in the range from 2-1/2 to 2-3/4 Nash apparently decided that a good campaign to sell would prove successful. Such campaign actually started the day after registrant acquired its first 5,000 shares at 45¢. The denials by the salesmen and Nash that they told customers Vista would rise in the price are emasculated by evidence in the record from Nash, Ignatoff and another salesman who admitted telling or suggesting to customers that there was a good likelihood that they could either make money by purchasing Vista or that Vista stock could or would rise or that Vista stock was down at the moment and was expected to rise.

The hearing examiner concludes that registrant willfully violated the anti-fraud provisions of the Securities acts and that Nash and Ignatoff willfully violated and aided and abetted registrant in its willful violation of the said acts.

Sale of Securities at Unfair Prices

The order for proceedings alleges that between October 18, 1962 and October 15, 1963 registrant, Nash and Ignatoff, singly and in concert, willfully violated the anti-fraud provisions of the securities acts by inducing persons to purchase and selling to such persons Vista stock at prices far in excess of and having no reasonable relationship to the then current market price of such stock

without disclosing to such persons the market price or the contemporaneous cost of such securities, thereby obtaining excessive profits. At the hearing the above-mentioned order was amended to allege additionally that the said pricing practice was in willful violation of Section 15(c)(1) of the Exchange Act and Rule 15c1-2 thereunder. Of a total of 169 sales to customers of Vista stock during the period October 19, 1962 through October 1, 1963 the prices charged by registrant in 91 such transactions included mark-ups which ranged from 38.9% to 150% computed on the basis of the price paid by registrant in same day purchases of Vista stock from other dealers or customers or if no such purchases were made based on prices paid by registrant in purchases made within one or two trading days before or after such sales to customers.[16/] Forty of such sales were made at mark-ups ranging from 38.9% to 50%; 7 at mark-ups ranging from 50.1% to 100% and 44 at mark-ups ranging from 100.1% to 150%.[17/] The total sales prices in the 91 transactions ranged from $17.50 to $1500.

16/ See Linder, Bilotti & Co., Inc., (Securities Exchange Act Release No. 7738 (1965) which the Commission computed mark-ups based on purchases made within three days before or after sales to customers in addition to same day purchases.

17/ In 25 of the said 91 sales, registrant purchased Vista stock on the same day it sold such stock to customers, of which 3 were sales at mark-ups of 150%, 2 at mark-ups of 140%, 9 at mark-ups ranging from 108.3% to 134.3% and 11 at mark-ups ranging from 38.9% to 50%.

The Commission has consistently held and the Courts have affirmed that it is unfair and a fraud on customers to sell them securities not reasonably related to the prevailing market prices and that absent countervailing evidence the price paid for a security by a dealer in actual transactions closely related in time to his sales are normally a highly reliable indication of the prevailing market price. 18/

The question to be determined therefore is what under all of the circumstances is the best evidence of the prevailing market price of the Vista stock during the period October 1962 and October 1963. Registrant does not dispute that the prices upon which the above computations were based were, in fact, charged to customers but urges that the use of contemporaneous cost as a base for the said computations is improper since it does not reflect true current market prices and that registrant's method of determining the price to customers was representative of true market price and is not unfair. In substance, respondents argue that in the instant case the countervailing evidence to the use of contemporary cost as indicative of market price is registrant's use of the average bid and ask prices which it obtained from other broker-dealers. Nash testified that each morning he would call two or three brokers appearing in the pink sheets, obtain their

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18/ Naftalin & Co., Inc., S.E.A. Release 7220 (Jan. 10, 1964); Barnett v. U.S., 319 F. 2d 340 (C.A.8, 1963). See also NASD policy as set forth in the NASD Manual, p. G-3.

bid and ask prices, strike an average of such prices and such average would be the selling price to a customer.[19] Nash further testified that in fixing the selling prices each day he gave no consideration whatsoever to the price at which he purchased Vista stock on any given day even though he sold to a customer that day since he was selling from what he termed a "risk position" which he described as being either long or short each day.[20] Registrant's method of determining prevailing market price cannot be accepted as establishing the best evidence of prevailing market since it ignores the salient factor of its own cost on a given day as indicative of the market price. Moreover, selling from a so-called risk position furnishes no basis to registrant to completely disregard its own substantially contemporaneous cost nor any basis for accepting an average of bid and ask price quotations from two or more brokers as decisive of prevailing market price.[21] In the Naftalin case, supra, respondent also contended that the quotations received from other dealers rather than its own cost constituted the best evidence of prevailing market price. The Commission rejected the argument pointing out that dealers' quotations are subject to negotation and therefore not reliable as a test of prevailing market. An analysis of registrant's transaction

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19/ There is no evidence of the names of the brokers called nor was any record kept of prices furnished.

