

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of)	
)	INITIAL DECISION
SUZANNE L. COOK)	APRIL 27, 1995
)	

APPEARANCES: Catherine M. Shea and Judith L. Gelber for the Division of Enforcement

Graeme W. Bush, Trevor W. Swett III and Nathan D. Finch for the Respondent

BEFORE: Edward J. Kuhlmann, Administrative Law Judge

This is a proceeding pursuant to Sections 15 (b) (6) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 780 (b), 78s (h) (1988). The Division of Enforcement alleges that respondent Suzanne L. Cook, an oil and gas service industry analyst when employed by Merrill Lynch Pierce Fenner & Smith ("Merrill Lynch"), a registered broker-dealer, willfully violated Section 10 (b) of the Exchange Act, 15 U.S.C. § 78j (b) (1988) and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5 (1994), by drafting for Barton Industries, Inc. ("Barton") a press release dated December 15, 1990 that was materially false and misleading. Hearing sessions were held on October 18-21 and 24-25, 1994. Proposed findings and conclusions and briefs were filed by the parties on December 9, 1994. A reply was filed by the Division on January 26, 1995 and one by the respondent on February 21, 1995.

FINDINGS OF FACT

BARTON INDUSTRIES, INC.

Barton was an Oklahoma corporation in the business of manufacturing valves and other products used in the oil and gas industry. Tr. 11. At all relevant times, Barton's common stock was registered with the Commission pursuant to Section 12 (g) of the Exchange Act and was traded on the National Association of Securities Dealers, Inc. Automated Quotation System ("NASDAQ"). Order Instituting Proceedings, at 1; Tr. 12. As of December 15, 1990, Barton's Chairman, President and Chief Executive Officer was C.W. Earl Johnson ("Earl Johnson") (Tr. 13) and its Chief Financial Officer was Victor L. Joyce. Tr. 13. Both Earl Johnson and Joyce have been sued in

the United States District Court for the Western District of Oklahoma by the Securities and Exchange Commission ("the Commission") for violations of the federal antifraud provisions for, inter alia, the issuance of false and misleading press releases concerning Barton's financial condition, including the December 15, 1990 release. Division Exhibit 26, p. 20-21. As of December 15, 1990, Barton's board of directors was comprised of Earl Johnson, William Barton, John Heffner, Dr. James Johnson ("J. Johnson"), Francis Galloway and Jack Sandman. Tr. 13.

The parties agreed that if Earl Johnson were called to testify in this proceeding he would have asserted his right against self-incrimination under the Fifth Amendment of the U.S. Constitution and refused to testify. Tr. 68.

RESPONDENT

Cook was employed by Merrill Lynch as an analyst for the oil and gas service industry from March 1988 through 1992. Tr. 771, 946. After leaving Merrill Lynch, Cook was employed as an oil and gas service industry analyst by Wasserstein Perella, a broker-dealer registered with the Commission, from 1992 until July 1994, when she formed her own company. Tr. 771. She received a Bachelor of Science degree in Economics from the Wharton School of Business of the University of Pennsylvania in 1977. Tr. 937.

Before joining Merrill Lynch, Cook had worked for First Boston Corporation as an oil service industry analyst. Tr. 942-44. Prior to her employment at First Boston, Cook had served as assistant director of investor relations for The Sun Company, where her responsibilities included writing annual and quarterly reports and the

financial supplement to the annual report, as well as coordinating the numbers in company financial reports with the company's accountants. Tr. 938. A major responsibility of Cook's, as an industry analyst for major Wall Street brokerage firms, was reading companies' quarterly earnings reports and informing trading personnel at her firm in a timely manner of them. Tr. 951-52. In accomplishing this task, Cook discussed the numbers in the companies' press releases and quarterly reports with investor relations personnel at the companies publishing the reports. Tr. 952-53.

COOK'S INTRODUCTION TO BARTON

Cook was introduced to Barton in August 1990 when John Hedquist, a Merrill Lynch customer who was a large Barton shareholder, asked her to attend a "dog and pony show" to learn about Barton. Tr. 979. On August 17, 1990, Cook attended such a meeting in Dallas, at which time Barton employees explained the company's various technologies, including the pump off control and the BTU analyzer. Tr. 980. She also met Earl Johnson for the first time at that meeting. Tr. 981.

On August 28, 1990, Cook toured Barton's Shawnee, Oklahoma plant and met with Earl Johnson. Tr. 990-91. Within a few days, Cook suggested to Steve Chazen, the head of Merrill Lynch's investment banking energy division, the possibility of a merger between Barton and National-Oilwell, a Merrill Lynch client. Tr. 1003-05. As a result, in mid to late September, Chazen and an associate toured Barton's Shawnee plant and met with Barton officers there. Tr. 1004-05.

Also during the fall of 1990, Cook sought an investor in Barton at Earl

Johnson's request, and arranged for Craig Drill, President of Craig Drill Capital, to meet with Earl Johnson and Cook in Dallas in early October 1990 to discuss the possibility of Drill's investment in Barton. Tr. 1008-09. During the fall of 1990 and prior to December 12, Cook spoke to Earl Johnson by telephone and met with him at least once in Dallas for an update on Barton's progress on a possible contract with Sprint relating to a fiber optics network (Tr. 1020), as well as a possible Indonesian contract. Tr. 1021. During this time, Merrill Lynch's investment banking group was also developing a National-Oilwell merger proposal, which was ultimately produced in mid-December 1990. Resp. Ex. 25; Tr. 1007-08.

In the fall of 1990, Cook's husband, Spencer Cook ("Spencer Cook") was retained by Earl Johnson to do consulting work for Barton. Tr. 713, for which he was paid \$25,000. Tr. 715. Spencer Cook was introduced to Earl Johnson as a result of his wife's contacts with Barton. Tr. 713.

As a consultant, Spencer Cook's work consisted of preparation of an 8-page report entitled "The New Barton." Tr. 714-15; Div. Ex. 18. Spencer Cook's other work as a consultant consisted of sending a letter concerning Barton under his signature to Alvin Shoemaker (Div. Ex. 19), which Cook helped him prepare (Tr. 761) and which was virtually identical to a document handwritten by Cook. Tr. 720; Div. Ex. 20.

On December 14, Spencer Cook signed an Employment Agreement to be Director of Marketing of Barton's Integrated Technology Systems Division ("ITSD"), a Barton subsidiary located in Dallas. Div. Ex. 21; Tr. 722. Upon his employment,

Spencer Cook also signed an Incentive Stock Option Agreement entitling him to 250,000 shares of Barton stock, which was exercisable after five years of service. Tr. 729; Div. Ex. 22.

Spencer Cook was hired by Earl Johnson. Tr. 720. Mark McKinsey, who was then Executive Vice President of Barton based in Dallas in charge of ITSD (Tr. 537-38), was not in any way involved in hiring Spencer Cook. Tr. 554. McKinsey learned Spencer Cook was on his ITSD payroll from an internal press release announcing his hiring. Div. Ex. 9; Tr. 553-4. McKinsey had no idea what Spencer Cook was doing for Barton and never saw him in the ITSD Dallas office during the term of Spencer Cook's employment. Tr. 555.

Barton paid Spencer Cook at a rate of approximately \$75,000 per year, making him the highest paid employee of Barton at that time, after President and CEO Earl Johnson and Executive Vice President McKinsey. Tr. 558, 729; Div. Ex. 10.

