UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
J. E. MARKEN & CO., INC. (8-10657)
JOHN E. MARKEN
MORRIS CIPRIS
JACK PERLOW
NAT HOROWITZ

INITIAL DECISION

Washington, D. C.
November 15, 1965

Irving Schiller
Hearing Examiner

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BEFORE: Irving Schiller, Hearing Examiner

APPEARANCES: Joseph C. Daley, Joel Leifer, Roberta Karmel and Gerald H. Goldsholle, Esqs., for the Division of Trading and Markets.

Martin M. Frank, Esq. of Feldshuh & Frank, Esqs., for J. E. Marken & Co., Inc., John E. Marken, Morris Cipris and Jack Perlow.

Milton M. Meyer, Esq. for Nat Horowitz.

These are proceedings[1] pursuant to Section 15(b) and 15A of the Securities Exchange Act of 1934 (Exchange Act) to determine whether J. E. Marken & Co., Inc. (registrant), John E. Marken (Marken), Morris Cipris (Cipris), Jack Perlow (Perlow) and Nat Horowitz (Horowitz), singly and in concert, willfully violated and aided and abetted in willful violation of Section 17(a) of the Securities Act of 1933 (Securities Act) and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder, whether registrant willfully violated Section 17(a) of the Exchange Act and Rules 17a-3-4 thereunder and whether Marken and Cipris aided and abetted in such willful violations and whether any remedial action is appropriate in the public interest pursuant to Sections 15(b) and 15A of the Exchange Act.[2]

1/ These proceedings were consolidated with proceedings simultaneously ordered by the Commission in the Matter of Christopher & Co., Inc. (File No. 8-9380) and Harris Clare & Co., Inc. et al (File No. 8-10474) as to common questions of law and fact. On October 15, 1965 the hearing examiner filed an initial decision in the Harris Clare case and will in due course file an initial decision in the Christopher & Co., Inc. proceeding.

2/ 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 it 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(1)(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.
(Continued on p.3)

The order for proceedings alleges in substance that during the period July 1, 1962 through May 1963 registrant, Marken, Cipris, Perlow and Horowitz singly and in concert willfully violated and aided and abetted in willful violation of Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act 3/ and the respective Rules thereunder, in the offer and sale of the common stock of Alaska International Corporation (Alaska). The order further alleges that during the period May 1962 through December 1963 registrant failed to make and keep current certain books and records; that from January 1964 it failed to maintain and preserve such records as required and that registrant failed to file a report of its financial condition for the period ended December 31, 1963 in willful violation of Section 17(a) of the Exchange Act and Rules 17a-3, 4 and 5 thereunder and Marken and Cipris aided and abetted such violations.

After appropriate notice, hearings were held before the undersigned hearing examiner. Proposed findings of fact and conclu-

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Section 17(a) of the Exchange Act requires brokers or dealers to make, keep and preserve books, other records and reports and Rules 17a-3, 4 and 5 thereunder specify with particularity the types of records which must be kept current, preserved or filed with the Commission.

3/ 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.

sions of law and briefs in support thereof were filed by the Division of Trading and Markets and by Perlow.[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 is registered as a broker-dealer pursuant to Section 15(b) of the Exchange Act and has been so registered since May 6, 1962. Marken is president and Cipris is vice president and each of them is a director and owner of 10% or more of the equity securities of registrant. Perlow and Horowitz were employed as registered representatives by registrant during the period alleged in the order for proceedings. Registrant until April 2, 1965 was a member of the National Association of Securities Dealers, Inc. (NASD), a national securities association registered pursuant to Section 15A of the Exchange Act.[5/]

Fraudulent Sale of Alaska Stock

The record establishes that between July 1962 through May 1963 registrant, Marken, Cipris, Perlow and Horowitz engaged in

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4/ Registrant, Marken, Cipris and Horowitz were represented by counsel during the hearings but none of them filed proposed findings or briefs. Though under Rule 16(d) of the Commission's Rules of Practice proposed findings or conclusions may be regarded as waived the hearing examiner has based this decision on the record in these proceedings.