20/ From such description it would appear that what Nash was attempting to describe was nothing more than a decision by registrant to trade Vista from a principal position and that throughout the period in question he was either in a long or short position.

21/ Naftalin & Co., Inc., supra, at p. 6-7.

similarly reflects the inherent danger of accepting dealers' quotations as proof of prevailing market. The price of the stock was relatively stable during the entire period of time in question and except for one purchase at 5/8 on June 3, 1963 all stock was bought between 30¢ and 50¢ and all but 10 sales were made at 5/8 and 3/4.[22/] Thus, the record shows that in October 1962 all of registrant's purchases were at 45¢ and all sales 62-1/2¢; in November, all purchases were at 30¢ and 45¢, and sales were at 62-1/2¢ and 75¢; in December, 3 purchases were made at 1/2 and 19 sales at 3/4; in January 1963 one purchase was made at 1/2 and 14 sales at 3/4; in February, March, April and up to May 14, 1963 all purchases were at 1/2 and sales at 3/4. On May 14 registrant purchased Vista at 3/8 but continued selling through May 20 at 3/4. On May 23 registrant purchased at 3/8 and sold on that day at 3/4. On May 28 registrant bought 2400 shares at 5/16 and 1000 shares at 37¢ and on the same day sold 800 shares at 3/4; in July registrant made 5 purchases totalling 14,100 shares, 3 of which were at 30¢, one at 31¢ and one at 35¢ and sold a total of 13,000 shares in 31 transactions all at 75¢ per share except for 3 transactions at 62-1/2¢. Between August 6 and 16 registrant bought 3800 shares on 7 trading dates all at 30¢ per share and sold 3,050 shares in 8 transactions between

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22/ Of the 10 sales, 8 were made in September 1963 at 7/8, one in the same month at 80¢ and the remaining sale to Nash's wife at 35¢.

August 7 and 26 all at 75¢ per share. Hence, the record establishes that registrant was consistently able to purchase at prices considerably below the prices allegedly quoted to Nash by broker-dealers which quotations became registrant's sale price and registrant's practice of selling at a mark-up without regard to the price or number of shares demonstrates a pattern which precludes any attempt to justify the mark-ups on the basis of particular circumstances of each sale. 23/

However, in the instant case the record contains even more cogent evidence that the bid and ask quotations received by registrant are not a reliable guide in determining prevailing price. A complete documentation of all purchase and sale transactions of Vista stock effected among the dealers themselves during the period October 1962 through October 1963 was included in the record. Evidence of such inter-dealer transactions were furnished by 114 different brokers. In 164 of the 169 sale transactions by registrant to customers previously referred to, registrant's prices to customers on each day it made such sales exceeded the highest price in inter-dealer transactions on the same date. Only on five days between January 15 to January 28, 1963 were registrant's prices to customers the same as the highest price charged in inter-dealer transactions. Thus, the record shows that in 22 transactions registrant's mark-ups computed on the difference between registrant's price to customers and the highest inter-dealer

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23/ See J. A. Winston & Co., Inc., Securities Exchange Act Release No. 7337 (June 8, 1964).

price ranged from 20% to 50% involving amounts from $12.50 to $1096.88; in 65 transactions such mark-ups ranged from 50.1% to 100% involving amounts from $25 to $1,250; in 51 such transactions the mark-ups ranged from 100.1% to 150% involving amounts from $24 to $1150; in 18 such transactions mark-ups ranged from 150.1% to 200% involving amounts from $50 to $1,000 and in 8 transactions the mark-ups were over 200% involving amounts from $62.50 to $1,250. It is thus evident that the quoted prices received by registrant cannot be accepted as a reliable basis of the prevailing market since such quoted prices were in fact considerably higher than the prices at which transactions were being effected between dealers.