Spencer Cook spent the five weeks between the date of his employment and his resignation educating himself by reading oil and gas industry publications at home and observing one presentation by other Barton employees in New Mexico. Tr. 722, 724, 728-29. He resigned on January 18, 1991 primarily because Earl Johnson was no longer employed by Barton. Tr. 732-33.

BARTON AUDIT PROBLEMS

By late November 1990, Barton's independent auditors, Coopers & Lybrand ("C&L"), were encountering serious problems in their audit of Barton's financial statements for the fiscal year ended September 30, 1990. Tr. 397. The auditors had

discovered a number of accounting issues relating to the validity or appropriateness of various transactions and compliance with Generally Accepted Accounting Principles ("GAAP"). Tr. 397. One of these issues was whether a \$1 million sale (hereinafter referred to as "the FEPCO transaction") had been properly recorded in the third quarter of 1990 and whether it was a legitimate sale. Tr. 398. Another issue identified by the auditors was Barton's non-payment of payroll withholding taxes, which could constitute a violation of Barton's loan covenants and permit Barton's lenders to accelerate the company's debt. Tr. 402.

The auditors were concerned about whether Barton could meet prior financial projections made in a March 7, 1990 news release and September 1990 public announcement. Tr. 398-99. The March 7 release projected that Barton's earnings for its 1990 fiscal year would be \$32 million and its profits would be \$5 million. Div. Ex. 12A. The September announcement estimated earnings at \$3 million. Tr. 398-99. However, by early December 1990, as a result of Coopers' audit work, Darryl Spurlock, the audit partner for C&L, believed that Barton was likely to report a loss for fiscal year 1990. Tr. 399.

During the first week of December, Spurlock presented a list of these significant open audit issues, including the FEPCO transaction and the non-payment of payroll taxes, to Barton's senior management -- Earl Johnson, Joyce and Michael Barnes, Barton's controller. Tr. 399-401. During the following week beginning Monday, December 10, Spurlock continued to have significant ongoing discussions about these open audit issues with Barton's senior management, the Audit Committee of its Board

of Directors, and outside legal counsel. Tr. 400. In those discussions, Spurlock also apprised Earl Johnson and the Audit Committee that C&L would probably issue a going concern opinion. Tr. 401. (A going concern opinion means there is substantial doubt about a company's ability to continue in existence for another year without additional capital or funding or other significant operational changes. Tr. 402.)

Issuance of December 10 and 11 Releases

By late November 1990, Earl Johnson had informed Thomas Noulles, of the law firm of Pray, Walker, Jackman, Williamson & Marlar, Barton's outside legal counsel, that Barton would not meet its previously announced projections. Tr. 651. In response, Noulles advised Earl Johnson of the need to issue immediately a new press release revising the projections downward. Tr. 652. Spurlock also told Earl Johnson of the need to issue a public statement correcting Barton's previous projections. Tr. 399.

In response to the auditors' and lawyer's concerns, Barton, on December 7, sent a draft release to Noulles who reviewed and edited it and sent it back to Barton. Tr. 653. On December 10, Barton issued a release which had Noulles' "blessing." Tr. 653-4. This December 10 release stated that Barton's earnings for fiscal year 1990 would be substantially reduced from previously reported interim period levels and that, depending on the resolution of open accounting issues, Barton could report a loss for the year. Div. Ex. 1. The December 10 release was released by Barton, not Noulles or his law firm. Tr. 654. The price of Barton stock dropped severely after the issuance of this release. Tr. 19; Resp. Ex. 211. On Tuesday, December 11, Barton issued another

release indicating that the manufacturing problem affecting the sale of its pump off control units was corrected. Div. Ex. 13; Tr. 658.

On Wednesday, December 12, a proposed release was faxed from Barton to Noulles. Div. Ex. 14; Tr. 659. Noulles did not know who at Barton drafted this proposed release. Tr. 674. Noulles marked up the proposed release extensively because he believed it was contrary to his prior legal advice to Barton. Tr. 662. The December 12 proposed release was never issued because Noulles and Barton failed to agree on its contents and they decided to discuss it in person at a Barton Board meeting scheduled for Friday, December 14. Tr. 664-65.

THE WEDNESDAY, DECEMBER 12 PHONE CALL WITH BARTON'S AUDITOR

On the same day that the proposed release was faxed to Noulles from Barton -- Wednesday, December 12 -- Cook was at Barton's Shawnee headquarters meeting with Earl Johnson concerning financing for a Barton project. Tr. 774-75. While in Earl Johnson's office, Cook overheard a telephone conference on the speaker phone between Spurlock and Earl Johnson. Tr. 778-79; First Set of Stipulations, #5.

Cook took notes of this telephone conversation. Tr. 781; Div. Ex. 23. Cook's notes reflect that she wrote a note to Earl Johnson during the phone call stating: "Ask him to tell us 1 at a time his other problems." Div. Ex. 23, p. 811; Tr. 784. Cook wrote this note to Earl Johnson because she understood that C&L's audit of Barton was delayed and she wanted to hear an explanation of the delay. Tr. 784-85. Cook acknowledged that a failure by C&L to close the audit would have negative effects on

the projects she was working on with respect to Barton. Tr. 785.

Cook's notes on the same page further state:

Darryl Spurlock says agreed to items #1-11, (\$2 1/2 mm in adjustments)
items 12-35 are subject to review

Div. Ex. 23, p. 811. From these notes, Cook understood that Spurlock was saying that the outcome of C&L's audit work on items 1 through 11 was that Barton would have a \$2.5 million adjustment, and that more work was necessary on items 12 through 35 to complete the audit. Tr. 1030.

During that conversation, Spurlock also told Earl Johnson, among other things, that there was every probability C&L would be issuing a going concern opinion on Barton's 1990 financial statements. Tr. 401, 403-04.

The next notes by Cook of this conversation read "opinion subject to a going concern," this phrase is circled and has an arrow pointing to it. Div. Ex. 23, p. 811. Cook admitted that she understood that a going concern qualification on Barton's financial statements was a possibility (Tr. 786), and that this was a serious matter for the company. Tr. 787-88.

On the next consecutive page, Cook wrote a note to Earl Johnson -- "They wouldn't know a going concern if they saw one" (Div. Ex. 23, p. 812); "they" refers to the auditors. Tr. 789. Cook admitted that this was a "flip comment." Tr. 1036. Below that notation, Earl Johnson wrote a note back to Cook: "Darryl did not think we would have sales of 27,000,000 this year." Div. Ex. 23, p. 812; Tr. 790.

Cook's notes from the overheard December 12 conversation further state:

- 3 issues
- (1) proj of earnings
 - (2) Q3 - Col
 - (3) nonpayment of taxes
accel LT Debt. - default
under loan covenant

Div. Ex. 23, p. 814; Tr. 792. This notation refers to three issues identified by Spurlock during the conversation -- (1) projection of earnings; (2) a Colombian sale reported in the third quarter by Barton; and (3) the fact that non-payment of taxes accelerates Barton's long term debt which constitutes a default under its loan covenant. Tr. 792-93, 796.

Below the list of three issues, Cook's notes further state:

3rd qtr has sig. liability issues
Was a valid order at the time

Div. Ex. 23, p. 814. Cook's understood, as reflected in these notes from the overheard conversation, that the third quarter Colombian transaction (the FEPCO transaction) presented significant liability issues for Barton. Tr. 797. Cook further understood that Barton's nonpayment of taxes was a "very serious" matter for the company. Tr. 796-97.