5/ Official notice is taken of the fact that registrant was expelled from the NASD on April 2, 1965. See NASD Manual, Supplement No. 4, May 1965, page B-302 (File No. 16-1-2-25).

a sales campaign to sell Alaska stock and made untrue statements of material facts and omitted to state material facts to prospective purchasers of the common stock of Alaska and engaged in acts, practices and a course of business which operated as a fraud and deceit upon purchasers of the said securities.

Four investor witnesses testified as to representations made to them by Horowitz. One of such witnesses stated he was told that Alaska was temporarily depressed but had been as high as $3, that in a few months the investor could double his money and that he can't lose on the investment. Horowitz repeated to a second witness that Alaska was at a low level but had sold at one time at $3, that in a short period of time it had a very good chance of going to $1 and that the investor would make up for prior losses which he sustained purchasing other securities recommended by Horowitz. Several months later when the price of Alaska had dropped Horowitz urged the same customer to average his cost down representing that Alaska would still move toward the dollar range promising him that when it rose a quarter of a point he would be taken out of the stock. Horowitz warranted Alaska was a "sure thing". To a third witness Horowitz represented that the price of Alaska would rise before the summer because the company had an earning potential. To the fourth witness to whom he sold on three separate occasions Horowitz again stated that the price of Alaska stock was depressed, that it had at one time sold as high as $3, that the price of the stock would be pushed up

again, that the customer could make money and would make at least a quarter of a point in a short period of time. Again, Horowitz represented that the customer could recoup losses he previously sustained.

Cipris represented to one customer that Alaska was a good solid stock and it would not be too long before it would go up. A second customer was told that he could double his money in four or five weeks, that Alaska could go up to $8 a share in two or three months, that the customer could make money on the transaction and could expect a profit in a couple of weeks. Cipris further advised him that with the money he would make on purchasing Alaska he could put enough aside for his children's education.

Perlow represented to one customer that he could expect a profit in a couple of weeks and could make money on the transaction and told a second customer that he could double or triple his money in two weeks time or "if this thing should be slow we'll pay you the amount you invested," that several brokerage firms were working on the stock and that the investor could not possibly lose. The customer was urged to get in on the ground floor since Perlow expected the stock to really move.

With respect to Alaska's business and operations Horowitz represented to his customers that Alaska was a mining company conducting activities in this country and abroad and represented to at least one customer that the company was doing very well. Cipris

represented to one customer that Alaska was a mining company and, to another, that it had properties in Alaska and Arizona, and that the company was very stable and worth from $3 to $5 million. Perlow never discussed Alaska's business with one of the investor witnesses and told the other witness within the ensuing several months the company was going to do very well. The customer testified he was told nothing derogatory regarding Alaska's financial structure.

Neither registrant nor its salesmen had any reasonable basis for the representations and predictions made. Alaska was incorporated in 1957 and during the period registrant sold its stock it was a diversified holding company engaged in the exploration and development of mineral and mining properties and owned or had an interest in developed and undeveloped real estate. For the fiscal year ended July 31, 1959 Alaska had a loss carry forward of $161,106 and for the period ended July 31, 1960 such loss amounted to $273,797. By the latter part of 1960 Alaska was in a very weak financial position and unable to meet its obligations. During the summer and fall of 1960 the old management negotiated to sell control of the company and on or about April 1, 1961 such sale was effected. The group which acquired control made some loans to Alaska in light of its dire need for cash and embarked on a program of acquiring leases and other property by issuing its own 3-cent par value common stock which it arbitrarily valued at $1 per share. As at July 31, 1961 Alaska had issued and outstanding 6,234,058 shares of its common stock and by July 31, 1962 there were 8,806,288 such shares outstanding.

It is clear from the evidence that from at least 1959 Alaska had no operating profits but sustained losses. For the fiscal year ended July 31, 1960 Alaska had a total income of $10,702 and a loss of $273,797. As at the same period it had an accumulated loss of $1,781,522. For the fiscal year ended July 31, 1961 Alaska's total income amounted to $32,459, which was composed of income from the sale of oil and gas amounting to $20,079 and a refund of prior charges amounting to $12,380. For the same period Alaska expenses amounted to $1,013,855 and included a write-off of the cost of exploration and development on expired leases amounting to $107,133, the cost of expired mineral leases and permits amounting to $760,788 and the cost of operations on abandoned leases amounting to $14,748. The total loss for the fiscal year ended July 31, 1961 amounted to $981,395. As at the same period Alaska's total accumulated loss amounted to $2,762,917.