Registrant urges that the use of prices in inter-dealer transactions as a basis for computing mark-up is improper since such prices are not published for over-the-counter transactions and are unavailable. The argument loses sight of the fact that such transactions are used in the instant case to establish evidence of prevailing market price. Registrant's knowledge of prevailing market should, at least, have been determined by its own contemporaneous cost under the circumstances of this case. We do not now decide whether absent evidence of contemporaneous costs as indicative of prevailing market or other evidence of such market, it would be proper to charge mark-up as unfair based solely on actual inter-dealer transactions where the evidence shows that the prices in such transactions are not published and are unavailable. However, under the facts of the instant case computation of mark-up based on the highest

price in inter-dealer transactions forcibly demonstrates that bid and ask quotations obtained by telephone were not representative of the actual market in Vista stock since quite obviously the quoted prices were higher than the prices at which registrant was consistently able to purchase and also higher than the prices at which dealers were actually effecting transactions. Under all of the foregoing circumstances the hearing examiner finds that registrant, aided and abetted by Nash who the record shows was solely responsible for determining registrant's selling price to customers, willfully violated Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rule 17 CFR 240.10b-5 and 15c1-2 thereunder in that it sold securities to customers at prices not reasonably related to the prevailing market prices as determined by registrant's same day or substantially contemporaneous cost for such securities and by the actual prices in inter-dealer transactions and that the prices registrant charged customers for Vista stock were unfair.

Violations of Section 10(b) of the Exchange Act and Rule 10b-6 thereunder

The Commission's order for proceedings alleges that during the period October 1962 through October 1963 registrant, aided and abetted by Nash, Ignatoff, Finkelman and Markowitz (Phillips), bid for and purchased Vista stock while participating in a distribution

of such securities in willful violation of Section 10(b) of the Exchange Act and Rule 10b-6 thereunder.[24/]

As we have seen, registrant purchased Vista stock during the period specified, and hence the issues are presented whether registrant was participating in a distribution at the time of such purchases, and if so, whether any exemption is available. During the period in question Vista had outstanding 2,025,000 shares of which approximately 1,034,000 were in the hands of the public. In the said period registrant purchased a total of 110,750 shares for its own account and sold 108,450 such shares. Its purchases and sales were thus in excess of 10% of the outstanding shares in the hands of the public. The Commission has held that the purpose of the Rule 10b-6 is to prevent manipulative practices and the term "distribution" interpreted in light of such purpose covers offerings of such a nature or magnitude as to require restrictions upon open market purchases by participants.[25/] Under the said rule it has been held that it is sufficient if the broker or dealer is engaged in a distribution in the sense of a major selling effort in his own behalf.[26/] In determining the magnitude of an offering consideration

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24/ Rule 10b-6 is one of the basic anti-manipulative rules. It provides that no broker-dealer or other person who is making or participating in a distribution of securities shall bid for or purchase securities of the same class and series, subject to various exceptions for specified types of transactions which are not deemed to be of a manipulative nature.

25/ Bruns, Nordeman & Co., 40 S.E.C. 652, 660 (1961).

26/ Gob Shops of America, 39 S.E.C. 92, 103 n. 25 (1959)

is given to selling efforts and selling methods utilized. In addition to the considerable amount of stock sold publicly by registrant, we have already noted that registrant engaged in an intensive campaign to sell Vista stock by means of fraudulent and misleading representations, failure to disclose material information to prospective purchasers and charging such customers unfair prices. Such methods are inconsistent with ordinary trading transactions and other normal conduct of a securities business.[27/] Under all of the circumstances the hearing examiner finds that in the sale of Vista stock during the period specified registrant was engaged in a continuing distribution in willful violation of Section 10(b) and Rule 10b-6 and that Nash aided and abetted in such violation.