Within one or two days, Spurlock hand-delivered a letter dated December 13, 1990, to Earl Johnson and Jack Sandman, Chairman of the Audit Committee of the Barton Board, requesting that Barton hire counsel to perform a special investigation to advise Barton and C&L as to potential claims resulting from certain matters. Div. Ex. 4; Tr. 405. These matters consisted of, *inter alia*, the likelihood that Barton would report a net loss for fiscal year 1990, contrary to its prior public projections; the

reversal of the FEPCO transaction recorded in the third quarter; the failure to disclose Barton's non-payment of payroll taxes; and the consequences of such non-payment.

Div. Ex. 4.

THE FRIDAY, DECEMBER 14 BOARD MEETING

On Friday, December 14, the Audit Committee, consisting of Sandman, Heffner and J. Johnson, met at 8 a.m. at Barton's Shawnee headquarters. Tr. 25. Heffner took notes of this meeting. Div. Ex. 2. Spurlock joined the meeting to review the concerns about the audit expressed in his December 13 letter to Sandman and Earl Johnson. Div. Ex. 4; Tr. 30.

Immediately following that meeting, a special meeting of Barton's board was held. Tr. 22, 42. In attendance at this meeting were the board members as well as Noulles, two other attorneys from his firm, Don Pray and Don Marlar, Joyce and Robert Carlson, a Barton employee. Resp. Ex. 75-OA, p. 1; Tr. 42, 666.

Noulles brought with him a draft release which he and Marlar distributed to the board members for their review. Resp. Ex. 75-OA, p. 6; Tr. 51, 666. The board reviewed the contents, accuracy, and proper reporting of the draft release paragraph by paragraph. Tr. 52. Some of the board members had non-substantive suggestions for changes in the release, such as the arrangement of paragraphs or sentences. Tr. 667. A motion to issue the release was made and seconded by the board, but no vote was taken. Div. Ex. 3; Tr. 51-52.

The only issue raised by the Board with regard to the release proposed by counsel was whether Barton should disclose that the third quarter would have to be

restated based upon the improper recognition of the FEPCO transaction in that quarter. Tr. 667. The board waited all day for copies of shipping documents which would resolve whether the date of actual shipment was in the third or fourth quarter. Tr. 667. The shipping documentation which finally arrived indicated that the goods had been shipped in the fourth quarter. Resp. Ex. 75-OA, p. 6; Tr. 668.

Once that shipping information arrived, Noulles believed he was authorized by Barton to disseminate the release and instructed a Barton secretary, Madonna Qualls, to send the release to the wire services. Div. Ex. 5; Tr. 668, 670. At approximately the same time, the December 14 release was incorporated, along with the December 10 and 11 releases, into a Form 8K signed by Earl Johnson. Div. Ex. 15; Tr. 668-69. Noulles also instructed Qualls to transmit the Form 8K to the SEC. Tr. 668.

The December 14 release disclosed, among other things, that a net loss could be reported for Barton's 1990 fiscal year, that Barton had determined to restate its third quarter results to omit a sale incorrectly recorded in that quarter, and that Barton was delinquent in its payroll tax obligations. Div. Ex. 5; Tr. 52-54.

Upon returning to the meeting room, Noulles learned that some board members were surprised that the December 14 release had been issued because they expected an opportunity to make further non-substantive changes in the press release. Tr. 670-71. Heffner, one of the directors, felt that counsel had upstaged the board by issuing the release before the board voted on it. Tr. 56. The board had never previously had any role in preparing news releases for Barton. Tr. 671. However, the board approved a resolution at that meeting that the audit committee, consisting of Sandman, J. Johnson

and Heffner, was to approve all future press releases. Resp. Ex. 75-OA, p.4.

THE SATURDAY, DECEMBER 15, MEETING AT BARTON

On Saturday, December 15, Earl Johnson called a meeting at Barton's Shawnee headquarters to determine a course of action to counter the adverse publicity about Barton during the preceding week stemming from the negative news releases. Tr. 539. Earl Johnson, Joyce, and J. Johnson arrived in early morning and commenced to meet in the Barton board room. Tr. 58. Cook also arrived early and went to the Board room, accompanied by Spencer Cook, who had on the prior day signed his employment agreement with Barton. Tr. 58, 722; Div. Ex. 21.

Next, Heffner and Galloway, who were driving by Barton's offices on their way home to Texas, saw cars in the parking lot, and decided to go inside. Tr. 57-58. When they entered, they were invited to join the meeting already in progress in the board room. Tr. 58. It was approximately 8:45 a.m. when they arrived. Tr. 58. At that time, Earl Johnson introduced the Cooks to Heffner and Galloway, and mentioned Cook's professional abilities as an analyst and that Cook had examined Barton's operations in that capacity. Tr. 58-9. McKinsey, who had arrived earlier and was working in a nearby office, was invited to join the meeting between approximately 8:30 and 9 a.m. Tr. 540-41. The previous night, Earl Johnson had asked McKinsey to come to Shawnee expressly for the meeting. Tr. 539.

Also on Friday night, Earl Johnson had specifically asked Qualls, his secretary, to come to work the next day for the purpose of typing a corrective press release. Tr. 191. Qualls arrived at Barton on December 15 at approximately 9 a.m. Tr. 191.

Heffner took contemporaneous notes of the statements made throughout the December 15 meeting for the purpose of assisting his memory of the day's events. Tr. 59, 62; Div. Ex. 6. Although he may not have written down all the words uttered by each speaker, Heffner's habit was to record significant statements. Tr. 34. His practice was to record the actual words spoken and many notes were exact quotations. Tr. 109, 112. As the December 15 meeting progressed, he wrote the name of the speaker in the left-hand margin as well. Tr. 111. Others present that day observed Heffner taking copious notes during the meeting. Tr. 296, 588. Heffner's initial notes reflect Earl Johnson's statements about the preceding week's negative news releases:

- ▶ Press releases have killed us - mention of IRS was a bullet to the heart. Obviously we have a real problem with counsel.
- ▶ By Monday, a corrected release should be out
- ▶ Can't have them talking to the auditors

Div. Ex. 6, p. 1; Tr. 70-71. Earl Johnson indicated to those present that the December 14 release had been issued by outside counsel without proper authorization. Tr. 545. Cook was in attendance at the time of this discussion. Div. Ex. 6; Tr. 71. After a comment by J. Johnson, Heffner's notes reflect that McKinsey asked: "Can we go to Dow Jones to retract news release." Div. Ex. 6, p. 1; Tr. 72. McKinsey was referring to the release issued on the previous day, Friday, December 14. Tr. 72. Heffner's notes reflect that Earl Johnson then directed Qualls to call Southwest News Wire for that purpose. Div. Ex. 6, p. 1; Tr. 73.

Cook then suggested substituting a revised press release for the one issued the previous day. Div. Ex. 6, p. 1; Tr. 73. Next, Cook spoke at length about the current

business climate in the oil industry and Barton's potential within the industry. Div. Ex. 6, pp. 1-2; Tr. 73-74, 1051. Cook further stated that the "Atlanta group" is erratic and is not regarded as sophisticated investors. Div. Ex. 6, p. 2; Tr. 75. The "Atlanta group" referred to stockholders from Atlanta, including Jack Camarda, Paul Brostrom, Russell Henderson, and John Hedquist.

According to Heffner's notes, the discussion then continued as follows:

Got to put out press release to distance ourselves from the attorneys. Because of two bad releases must put out third release to make point. Before Monday. Run the risk of manipulation. Suzanne will prepare release for our review.