Alaska's operations during the following fiscal year continued their unfavorable trend and neither the existing projects nor the properties acquired during the said year resulted in any operating profit. 6/ In fact, Alaska's accumulated loss substantially

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6/ Alaska's chief executive officer responsible for the company's operations for the period August 1, 1961 through July 31, 1962 testified that the company set up its operations as projects, all of which incurred expenses far exceeding any income which any project may have had and each of which resulted in an operating loss. Many of the leases were dropped as commercially unfeasible or abandoned as worthless. Alaska's "prime project" was the R-Gold Project located outside Phoenix, Arizona. During 1961 and early 1962 Alaska conducted a pilot gold mining operation. In the fall of 1962 Alaska learned its properties had been "salted." No gold had ever been produced commercially. Alaska's loss on this operation was approximately $60,000. Its next largest project was called the Beryllium Project. The ore mined in this beryllium operation failed to meet the requirements of Alaska's purchaser. Moreover, Alaska needed milling facilities which it was unable to obtain and it was unable to erect its own facilities since it (Cont'd next page.)

increased. For the fiscal year ended July 31, 1962 Alaska's gross income amounted to $3,427. For the same period its expenses amounted to $239,065 and included a write-off of the abandoned mineral leases amounting to $88,500, the cost of exploration and development on abandoned leases amounting to $67,713 and the cost of expired oil and

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lacked adequate financial means. At any rate it is clear that after May 1962 there was no possibility of commercial production of beryllium by Alaska and the project was dropped with a $25,000 loss. The third largest project related to an oil and gas concession in Queensland, Australia in which Alaska owned a 10% stock interest. Alaska had no money to meet its requirements or pay rentals. No drilling was ever conducted on this project, no oil was ever discovered and no income ever received from operations.

Similarly, other projects either had no income or very little income and all of them necessitated expenditures for development or other operations and each of them resulted in losses by Alaska for the year ended July 31, 1962. Alaska's books reflect that the following projects, which constituted its major operations, were either abandoned or determined to be worthless and written off as losses.

Name of Project	Loss
Big Bug Placer - No commercial operation - abandoned	$ 36,641
Frenchman's Gulch - Investment abandoned as worthless	21,529
Plaza Hospital Center and Heritage Home - Research and exploration on both properties which were abandoned	2,666
Equitable Development - Management determined that its investment was worthless	90,342
Centennial Beryllium - Project abandoned December 1961	91,982
Cinco Petroleum Write-off of investment	134,156
National Growth Corporation	
Loss on investment -	159,259
Loss in value of securities -	191,109
Two oil and gas leases in Alaska and research of oil property in Ohio -	18,446
Banner Oil Corp. - Determined by management to be worthless	7,000
Partridge Canadian, Ltd. - Determination by management that stock was worthless	26,291

gas leases $71,100. The total loss for the fiscal year ended July 31, 1962 amounted to $418,489. In addition, Alaska sustained long-term capital losses amounting to $202,714 and short-term capital losses amounting to $6,899. As at July 31, 1962 Alaska's accumulated loss amounted to $3,131,291.

Alaska's secretary-treasurer testified that for the period August 1, 1962 to October 1963 Alaska's expenses continued to exceed its income and the record establishes that at July 31, 1963 Alaska's monthly expenditures, including funds set aside for the payment of promissory notes, totalled over $5500, with projected regular monthly receipts amounting to $2700, resulting in a monthly deficit of $2800. It further appears that as at the same date Alaska could not afford to continue carrying its main office overhead and the company's management made efforts to close such office and move its operations in the hope of reducing its heavy expenses. He further testified that for the period ended July 31, 1963 Alaska's bookkeeping records were incomplete, that it had been unable to pay its accountants and that Alaska did not have sufficient funds to pay his salary for the entire period from August 1, 1962 to July 31, 1963.