Public Interest

The remaining question is whether a sanction is appropriate in the public interest. On the basis of the record the hearing examiner concludes that it contains overwhelming evidence of serious misconduct, complete disregard of the financial welfare of customers and utter abdication of the fiduciary duties which a broker-dealer owes to his customers. The hearing examiner found that registrant willfully violated the anti-fraud provisions of the securities acts in the offer and sale of Vista stock and engaged in the practice

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27/ See Bruns, Nordeman & Company, supra.

of selling securities to customers at prices in excess of and having no reasonable relationship to registrant's contemporaneous costs or the prevailing market to the detriment of its customers. The practice of charging unconscionable mark-ups to customers not only violated the anti-fraud provisions of the securities acts but was inconsistent with the just and equitable principles of trade in contravention of Sections 1 and 4 of Article III of the Rules of Fair Practice of the NASD, of which registrant was a member.[28/]

The Commission has frequently emphasized that inherent in the relationship of every broker-dealer with his customer is the implied vital representation that the customer will be dealt with fairly and honestly.[29/] Registrant's manner of conducting business had all the characteristics of a boiler room in which customers are consistently importuned to purchase low-priced speculative securities by unwarranted misrepresentations, concerted high pressure efforts by telephone to sell a large volume of such speculative security without concern for the customers' welfare. Of the 17 investor witnesses who testified concerning the representations made to them 13 were repeatedly called to make additional purchases of Vista stock.[30/] Registrant and Nash urge that a reasonable

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28/ See NASD Manual, pp. G1, G6.

29/ Pinsker & Co., Inc., 40 S.E.C. 285, 291 (1960).

30/ The record discloses 2 investors were called on 5 different occasions, 3 were called on 4 occasions, 3 others on 3 occasions and 3 were called on 2 occasions.

investigation of Vista was made prior to undertaking the sale of its securities, that Nash talked to one or more officials of the company and received an interim 9-month consolidated statement. The hearing examiner has found that the inquiry made by registrant and Nash was insufficient to establish a basis for the type of exuberant and unwarranted representations made to customers. Throughout the entire year that registrant sold Vista stock it never obtained financial statements of either Vista or any of its subsidiaries other than the unverified interim consolidated statement which the issuer itself never gave to stockholders and which registrant never furnished to customers.

Nash, in addition to being president of registrant and admittedly exercising supervision over all of registrant's activities, also sold Vista stock. One investor witness testified that Nash represented to him that he had inside information, that the price of the stock would increase to $2 a share. Nothing was said to the investor by Nash concerning the financial condition or earnings of Vista or any subsidiaries. Nash denied telling the investor who testified as to the representations Nash made to him that Vista stock would rise or that it would go up to any particular price. However, such denial is inconsistent with his own testimony that at sales meetings which he held with his salesmen he told them that Vista stock was down in price at the time but that it was expected to rise and that such information should be passed on to customers. He also

testified that he never told customers that registrant was unable to obtain current financial statements from Vista and that only upon the specific request of an investor would such information be given. Nash admitted that he was responsible for determining the price at which Vista would be sold to customers and that he furnished such prices to his salesmen. Nash further testified that he monitored his salesmen's calls every day but never heard any statements being made to customers concerning any price rise or any of the other representations testified to by the investor witnesses. However, not only did the representations by all of the salesmen, including Nash's own representations, bear a striking similarity to one another, which suggests that all of them were employing an agreed upon sales "pitch" which could hardly have occurred without Nash's knowledge,[31/] but such monitoring as may have been done was obviously inadequate. The hearing examiner finds that Nash either failed properly to supervise his employees or did so in a careless and negligent manner. Nash also urges that he was told by representatives of the Commission that his pricing methods did not violate the law. The record discloses that Commission employees remonstrated with him about his "big mark-ups" but that Nash insisted he was selling from a so-called risk position and therefore his pricing policies were fair. He disregarded the warnings given to him

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31/ See Best Securities, Inc., 39 S.E.C. 931, 934 (1960).

regarding his pricing practices. Finally, registrant and Nash assert that they sent one or more of Vista's brochures to customers and that those who testified receiving them stated there was no material differences between the information in the reports and the representations made to them. It is not clear from the record whether such material was received by all the witnesses who testified before or after their purchases. However, it is clear that no financial information was in any of the brochures and such information as was in the material did not support or was inconsistent with the predictions and representations made. 32/

The hearing examiner finds that Nash willfully violated the anti-fraud provisions of the securities acts in connection with his sales of Vista stock, that he was primarily responsible for determining the unfair prices charged by registrant to its customers and aided and abetted registrant's willful violations of Sections 10(b)(6) and 15(c)(1) and Rules 10b-6 and 15c1-2 thereunder and that he failed adequately to supervise his employees. The hearing examiner concludes that it is in the public interest to bar Nash from being associated with a broker or dealer.