Div. Ex. 6, p. 2. Heffner believed that Earl Johnson made these statements. Tr. 76. Cook was present and made no comment concerning the directive that she prepare the release for their review. Div. Ex. 6; p. 2. As of that day, Cook had in her possession the December 10 release. Tr. 807.

Next, McKinsey asked why the release had been issued on Friday, to which Cook answered "Just to get the jump on management." Div. Ex. 6, p. 2; Tr. 77. Cook then discussed Barton's long term potential and suggested the company "consider a special committee of the Board to review year-end facts and assist Earl in decisions." Div. Ex. 6, p. 2; Tr. 78-79. Earl Johnson then expressed concern that Barton's bank was "in league" with its outside counsel to delay Barton's interim financing, and also discussed financing issues. Div. Ex. 6, p. 2; Tr. 79.

According to Heffner's notes, Earl Johnson then described the priority of events to be accomplished for Barton:

1. New Press Release

2. Obtain Financing (Take the Bank out)
3. Gear up on Natl/Oilwell
4. Secure attorney

Div. Ex. 6, p. 3; Tr. 80.

Cook's handwritten notes from December 15, like Heffner's, reflect Earl Johnson's stated agenda at the meeting:

1. Pull Release & Send new Rel.
 2. Get \$ 4 mm
 3. Natl Oil Well
 4. Special Committee of the Bd. Dr. Johnson
John
- Mark & Earl

5. Law Firm

Div. Ex. 23, p. 817; Tr. 800-01.

Sometime before 10 a.m., there was a break in the meeting and Cook left to write a news release to substitute for the December 14 release. Div. Ex. 6, p. 3; Tr. 82. Cook went into Earl Johnson's office with Joyce and Earl Johnson. Tr. 193. Cook subsequently brought a handwritten draft of a news release to Qualls at Qualls' desk for typing. Tr. 193, 194, 197. It can be reasonably inferred from Qualls' testimony that the initial draft release was in Cook's handwriting. Specifically, Qualls testified that: Cook was in Earl Johnson's office with only Spencer Cook, Joyce and Earl Johnson; Cook came out of that office and gave Qualls the handwritten draft; and Qualls did not recognize the handwriting as being that of either of her employers, Joyce or Earl Johnson. Tr. 193-94.

Moreover, the existence of the December 12 draft does not vitiate a finding that

the draft given to Qualls on December 15 was written by Cook and in her handwriting. The December 12 and 15 releases were substantially different, as a result of the extensive moves, edits and new language added to the December 15 release. Div. Ex. 17; Tr. 678-81. Spencer Cook testified that it was his wife's general practice to draft documents by hand. Tr. 720. Thus, it is plausible that, even if Cook had the December 12 draft available in Earl Johnson's office on December 15, she would have handwritten the initial draft of the new release to give to Qualls.

Qualls then brought the typed version into Earl Johnson's office and Cook returned the typed versions with additional edits to Qualls at her workstation several more times; at one point, Cook typed certain edits herself. Tr. 195.

Qualls' inability to recall the presence of McKinsey, J. Johnson, or two shareholders from Atlanta, Jack Camarda and Paul Brostrom, in the board room meeting that day (Tr. 204) can be explained by her testimony that she only went into the board room once (Tr. 196) and that people could have been out of her sight in the back room off the board room during that time. Tr. 211-12. Qualls also was away from her desk several times on restroom or coffee breaks and thus might not have seen individuals enter or exit the board room. Tr. 195, 212. Similarly, the fact that Qualls believed Earl Johnson, Joyce and Cook were in Earl Johnson's office throughout the day (Tr. 199-200), despite contrary testimony from other witnesses, can also be explained by Qualls' absences from her workstation at various times.

After the break in the meeting, and while Cook was working on the release outside the board room, Camarda and Brostrom, the two Barton shareholders from

Atlanta, joined the meeting in mid to late morning. Tr. 286. They attended with Earl Johnson's approval to express their concerns as shareholders. Tr. 285, 461. When they entered the meeting, Camarda and Brostrom observed that those in attendance were "gloomy" and "upset" about the issuance of the prior day's release. Tr. 287, 462. Brostrom and Camarda were told that someone was in another room writing a new, more positive press release. Tr. 463.

While the Cooks were out of the board room, there was further discussion summarizing the audit delay and financing issues for Camarda and Brostrom. Tr. 85; Div. Ex. 6, p. 4. Camarda expressed his ideas about financing (Tr. 85; Div. Ex. 6, p. 4), and he and Brostrom reviewed the December 14 news release, which was available in the board room. Div. Ex. 6, p. 4; Tr. 288, 465, 544.

Shortly thereafter, Cook rejoined the meeting carrying a draft release for those in attendance to review. Tr. 289, 465, 546. Cook was introduced to those in the meeting room; both Camarda and Brostrom understood she was from Merrill Lynch. Tr. 293, 464. Upon her return to the meeting, Cook proceeded to speak about the possibility of a merger with National-Oilwell and expressed her excitement about the prospect. Tr. 85; Div. Ex. 6, p. 5. Cook then stated, according to Heffner's notes:

Concern we are running out of time. Lawyers have taken unauthorized action. Arabs against us, year end problems, lawyers against us.

Div. Ex. 6, p. 5.

The next event recorded in Heffner's notes is:

Earl stated he asked Suzanne to prepare release; sent to attorney who cut it up.

Div. Ex. 6, p. 5; Tr. 86. The Heffner notes from that meeting indicate no reply or comment by Cook with respect to this statement by Earl Johnson. Div. Ex. 6.

The participants in the meeting reacted positively to the draft release Cook brought to the meeting room. Tr. 290, 466. The draft release contained very positive analysts' estimates for Barton for fiscal year 1991. Tr. 290, 305-06, 470. Brostrom thought the projections were "amazing" and higher than expected. Tr. 470.

Cook's handwritten notes from December 15 -- "85-100", "1-1.10" and "2.2-2.5" -- corresponded to the following numbers in the December 15 release: "\$.85-1.00 per share for income for 1991," "\$1.00-1.10 per share for cash flow for 1991," and "multiples of 2.2-2.5 times analysts' estimates." Div. Ex. 23, p. 818; Div. Ex. 7; Tr. 802-03). The number "\$2-3/16" from Cook's December 15 notes referred to the closing price of Barton's stock on December 14. Div. Ex. 23, p. 818; Tr. 803-04. After further discussion of financing issues, there was a break in the meeting prior to the members meeting alone with Camarda and Brostrom. Div. Ex. 6, p. 6; Tr. 290, 466.

During a break, Camarda and Brostrom spoke in the outside hall alone with Cook. Tr. 290, 466. Camarda asked her if she was the analyst referenced in the draft release making the projections and she said that she was. Tr. 290-91. Camarda and Brostrom then asked Cook if the information could be justified (Tr. 466) and how sure she was of the numbers in the draft release. Tr. 291. Cook responded to them that "we" had done "due diligence" (Tr. 291, 466); both men understood "we" to refer to Merrill Lynch and Cook. Tr. 291, 466. Camarda recalled that Cook said that the time

period over which due diligence had been done was four months. Tr. 291. Camarda then indicated to Cook that her statement brought them comfort as shareholders. Tr. 291.