Obviously, during the period registrant was selling Alaska stock that company was continually losing money and it is clear from the testimony of the investor witnesses they were never told anything of Alaska's losses for the years 1961 and 1962 nor were they informed that the company continued to lose money during the fiscal year 1963.

It is also evident from their testimony that none of them were given a clear understanding or complete description of the nature of Alaska's business nor were they told about the risks involved in the purchase of Alaska securities. Thus, four of the investor witnesses were told that Alaska was in the mining business, and one of such witnesses in answer to an inquiry was told by the salesman (Horowitz) that he really did not know what Alaska's business was but would send a brochure - which he never did. Another witness was told that Alaska had property in Alaska and Arizona, that it had purchased land in Australia and was buying a gold mine or an oil well. Two other witnesses were apparently never told what business Alaska was in.

An analysis of registrant's knowledge concerning Alaska prior to and during the period it sold such stock is most revealing since in our view it demonstrates registrant lacked a basis for the predictions and representations made by its salesmen. Marken, who had previously sold Alaska stock while employed as a registered representative at two other brokerage concerns, determined soon after registrant was organized that it would offer Alaska stock. There is evidence that in the spring of 1962, Marken visited one of Alaska's properties outside of Phoenix, Arizona. Alaska's then president testified, and his statements are uncontroverted, that he told Marken that a pilot gold mining project had been conducted at the property and that samples of gold had been filed with the Bureau of Land Management. At the same time Marken was also told that the property had possibilities as

a real estate development if a partner could be found to furnish financial help since Alaska itself did not have money to develop the property. Marken at that time neither requested nor obtained financial statements nor in fact any financial information concerning all of Alaska's operations. Alaska's president further testified that the company's books and records were available at all times to any one who cared to examine them and that Marken made no such request. The one salesman who testified in the proceeding stated that the only information concerning Alaska which he saw at registrant's office consisted of reprints of two newspaper articles and some information concerning Australian oil wells which he vaguely remembered reading. Although Marken claimed in a statement he gave to the staff prior to the hearing that he saw some sort of financial report of Alaska no such report was produced by him at the hearing and the salesman who testified stated he requested but never received any financial statement concerning Alaska nor did he ever see one at registrant's office.

An analysis of the newspaper articles both appearing in June 1962, which registrant possessed, apart from the fact that each dealt with only one facet of Alaska's operations, indicates they could not possibly have furnished a basis for predicting a rise in the price of Alaska stock or any other of the optimistic representations made by registrant's salesmen. A reprint from a Las Vegas newspaper article mentioned that Alaska had an interest in the only granite quarry in the State but consisted, almost entirely, of an interview with a plant superintendent as to the methods of mining granite and

its possible uses. The article noted that such mining venture was a new industry in Las Vegas, that new machinery was needed and pointed out that "Progress is a little slow right now but within the next two years we plan to add 40 or more so men to the payroll and we want to build another building." There was nothing in the article indicating that operations were or could be profitable. The second reprint from a Phoenix newspaper referring to Alaska's gold mining operation stated: "Recovery is the problem. Arizona mining and prospecting authorities have known of the existence of gold in the area for years. Whether there presently are economically feasible methods of recovering it is the question." The article quoted a geological engineer, who had tested property north of Alaska's property which tests showed results similar to those of Alaska, who predicted "there will be no major gold production in the area before 1964, and then only if further testing bears out initial findings."

It is quite apparent from the record that the information in the two newspaper articles together with the little information Marken gathered in the spring of 1962 in Phoenix constituted registrant's knowledge of Alaska. Notwithstanding that Alaska's president told Marken the company needed financial help for at least one of its projects, a fact which should have put him on notice that further inquiry was called for, he nevertheless formed the groundless opinion that Alaska was a speculative stock with a very good chance for capital appreciation and suitable for prospective investors. The absence of financial statements which would have disclosed Alaska's substantial

losses when viewed with what registrant knew concerning Alaska makes it evident that registrant's representations as to a rise in the price of Alaska stock were wholly without justification and calculated to deceive prospective investors into believing their investment would be profitable. Such conduct constitutes a reckless indifference as to whether such representations are true or false and registrant is chargeable as if he had knowledge of the falsity. Irwin v. United States, 338 F. 2d 770 (C.A. 9, 1964).