All of the 7 investor witnesses who testified concerning representations made to them by Ignatoff stated they were told that Vista stock would rise, one of whom said it would either double or

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32/ See footnote 11, supra; Waldeman & Co., Securities Exchange Act Release No. 7828 (1966).

go as high as 3-3/4. Ignatoff testified that he sold Vista stock from May to October, 1963, that he discounted the interim consolidated financial statement, a fact he never told his customers, that his recommendations were based primarily on the acquisition of the films by Vista. Since he never received any financial statements concerning such acquisitions and had no information whether the new enterprise was operating profitably his statements concerning the rise in the price of Vista stock were completely unfounded. Ignatoff emphatically denied that he told any of the 7 investor witnesses that Vista stock would rise in price. In fact, he denied he made each and every representation testified to by the said investors. In light of the similarity of the representations made by Ignatoff to each of the investors with those made by the other salesmen of registrant the hearing examiner is unable to believe Ignatoff's denials and credits the testimony of the investor witnesses. His undertaking to sell such a highly speculative stock as Vista by making unwarranted representations and failing to disclose his lack of current financial information and his inability to obtain such information leads to the conclusion that he does not possess the qualifications requisite to selling securities to the public. Under all of the circumstances the hearing examiner finds that it is in the public interest to bar Ignatoff from being associated with a broker or dealer.

Sanction with Respect to Registrant

These proceedings have been instituted pursuant to Section 15(b) and 15A of the Exchange Act. The order for proceedings states that one of the determinations to be made is what, if any, remedial action is appropriate in the public interest pursuant to the aforementioned sections.

The hearing examiner has given careful consideration to the issues involved in this matter and has balanced the interests of registrant on the one hand and of investors on the other and has concluded that in the public interest and for the protection of investors, registrant's registration should be suspended pending final determination of the question of revocation.[33/] As noted earlier, registrant has engaged in a campaign, using well-recognized boiler room techniques heretofore described, to sell securities by means of false and misleading representations and omissions to state material facts. Such a course of conduct is proscribed by the anti-fraud provisions of the Securities Acts and is the antithesis of fair dealing. In addition, registrant is continuing to engage in a practice of charging unconscionable mark-ups to customers despite repeated protestation by the staff of the Commission and is engaging in practices and a course of business which is operating as a fraud and deceit upon purchasers and prospective purchasers of securities. Registrant's pricing

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33/ Included among the sanctions in which may be imposed under Section 15(b) of the Exchange Act after notice and opportunity for hearing is suspension of registration pending final determination as to whether such registration shall be revoked. The requirement for notice and opportunity for hearing have been met.

practices, as indicated above, are resulting in charging mark-ups ranging from approximately 38% to in excess of 200%. The course of conduct engaged in by registrant manifests a complete lack of concern regarding not only compliance with the Act and the Rules but with basic standards of fair and honest dealing with the public. Such a record of persistent violations should not be tolerated, nor should the public be subjected to the hazards of a broker-dealer responsible therefor.

The Commission has held that in considering whether public interest requires suspension, the question is whether the record contains a sufficient showing of misconduct to indicate the likelihood that registrant will be found to have committed willful violations or any of the other grounds prescribed with respect to revocation in Section 15(b) will be established and that revocation will be required in the public interest.[34/] The hearing examiner is satisfied, on the record in the instant case, that registrant has engaged in such serious misconduct and willful violation of the securities acts and the rules thereunder that public investors would be jeopardized by registrant's continuing to deal with them during the more extended interval which determination of the issues relating to revocation would entail.[35/] That the record contains a sufficient

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34/ See A. G. Bellin Securities Corp., 39 S.E.C. 178, 186 (1959); Peerless-New York, Incorporated, 39 S.E.C. 712, 715 (1960).

35/ D. H. Victor & Company, Inc., 40 S.E.C. 689, 691 (1961).

showing of misconduct is demonstrated by the findings and conclusions set forth herein above and that revocation will be required in the public interest is clear.

Accordingly, the hearing examiner finds that it is in the public interest and for the protection of investors that registrant's registration be suspended until final determination on the question of revocation. 36/

Irving Schiller
Hearing Examiner

Washington, D. C.
March 29, 1966

36/ To the extent proposed findings and conclusions submitted by the parties are in accord with the views set forth herein they are sustained and to the extent they are inconsistent therewith they are expressly overruled.