After the break, the meeting resumed with only the board members, Camarda and Brostrom in attendance. Div. Ex. 6, p. 6; Tr. 91, 294, 472. Camarda and Brostrom expressed concern about the performance of certain Barton employees, including Joyce. Div. Ex. 6, p. 6. Joyce was listed as a contact person on an early version of the draft release. Div. Ex. 11; Tr. 550, 613.

McKinsey was informed, before he left Barton between 1:30 and 2 p.m. that day, that the release would be revised to list him as contact person instead of Joyce. Tr. 548, 550. As McKinsey was leaving, he walked out of the meeting room with Earl Johnson and Cook into the hallway, and told them that, as he was in charge of communications with shareholders about the release, he would need to respond to inquiries. Tr. 548.

McKinsey then referred Cook and Earl Johnson to the analysts' predictions in the proposed release (which then was in the form of Division Exhibit 11) and asked where this information was from and who the analysts were. Tr. 549. The analysts' projections to which McKinsey referred in that conversation also appeared in the final version of the December 15 release. Div. Ex. 7; Tr. 549. Earl Johnson then walked away from McKinsey and Cook, and Cook responded to McKinsey's question by stating that: "you can say Merrill Lynch and other analysts who follow the company." Tr. 549.

McKinsey's account of Cook's statements is credible, notwithstanding his acknowledgment that in a telephone interviews with Cook's counsel in March and April 1993 he provided an inconsistent version of events. See generally Tr. 593-604. McKinsey offered a believable explanation for any differences in his description of the events at issue in March or April 1993 and in this proceeding. He had produced his original documents pursuant to an SEC subpoena in connection with the Barton investigation and therefore lacked access to them until May 1994, when he visited the SEC's offices in preparation for this proceeding. Tr. 606-07, 864. McKinsey also stated that both phone calls from Cook's attorneys were made without any pre-announcement. Tr. 595.

Although Cook's former counsel did fax the final version of the December 15 release to McKinsey to refer to during their April 1993 telephone conversation, McKinsey did not have at that time a prior version of the December 15 release on which he had made handwritten notations questioning the identity of the analysts (Div. Ex. 11; Tr. 607, 863). McKinsey testified that he was able to refresh his recollection of the events of December 15 upon visiting the SEC's offices in May 1994 and reviewing his original documents, particularly his annotated draft December 15 release. Tr. 607, 616.

The testimony of Mark Greenberg, Cook's former counsel, about his telephone interview is of little value in evaluating McKinsey's testimony in this proceeding. Greenberg and his associates called McKinsey with the admitted purpose of obtaining information favorable to Cook. Tr. 860. It is impossible to assess whether certain facts

were suggested to McKinsey from the nature of the questions asked by Cook's former attorneys. Tr. 874. On cross-examination, McKinsey never denied making the allegedly inconsistent statements to Greenberg and his associates; he either admitted them or lacked a specific recollection. Tr. 594-604.

Cook permitted Barton to make use of her expertise and issue her work in connection with issuance of the December 15 release. Specifically, she suggested preparing the corrective release (Div. Ex. 6, p. 1; Tr. 73), drafted the new release (Div. Ex. 6, p. 3; Tr. 193-4, 197), calculated the multiples figure in it (Div. Ex. 23, p. 818; Tr. 802-04), and presented it to the meeting participants for review. Div. Ex. 6, p. 6; Tr. 289, 465, 546. In addition, Cook held herself out, either expressly or impliedly, to a Barton director, officer and two shareholders, as the analyst referenced in the release (Tr. 290-01, 549) and invited reliance on her credibility by vouching for the accuracy of the numbers in the release. Tr. 270, 291, 466. Heffner acquiesced in issuance of the December 15 release because it was presented by Cook, whom he believed a "credible source," based on her credentials and the research and due diligence she had performed on Barton. Tr. 248, 270.

The release, which had been reviewed and approved by the board members present (Div. Ex. 6, p. 6), was sent on December 15 by Qualls to the Oklahoma Journal, the Wall Street Journal and the Southwest Wire Service. Tr. 196. The individuals remaining at the meeting departed during mid to late afternoon that day. Div. Ex. 6, p. 6.

On the next day, Sunday, December 16, Cook made telephone calls to the Wall

Street Journal and the New York Times at Earl Johnson's request to determine whether the publications would retract Barton's December 14 release. Div. Ex. 23, p. 19; Tr. 805-06.

The December 15 release was released publicly on Monday, December 17, 1990. Tr. 550. Upon receiving the already-issued December 15 release, Barton's outside counsel resigned. Tr. 674-5; Div. Ex. 16.

COOK'S SUBSEQUENT SUPPORT FOR EARL JOHNSON

After December 15, Barton's problems became more serious and Earl Johnson was asked to resign from the board. Tr. 807. The board had decided to appoint McKinsey as President and Earl Johnson's status was "in limbo." Tr. 551.

Cook was asked by Williams & Connolly to send a letter to the board in support of Earl Johnson. Tr. 808-09. As a result, on January 2, 1991, Cook sent a letter signed by her to Barton's board on Merrill Lynch letterhead. Div. Ex. 8; Tr. 808. In that letter, which Merrill Lynch did not authorize or know about, Cook expressed her support for Earl Johnson to head Barton. Tr. 810-11. Cook's letter stated:

I understand that the Board of Directors of Barton Industries will tomorrow be addressing the issue of whether Mr. Earl Johnson is the best candidate to lead the company at this important point in Barton's history. My opinion has been requested in this regard....

In the days after the press releases of December 10th, 11th and 14th, I heard repeatedly from investors and from the press that they considered credibility to be a key issue for Barton....

In my four months of due diligence, I came to see these relationships as the key element in Barton's franchise.

Div. Ex. 8, emphasis added. Cook used the term "due diligence" despite the fact that

she did not do four months of due diligence. Tr. 811. This reference corroborates Camarda's testimony that Cook told him on December 15 that she had done four months of due diligence and could therefore confirm that the numbers in the December 15 release were justifiable.

Cook delivered the letter to Barton's board on January 2, 1991 in anticipation of a board meeting the next day. Div. Ex. 8; Tr. 808. On the next day, January 3, during two telephone calls, Cook advocated keeping Earl Johnson at Barton. Immediately prior to the board meeting, she spoke with Camarda and Earl Johnson by speaker phone and urged Camarda to support Earl Johnson before the Board, and Camarda did. Tr. 300-01.

Again, during the January 3 board meeting, Cook spoke to the Board by speaker phone to express support for Earl Johnson as Chairman so that she could continue her financing efforts on Barton's behalf. Tr. 198, 551. As a result of Cook's comments, the board decided to retain Earl Johnson in an arrangement where he and McKinsey would continue to work together. Tr. 552. McKinsey agreed to the arrangement so long as Earl Johnson would not have the power to sign checks. Tr. 552.

On January 7 or 8, McKinsey resigned from Barton because Earl Johnson failed to keep this agreement. Tr. 552. Within 10 to 15 days of the January 3 board meeting, the board asked Earl Johnson to resign as a result of negative information received from Barton's auditors. Tr. 301-02.

CREDIBILITY ISSUES IN COOK'S ACCOUNT

According to Cook's version of the December 15 meeting: she was not directed

to draft the release by Earl Johnson in the December 15 meeting. Tr. 1068; she did not see an initial draft until returning to the board room after a break (Tr. 1052); she did not bring a draft release into the board room (Tr. 1064-65); she made only non-substantive changes to the draft release (Tr. 1062-63); and she did not, as ascribed to her, have the hallway conversations with Camarda, Brostrom or McKinsey in which she told them that she or Merrill Lynch was the analyst and that she had done due diligence. Tr. 1070, 1071.