The Commission has consistently stated and the Courts have held that unfounded predictions as to future levels or price increases unsupported by any reasonable basis of fact are a "hallmark of fraud." Mac Robbins & Co., Inc., Exchange Act Release No. 6846, July 11, 1962, p. 15, affirmed sub nom Berko v. Securities and Exchange Commission 316 F. 2d 137 (C.A. 2, 1963); Alexander Reid & Co., Inc., 40 S.E.C. 986 (February 8, 1962). The hearing examiner finds that, in light of Alaska's substantial losses both prior to the date registrant undertook to sell such stock and mounting continually during the period such stock was being sold, there was no reasonable basis for the predictions of price increase or that the company was doing well or that an investor's prior losses could be recouped by purchasing such stock. Through the course of the hearings registrant contended that investors, when they purchased Alaska stock, either knew that it was a speculation or were so informed by the salesmen. The element of speculation is inherent in stock investments, but the investor is entitled to have the opportunity to evaluate the risk of loss, as

against the hope of lucrative return, from true statements of the financial status of the corporate enterprise in which he is acquiring an interest. 7/ Moreover, the Commission has held that the fact that customers may have been seeking speculative securities does not detract from the fraudulent nature of the representations made to them. 8/ The hearing examiner concludes that in the offer and sale of Alaska stock registrant willfully violated Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder. 9/

Findings as to Marken, Horowitz and Cipris

The representations made to investors by Horowitz and Cipris and the omissions to inform such investors of the financial condition and substantial losses incurred by Alaska have been detailed above. The representations made by both of them to one or more of their customers relating to potential earnings or that the Alaska was a stable company worth 3 to 5 million dollars were utterly false. The record is barren of any effort by either of them to acquaint themselves with the nature of Alaska's operation or to secure financial informa-

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7/ S.E.C. v. F. S. John & Co., 207 Fed Supp 566 (1962).

8/ Wright, Myers & Bessell, Inc., Securities Exchange Act Release No. 7415, p.4 (September 8, 1964).

9/ The evidence shows and there is no dispute that the mails were used in connection with the offer and sale of Alaska stock.

tion concerning such operations. The statement made by the two salesmen concerning Alaska's business were half-truths and neither of them gave customers an accurate description of the company's diversified operations. In light of the hugh losses incurred by Alaska for two fiscal years prior to the time Horowitz and Cipris undertook to sell that company's stock and continuing during the period they sold, which information they knew or should have known or at least made some effort to ascertain, the hearing examiner finds there was no reasonable basis for the representations made by them and that each of them omitted to state material facts concerning Alaska's financial condition and operations.

Neither of the salesmen testified in the instant proceeding and hence did not controvert any of the statements made by the investor witnesses concerning the representations made to them. The testimony of such witnesses is credited by the hearing examiner. It is well settled that, in a non-criminal case, the failure of a party to testify in explanation of suspicious facts and circumstances peculiarly within his knowledge fairly warrants the inference that his testimony, if produced, would have been adverse. 10/

The Commission has frequently emphasized that inherent in the relationship of every broker-dealer with his customer is the

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10/ 2 Wigmor Evidence (1940), S.E.C. Section 289; Mammoth Oil Company v. U. S. 275, U. S. 13, 52-3 (1927) Cf. N. Sims Organ & Co., Inc. v. Securities and Exchange Commission 293 F. 2d 78, 80-81 (C.A. 3, 1961) Cert. denied 82 S Ct. 440.

implied vital representation that the customer will be dealt with fairly and honestly.[11/] In the instant case it is evident and the hearing examiner finds that Horowitz and Cipris did not deal fairly with their customers and in fact made fraudulent representations to them to induce them to purchase Alaska by promising them quick profits.

Marken was president, a director and controlling stockholder of registrant. He was actively in control of registrant's business and determined in the first instances that Alaska should be offered by salesmen to prospective purchasers. During the period registrant sold Alaska, meetings were held with salesmen several times a week concerning Alaska at which salesmen presumably were encouraged to sell such stock. There is no evidence that Marken instructed salesmen to advise customers that it had no current information or financial statements concerning Alaska nor of registrant's inability to secure such information. As president, Marken had a duty to supervise his salesmen in order to prevent such fraudulent conduct as making unwarranted representations or giving glowingly optimistic statements concerning Alaska which were completely without basis. Marken, though not testifying at the hearing, admitted under oath prior to the hearing that there was no basis for predicting a rise in the price of Alaska stock. On the other hand assuming arguendo that Marken did not know

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

such misrepresentations were being made by his salesmen he was grossly negligent in failing adequately to supervise them so as to forestall such conduct.[12/] The record, however, reveals Marken's direct involvement in salesmens' activities such as being present and overhearing salesmen speaking to customers about Alaska and informing them to tell customers that financial statements would be forthcoming from Alaska when he knew or should have known as a result of his visit at one of Alaska's projects that none were available. The hearing examiner finds that misrepresentations were made to customers as a result of Marken's failure to exercise his responsibility to supervise and to that extent he became a party to these misrepresentations.[13/]

The hearing examiner finds that Horowitz, Cipris and Marken willfully violated and aided and abetted registrant in willfully violating Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder.

Findings as to Perlow

Perlow was the only respondent who testified in the instant proceeding. The details of the representation made by him to investors and the omissions to state material facts have been noted

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12/ Lawrence Securities, Inc., Securities Exchange Act Release No. 7146 (September 23, 1963).

13/ Aircraft Dynamics International Corp., Securities Exchange Act Release No. 7113 (August 8, 1963).

earlier. Accepting the well settled doctrine stated by the Commission and the Courts cited above, that the making of representations to prospective purchasers without reasonable basis constitutes fraud under the Securities Acts, we shall consider what Perlow learned of Alaska's business prior to undertaking to offer the company's stock to investors and appraise such knowledge in light of the existing facts concerning Alaska's financial condition and operations. Perlow testified that at the time he was employed by registrant, Cipris who was registrant'c vice president and had supervisory responsibilities over the salesmen, informed him that Alaska was a highly speculative stock, "they were inveigled with quarries," "had land or had leased land in Australia next to a big find of oils," that the stock had been traded for a number of years and had run from a low of about 25¢ up to $4 at one time and "sort of pitter pattered back and forth over a period of years from 25¢. . .to a dollar, a dollar and a quarter." He also testified he had requested "financial statements or any data that they have done in the past" and was told Cipris or Marken that "they have nothing - they expected to get it."

Perlow denied telling his customers Alaska would double or triple or that the stock would rise in price or that he guaranteed any customer that the price of Alaska would double or triple. He testified, however, that he told the wife of one of the investor witnesses that he had a cheap stock for investment which could go up 10¢ or down a nickel and that it was "speculative to make profit" and told the second investor witness that Alaska was a speculative

cheap stock, that "some good news may come out" and that "the stock may move up and he could make some money."

The details concerning Alaska's operation and financial condition including its substantial losses both before and during the period Perlow offered Alaska's stock have been set forth above. Perlow's testimony that he made no representations as to price rise to one witness and his denial of each and every representation which a second investor testified were made to him cannot be believed in light of his admissions and particularly since it is apparent he was impressed with the fact that the stock was cheap and had in the past sold as high as $4. The hearing examiner would indeed be naive to believe that to induce customers to purchase Alaska stock Perlow said nothing more encouraging than Alaska was a speculation. Moreover, Perlow testified he and Horowitz worked together as partners for approximately six months and shared commissions on all transactions. The hearing examiner has found that Horowitz made unwarranted representations concerning a price rise in Alaska stock and cannot help noting that Horowitz's representation bore a striking similarity to those made by Perlow. The hearing examiner credits the testimony of the investor witnesses.