Cook's Contradictions of Other Witnesses

Knowledge of Barton's Financial Condition

According to Cook, Spurlock told Earl Johnson on December 12 that, if Barton wanted the audit opinion issued more quickly, C&L could issue a going concern qualification without resolving the open audit issues. Tr. 1030-31. However, Spurlock unequivocally denied making that statement to Earl Johnson, because it would have been contrary to professional auditing practice to issue a going concern opinion if the audit was not complete. Tr. 1124.

Events in December 15 Board Room Meeting

Although Cook maintains that she did not arrive at Barton on December 15 until approximately 10 a.m., the clear weight of the evidence is that she was there earlier given her substantial participation in the meeting prior to 10 a.m., as reflected in Heffner's notes. Div. Ex. 6, p. 1; Tr. 58.

Cook's denial that she was directed to draft the release by Earl Johnson in the meeting (Tr. 1068) is contradicted by Heffner's testimony and notes, which establish unequivocally that she was so directed and in fact that she suggested substituting a revised release. Div. Ex. 6, pp. 1-2; Tr. 73, 76. Further, Heffner understood that Cook had left the board room meeting to draft the new release. Tr. 81. Qualls also testified that Cook was in Earl Johnson's office with Joyce and Earl Johnson and came out carrying a draft of the press release that was not in Earl Johnson's or Joyce's handwriting. Tr. 193. Brostrom was told upon joining the meeting that someone was in another room working on a new release; Cook thereafter entered the board room carrying the new release. Tr. 463.

Further, Cook's assertion that she did not bring the proposed release into the board room for the meeting participants' review (Tr. 1064-5), is contradicted by accounts of four other witnesses (Tr. 288, 465, 546; Div. Ex. 6, p. 4) and is not believable. Moreover, Cook's denial that she was introduced to the directors in the meeting as an analyst from Merrill Lynch (Tr. 1044) is contradicted by Heffner (Tr. 58-59), and can not be credited.

Cook testified that the December 14 release was not on the board room table during the December 15 meeting. Tr. 1053. However, her account is squarely in conflict with that of three other witnesses who testified that the December 14 release was available on the board room table that day. Tr. 288-89, 465-67, 544.

Cook testified that she saw the new release upon returning to the board room and only made non-substantive changes to it. Tr. 1052-54. However, Qualls'

recollection that Cook was the person who provided her with the initial handwritten draft and subsequent edited versions of the release is more credible. Tr. 193-95.

Qualls was asked to work that Saturday solely to type the release and was focused only on that task; she and Cook were the only two women there that day; and Cook had never asked her to do any other work for her. Tr. 193, 214.

Hallway Conversations

Given Cook's lack of candor throughout this proceeding, her claim that the critical hallway conversations with Camarda, Brostrom and McKinsey never happened (Tr. 1070-71) is not believable. It is contradicted by Camarda's, Brostrom's, and McKinsey's accounts of the two hallway conversations, *i.e.*, Camarda's recollection that Cook identified herself as the analyst in the proposed release; Camarda and Brostrom's testimony that she assured them the numbers in the proposed release were good and that she had done "due diligence" on Barton (Tr. 290-91, 466); and McKinsey's separate conversation with her in which she instructed him to refer inquiries about analysts' estimates to Merrill Lynch or others following Barton. Tr. 549.

The Camarda/Brostrom account is supported by the letter Cook sent to the Barton board on January 2, 1991 in support of Earl Johnson, in which she referred to "my four months of due diligence." Div. Ex. 8; Tr. 810-11. Camarda remembered Cook stating in the December 15 hallway conversation that four months of due diligence had been done. Tr. 291.

Cook dissembled in her testimony in this proceeding and sought to downplay

her use of the term "due diligence" in the January 2 letter to describe her Barton research:

To me it was the work that I had done to try to better understand the products, the nature of the products, the service center concept, essentially did Barton have something that could be a viable business. And that's what I meant by 'due diligence' in that context, although obviously it has a lot of meanings, different meanings, specifically different legal meanings.... I did not definitely [mean it to signify the kind of due diligence that a purchaser might do in connection with the purchase of a company]. They would do their own in that connection. It was strategic in nature.

Tr. 1091-92. The meaning of the term "due diligence" as understood by Camarda and Brostrom as businessmen, however, was that Cook had done a thorough investigation of Barton, sufficient to support the analysts' projections in the proposed release. Tr. 292, 467.

Cook's Subsequent Support for Earl Johnson

Cook's disavowal that on January 3, 1991 she took part in a telephone conference with the Barton Board, or in any telephone conversations with anyone at Barton, (Tr. 812) is contradicted by the testimony of three other witnesses and is therefore not credible. Camarda recalled that Cook advocated keeping Earl Johnson as Chairman of Barton immediately prior to the January 3 board meeting on a speaker phone call. Tr. 300-01. Both Qualls and McKinsey remembered that Cook participated by speaker phone during the January 3 board meeting, and expressed support for Earl Johnson as Chairman. Tr. 198, 551. McKinsey in particular had good reason to remember this event because it convinced the board to retain Earl Johnson, which precipitated his own resignation several days later. Tr. 552.

Credibility of Other Witnesses' Accounts

There is no evidence of bias against Cook on the part of Camarda and Brostrom. Brostrom and Camarda had never even met Cook prior to the December 15 meeting. Tr. 287, 463. Brostrom testified that he had received a letter dated October 4, 1991 from Russell Henderson, an associate, suggesting suing Merrill Lynch and Cook, and that he discussed the letter in passing with Camarda. Resp. Ex. 4; Tr. 518-19. However, there is no evidence in the record of the proposed basis for such a suit and no suit was brought. Tr. 377.

Further, Cook's supposition that Camarda and Brostrom were engaged in a "hostile takeover" of Barton during late 1990 (Tr. 774) is uncorroborated. The fact that both men were substantial Barton shareholders at the time (Tr. 283, 459), and that Camarda had filed a Form 13D on December 14 indicating he believed a merger or similar transaction as well as management changes were necessary (Resp. Ex. 92; Tr. 501-02), does not necessarily mean that they were trying to wrest control of Barton from Earl Johnson.

Heffner also met Cook for the first time on December 15. Tr. 58. Qualls and McKinsey had only a passing acquaintance with Cook before that day. Tr. 214, 542-43. Accordingly, there is no evidence of any motive by Heffner, Brostrom, Camarda, Qualls or McKinsey to lie about or exaggerate Cook's involvement in the events at issue in this proceeding.

Further, Cook has offered no witnesses to corroborate her version of the events of December 15. Although her husband Spencer Cook accompanied her to Barton on

December 15 (Tr. 1044) and the Division questioned him in this proceeding on other matters, Cook made no attempt to elicit any corroborating testimony from him about the events of December 15.

Nor does the testimony of director J. Johnson support Cook's account.

Although he did not see Cook drafting a release on December 15 (Tr. 897), he could not exclude the possibility that she did draft it. Tr. 907. While J. Johnson did not hear anyone say she wrote a release or was going to do so that day (Tr. 897-98), he was unable to recall any specific statements made at the December 15 meeting which he could attribute to any specific person concerning the need for a release or who should draft it. Tr. 908-09.