Perlow urges there is no duty on the part of a salesman to undertake an independent investigation of a company whose securities he is selling and may rely on statements furnished in literature of his employer unless he knows and is a part of a conspiracy to engage

with his employer in a fraudulent sales campaign. Reliance is placed on the case of S.E.C. v. Rapp, 304 F. 2d 786. That case however does not support Perlow's contention. The Court there held that the record in the case disclosed that Rapp was in clear violation of the anti-fraud provisions of the Securities Act but remanded the case for further proceedings as to a salesman since there were no findings by the lower court as to whether the salesman knew or should have known what the financial or other condition of the company was so that a determination could be made as to whether "opinions" expressed had any basis in fact. In the instant case Perlow never saw a financial statement of Alaska and though he was told one would be forthcoming undertook to sell the stock without either waiting to receive such information or otherwise making any independent effort to obtain current factual data concerning the company. To excuse a salesman who relayed to customers wholly unwarranted information that the price of the stock would rise and omitted to inform such customers he was unable to obtain any financial information concerning an issuer's operations nor in fact any current information of all of an issuer's business would make a mockery of a salesman's obligation to deal fairly with his customers as well as frustrate the regulatory scheme of the Securities Act.[14/] The hearing examiner has little doubt that Perlow willingly and knowingly joined in registrant's

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14/ Mac Robbins & Co., Inc., supra.

campaign to sell Alaska stock by fraudulent means.

The hearing examiner finds that there was no reasonable basis for the representations made by Perlow and that he willfully violated and, aided and abetted registrant in willfully violating Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder.

Failure to Keep Books and Records

The record establishes that in November 1963 registrant failed to maintain either the trading account for Alaska stock for the year 1962 or the employment applications of each of its salesmen as required by Section 17(a) of the Exchange Act and Rule 17(a)(3) thereunder. In January 1964 the required employee application forms were still not maintained. The record further establishes that in February 1964 registrant failed to maintain blotters, general ledgers, trading ledgers and customers' ledgers as required by the aforesaid rule. Registrant's explanation for the failure to maintain such required books and records in February 1964 was that such records had been stolen from his automobile. There is no evidence registrant made any effort thereafter to either reconstruct the stolen documents from other available records nor does the record reflect that registrant maintained new books and records from at least the time the records were stolen. In fact the record is barren of any explanation for the failure to maintain the aforementioned required records in November 1963 or January 1964. The hearing examiner finds that

registrant willfully violated Section 17(a) of the Exchange Act and Rule 17a-3 thereunder in failing to maintain the records mentioned above and Marken and Cipris aided and abetted such violation.

The record further establishes and the hearing examiner finds that registrant failed to file an annual report of its financial condition for the period ending December 31, 1963 as required by Rule 17a-5. Notice of the filing requirement was given registrant in November 1963 and notice of the failure to file given registrant in March 1964. The hearing examiner finds registrant willfully violated Section 17(a) and Rule 17a-5 thereunder in failing to file an annual report of its financial condition for the year ending December 31, 1963 and that Marken and Cipris aided and abetted in such violation.

The record establishes and the hearing examiner finds that on July 20, 1964 a judgment of Permanent Injunction was entered in the Supreme Court of the State of New York enjoining registrant and Marken from doing business as a broker and dealer in securities in New York State.

Public Interest

Having found that registrant and its salesmen willfully violated certain provisions of the Securities Act and the Exchange Act the remaining question is what, if any, remedial action is appropriate in the public interest. Wholly apart from the fact that the Commission has held that violations of the record maintenance and reporting

requirements of the Exchange Act and rules thereunder are sufficient grounds for revocation of a broker-dealer registration[15/] and that an injunction provides a further statutory basis for such a revocation[16/] we additionally examine registrant's activities in the conduct of its business to determine whether in the public interest a sanction is appropriate. During the period July 1962 through April 1963 registrant sold a total of 71,150 shares of Alaska stock, such sales emanating from registrant's determination to offer such stock to prospective customers as a speculative venture. As noted earlier, registrant urged that customers knew or were told Alaska was a speculation thereby implying they were not misled or defrauded. Although speculative securities may be a medium for investment if offered under appropriate circumstances in which a broker takes into consideration the suitability of such investment for a particular customer weighing such customer's financial situation and needs, his investment program and other security holdings and discloses all of the pertinent facts concerning the security he is offering and the inherent risks involved, the record establishes that such factors were not present in the instant case. Several witnesses testified they were never asked about their financial situation or their needs and there is no evidence that registrant considered the suitability of an investment in Alaska as to

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15/ Fred T. Garner, 39 S.E.C. 298 (1960).