Moreover, J. Johnson's testimony is vague and evasive in other respects and cannot be credited. For example, he claimed that, despite his presence at both the December 14 and 15 meetings, he never saw the releases sent out on those days before they were issued. Tr. 899, 916. This account is inconsistent with the testimony of Heffner and Noulles as to the December 14 release (Resp. Ex. 75-OA; Tr. 51, 666), and of Heffner, Camarda, Brostrom, McKinsey and Cook as to the December 15 release. Tr. 93, 289, 465, 546-47, 1052.

Cook's Departures from Prior Investigative Testimony

Cook's version of events has changed on several key points since her investigative testimony taken under oath on April 9, 1992. Cook asserted at this hearing that she went to Barton on Wednesday, December 12 to review the Sprint contract and gather information on the National-Oilwell/U.S. Steel matter. Tr. 1101-

02. Cook denied ever considering covering Barton in a research sense from August through the end of 1990 because it was below the threshold size for Merrill Lynch's coverage. Tr. 1109.

However, in her investigative testimony, when asked why she went to Barton during the week prior to December 15, Cook never mentioned the Sprint contract as a reason. Tr. 1102. Moreover, she offered as one possible reason that she was considering covering Barton in a research sense. Tr. 1102. Her testimony from the Barton investigation was as follows:

I don't recall exactly why the meeting was held. As I said earlier, I was in the process of trying to come to learn about the company and understand the company with the idea being at first that we might cover Barton in a research sense, or we might learn something about Barton that would be important for us in terms of covering the industry. Later that developed into thinking through the idea of merging Barton into National-Oilwell, which of which I was there on that day, I don't recall.

Tr. 1102.

Turning to the events of Saturday, December 15, Cook's account given in this proceeding was again inconsistent with her previous investigative testimony.

Specifically, she claimed that, during the December 15 meeting, she was unaware of the contents of the Friday, December 14 release. Tr. 1106. However, she testified to the contrary in the investigation:

On December 15th, when you... were reviewing the press release at Barton's headquarters, you were aware, were you not, that a news release had been issued on December 10th which stated in pertinent part that a combination of disappointing fourth quarter results and the potential adverse effects of a number of open accounting matters will substantially reduce Barton's earnings for its fiscal year and its September 30th from previously reported interim period levels. The net results are dependent upon resolutions of accounting matters

which could result in a loss for fiscal year 1990. And the release went on to discuss a manufacturing problem with the pump-off control units. You are aware of that? Answer: Yes. Question: Were you aware of the details of the press release on December 14th? Answer: Yes.

Tr. 1106-07.

Further, Cook admitted in this proceeding that figures appearing in her handwritten notes from the December 15 meeting corresponded with numbers in the December 15 release. However, when she testified in the SEC investigation that she did not remember that she taken the figures from the December 15 release. Tr. 1059. In particular, in this proceeding, she was able to remember that she had copied the numbers appearing in her notes from a draft of the December 15 release in order to calculate whether the statement in that release that Barton's stock was trading at "multiples of 2.2-2.5 times analysts' estimates of 1991 earnings" was correct. Tr. 1057-58.

Cook's explanation for her improved recollection on this point is not plausible. Cook maintained that, during the investigation, she did not remember the circumstances under which she had written these notes because she had previously sent her notes to Merrill Lynch in New York and therefore had not reviewed them prior to her SEC investigative testimony. Tr. 1060-61. Cook also testified that she did not anticipate that the December 15 press release would be the focus of the SEC's questioning in the investigation. Tr. 1060. After her investigative testimony, she apparently had an epiphany in a meeting with her former counsel, Wayne Secore, and could recall the true circumstances under which she recorded this page of notes. Tr. 1059.

However, Cook conceded that, at least several months prior to her investigative testimony, Merrill Lynch had returned a copy of her original documents to Secore, and she was not denied access to them. Tr. 1060-61. Secore was experienced in SEC enforcement matters (Tr. 1108), and was in fact the former regional administrator for the SEC's Fort Worth regional office. Tr. 834-35. It is improbable to believe that Secore would not have prepared Cook for inquiries from the SEC in her investigative testimony about the December 15 meeting -- the only meeting of Barton board members and shareholders attended by Cook -- particularly when he had a copy of her document production in his possession at that time.

In this proceeding, Cook also disclaimed her prior testimony concerning the events of the next day, Sunday, December 16. Cook's handwritten notes reflect telephone calls to the Wall Street Journal and the New York Times. Div. Ex. 23, p.819. She admitted in the investigation that these phone calls were made at Earl Johnson's request to determine whether the publications would retract Barton's December 14 release. Tr. 805-06. Nevertheless, in this proceeding, Cook flatly and inexplicably denied making the phone calls for that purpose on December 16. Tr. 805.

Further, in her testimony in this proceeding, Cook maintained that she wrote in her notes on December 12 "They would not know a going concern if they saw one" and that Earl Johnson wrote in response in her notepad "Darryl did not think we'd have sales of \$27,000,000 this year" after the overheard telephone conversation with Spurlock. Tr. 789. However, she stated in investigative testimony that they were written during the overheard phone call. Tr. 790-91. Cook gave no explanation at this

hearing for why she and Earl Johnson would be writing notes, rather than speaking audibly, while Spurlock was not on the phone.

MISSTATEMENTS IN DECEMBER 15 RELEASE

Prior Releases Were "Incorrect and Unauthorized"

The December 15 release contained several false and misleading statements. First, it stated that the "two prior releases of December 10 and 14, 1990 were incorrect and unauthorized by Management and the Board." Div. Ex. 7. The December 10 and 14 releases were in fact issued on the advice of counsel by Barton management. Tr. 653-54, 670. Earl Johnson, at the end of the December 14 board meeting, signed a Form 8-K attaching both releases for filing with the Commission. Div. Ex. 15; Tr. 668-69.

Although there is evidence in the record that the board expected to make further non-substantive changes before the December 14 release was issued (Tr. 56, 670-71), there was no question that the December 10 release was issued and approved by Barton's management. Tr. 654. Upon receiving the December 15 release, Barton's outside counsel resigned within days. Tr. 674-75; Div. Ex. 16.

Increased 1990 Profits

The December 15 release also stated that "Barton doubled 1990 revenues for fiscal year ended September 30 and increased profits." Div. Ex. 7. The statement that Barton "increased profits" in 1990 was false and misleading because Barton was almost certain to sustain a loss in fiscal year 1990. Tr. 398-99, 409. Furthermore, this statement was contrary to the December 10 and 14 releases, which disclosed the

possibility that Barton could report a loss. Div. Exs. 1, 5.

Analysts' 1991 Projections

The December 15 release further stated that:

Analysts' 1991 estimates show \$80 - \$110 million for revenue, \$17-\$20 million or \$0.85 - 1.00 per share for income, and \$20-\$22 million or \$1.00 - 1.10 per share for cash flow.

Div. Ex. 7. The 1991 revenue, income, and cash flow estimates attributed to analysts were unfounded (Tr. 408) and were therefore false and misleading. The projections showed Barton virtually tripling its revenues in the coming year and enjoying substantially increased earnings. There was no reasonable basis for these 1991 projections, given Barton's grim financial situation. Tr. 408. Barton lacked the financial strength to finance the growth that the 1991 projections represented. Tr. 407-08.

Cook conceded that a number of conditions were necessary for Barton to meet these projections:

[F]irst of all, [Barton] needed to find bridge financing. And second, [Barton] needed to build and install and turn on the fiber optics line that we have been discussing here. And... this would presuppose a certain level of success in the oil business generally. Certain oil prices, certain gas prices above a threshold, for instance, if oil and gas prices had gone down sharply.