16/ Gibbs & Company, 40 S.E.C. 963 (1962).

any of its customers. Moreover, the record establishes registrant was not fully familiar with Alaska's diversified operations, had no current financial or other information and was apparently unaware of its substantial losses. All of the sales were made as a result of one or more phone calls during which prospective customers were presented with an unwarranted optimistic picture of Alaska in such a manner as to whet the appetite for a quick profit without disclosing or distorting essential and material information. In addition, there is evidence in the record that registrant sent some of its customers a brochure entitled "Free Confidential Analysis of Your Portfolio" in which the customers were invited to list their security holdings which registrant would presumably analyze. There is no evidence that registrant employed a trained security analyst for such purposes or ever retained any persons with such qualifications or had facilities for such services. A former salesman employed by registrant testified that registrant held "pep talks" weekly at which salesmen were importuned to "get on the phone" and sell Alaska, that Cipris furnished him with "sales pitches" saying Alaska was going to move on the market and that when he inquired on several occasions about financial information concerning the company he was told such information was not available and not to worry about it. The hearing examiner concludes that the manner in which registrant functioned had the elements of "boiler room" techniques involving high pressure effort to sell a large volume of a speculative or promotional security by means of

unwarranted representations and predictions without concern for investors' welfare.[17/]

A course of conduct by a broker-dealer wherein false and misleading statements are made to investors and reasonably ascertainable adverse material information is not disclosed, clearly evinces a complete disregard of the customer's best interests and constitutes a violation of the fiduciary obligations to persons who had been induced to place their trust and confidence in such broker-dealer. The hearing examiner concludes that such a course of conduct amounted to a scheme to defraud which operated as a fraud and deceit on the public in violation of the anti-fraud provisions of the Securities Acts. The hearing examiner finds it is in the public interest to revoke registrant's registration as a broker-dealer.[18/]

Each of the four named respondents were found to have willfully violated the anti-fraud provisions of the Securities Acts. Ciprls, Horowitz and Perlow armed with superficial information about Alaska undertook to offer such stock without making a realistic effort (other than possibly asking their employer for a financial statement) to secure more trenchant information, financial or otherwise, concerning the company's operations which information was reasonably

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17/ Albion Securities Company, Inc., Securities and Exchange Act Release No. 7561 (March 24, 1965).

18/ Since registrant has already been expelled from the NASD the possible imposition of such sanction has become moot. (See footnote 4, supra.)

ascertainable by them. In general each of them and Marken by failing to properly supervise his employees demonstrated a lack of understanding of their legal and ethical obligation to deal fairly with customers. In their relationship with customers trust and confidence had been developed between each of them and their customers so that customers relied on the advice furnished and each of them had a duty to act in the customers' best interests. The record demonstrates and the hearing examiner finds that the conduct of Marken, Horowitz, Cipris and Perlow was inimical to the best interest of customers. Additionally, there is no evidence that any of them made any effort to determine whether Alaska was a suitable investment for such customer nor did they ascertain the customer's financial condition or his needs. It is evident that each of them was primarily impressed with the past market fluctuation of Alaska and persuaded their customers without any determinable foundation that there was every reason to believe that the stock, which at the time they were offering it was selling in the 25¢ to 50¢ range, would rise in price. In that connection the existence of a uniform pattern of misrepresentation and predictions used by Cipris, Perlow and Horowitz is patent. The conclusion is inescapable that all four persons participated in a scheme to defraud and in transactions and a course of conduct which would and did operate as a fraud and deceit upon investors.[19/] It has already been noted that the manner in which registrant's business was

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19/ Hamilton Waters & Co., Inc., Securities Exchange Act Release No. 7725 (October 18, 1965).

conducted had the characteristics of a boiler room. Cipris, Horowitz and Perlow were the direct instrumentalities through which sales of Alaska by such means were accomplished. Marken as chief executive officer of registrant was primarily responsible for the maintenance of an adequate and effective system for supervision of employees engaged in dealing with the public. His failure to diligently enforce a proper system of supervision made him an equal participant in the fraudulent conduct of his employees.

Under all of the circumstances the hearing examiner concludes that it is in the public interest to bar Marken, Cipris, Horowitz and Perlow from being associated with a broker or dealer.

Irving Schiller
Hearing Examiner

Washington, D. C.
November 15, 1965