Tr. 1074-75. As of December 15, however, Barton had neither obtained bridge financing (Tr. 1065-68) nor signed the fiber optics line contract with Sprint. Tr. 775.

None of these prerequisites for meeting the analysts' 1991 projections was disclosed in the December 15 release. Div. Ex. 7.

It was also false to attribute the 1991 projections to unnamed "analysts." Cook

admitted she had never seen any other analyst report on Barton (Tr. 1069) and could not identify any specific analyst covering Barton. Tr. 1069.

The draft December 12 release, which was faxed from Barton to Noulles, supports a finding that the 1991 projections emanated from Barton and/or Cook, not any other independent analyst. Div. Ex. 14. The 1991 projections in the December 12 and 15 releases are identical, except for the numbers representing the multiples of analysts' estimates at which Barton stock was trading. Div. Exs. 7, 14, 17. Cook admitted having performed the calculation of the correct multiple at Barton on December 15. Div. Ex. 23, p. 818; Tr. 1057-58. This raises an inference that she did so in order to include the correct multiple in the release.

In addition, the record evidence indicates that Cook was also involved in the preparation of the December 12 release. Cook was at Barton on December 12 meeting with Earl Johnson. Tr. 775. The draft release was faxed to Noulles, Barton's counsel, that day. Tr. 659. Noulles then marked up the draft release extensively with changes, comments and questions in red ink and faxed it back to Barton. Tr. 662. Three days later, according to Heffner's December 15 notes, Earl Johnson stated in Cook's presence that Earl Johnson had asked Cook to prepare a release for Barton, which was sent to his attorney who "cut it up." Div. Ex. 6, p. 5; Tr. 86.

.Multiples of Analysts' Estimates

The December 15 release announced that:

In response to inquiry, Chairman Johnson stated, "We know of no comparable oil service company trading at multiples of 2.2-2.5 times analysts' estimates of 1991 earnings and 2.0-2.2 times their estimates of operating cash flow, as

Barton is currently."

Div. Ex. 7. The calculations of the multiples of analysts' estimates of earnings and operating cash flow were false because they adopted the unsupported analysts' estimates. Further, the statement that Barton's stock price was trading at a comparatively low multiple of analysts' estimated 1991 earnings and operating cash flow also conveyed the impression to investors that Barton stock was undervalued relative to other companies in the industry, and therefore a good buy.

CONCLUSIONS OF LAW

COOK WILFULLY VIOLATED THE FEDERAL SECURITIES LAWS

The evidence in this proceeding supports sanctions and a cease and desist order against Cook pursuant to Sections 15 (b) (6) and 21C of the Securities Exchange Act of 1934. Cook violated Exchange Act Section 10 (b) and Rule 10b-5 promulgated thereunder.

Cook, an oil and gas service analyst then employed by Merrill Lynch, a registered broker-dealer, prepared a news release dated December 15, 1990 issued by Barton Industries, Inc., an Oklahoma manufacturer of valves and other products used in the oil industry. The release included materially false and misleading statements that:

- 1) two prior releases of December 10 and 14 were incorrect and unauthorized by Barton's management and Board of Directors;
- 2) Barton would increase profits for

1990; 3) "analysts" estimated Barton's 1991 revenues at \$80-\$110 million, income at \$17-\$20 million or \$.85-\$1.00 per share, and cash flow at \$20-\$22 million or \$1.00-\$1.10 per share; and 4) Barton stock was trading at multiples derived from the baseless 1991 analysts' estimates. The evidence establishes that Cook knew these statements were false, or acted with reckless disregard for the truth when she made them.

COOK PREPARED A FALSE PRESS RELEASE FOR BARTON

At a December 15, 1990 meeting held at Barton's headquarters, Cook prepared a false December 15 release, and held herself out as the analyst responsible for the baseless projections contained in it to two shareholders and an officer of Barton. The testimony of five witnesses linked Cook either to the preparation of the release or to the projections contained in it. Cook offered no coherent theory which would refute the testimony of these five persons, each of whom had only passing acquaintance with her.

In defense, Cook offered only her own uncorroborated account of the events of December 15, 1990, an account which cannot be reconciled with the testimony of the other witnesses present at the meeting. Moreover, in fashioning her version of the facts, Cook departed from previous sworn testimony she gave before the Commission staff in the investigation which led to this proceeding, raising significant questions about her credibility.

On December 10 and 14, 1990, Barton issued news releases announcing unfavorable information regarding its financial condition. At a December 15, 1990 meeting at Barton called by Earl Johnson, Barton's Chairman, President and Chief Executive Officer, Cook suggested substituting a revised news release for one issued

the previous day. According to the testimony of Barton director John Heffner, as well as his contemporaneous notes, Earl Johnson stated "Suzanne will prepare release for our review." ^{1/} Cook left the meeting at a break to write the release.

According to Madonna Qualls, Earl Johnson's secretary, Cook came from Earl Johnson's office, where she, her husband Spencer, Earl Johnson, and Victor Joyce, Barton's Chief Financial Officer, were sitting, and handed Qualls a handwritten draft of the press release, which Qualls typed. The handwritten draft was not in the handwriting of either Earl Johnson or Joyce. It can be inferred from the circumstances that the draft was handwritten by Cook.

Jack Camarda and Paul Brostrom were shareholders in Barton who were at the December 15 meeting to present their concerns. When they arrived, according to Brostrom, they were informed that "someone was in another room" writing a new release. Three witnesses stated that Cook later entered the room carrying a draft release, which she distributed to the meeting participants for review.

At a break in the meeting, Brostrom and Camarda encountered Cook in a

^{1/} Cook argues that Heffner's notes from the December 15 meeting should be inadmissible, at least with regard to statements by Earl Johnson about the actions of Cook. Cook argues that it could not attack the reliability of Heffner's notes in this regard because Earl Johnson would not testify. Determining the credibility of Heffner's notes is not dependent on the testimony of Earl Johnson. There were a number of other people present when Earl Johnson made his remarks, including Cook's spouse, Spencer Cook. Cook had every opportunity to test the accuracy of Heffner's notes through them. The statement which Heffner attributes to Earl Johnson is consistent with other testimony about Cook's role in the preparation of the December 15 release.

hallway outside the Board room. Camarda asked Cook whether she was the analyst referred to in the release, and she responded that she was. Camarda and Brostrom inquired of Cook if the information could be justified and how sure she was of the numbers contained in the release. Cook replied that "we" had done "due diligence." Both men understood "we" to mean Merrill Lynch.

Mark McKinsey, Executive Vice President of Barton, learned during the December 15 meeting that he would be designated the contact person on the new press release. He walked with Cook and Earl Johnson to the hallway, and told them he would need to respond to inquiries. He referred to the projections in the draft release and asked where the information was from and who the analysts were. Earl Johnson walked away. Cook responded "you can say Merrill Lynch and others following the company."

Cook's own notes also tie her to the December 15 news release. Cook wrote, in notes she took at the December 15 meeting, "85-100," "1-1.10," and "2.2-2.5" -- numbers which corresponded to statements in the December 15 news release. Cook admitted that she wrote the numbers on the 15th in connection with her calculation of the multiples appearing in the release. The evidence supports the inference that Cook made these notes in calculating the numbers to place in the release she prepared.

By December 15, Cook knew that Barton's financial condition made it unlikely that the projections in the December 15 release could be met. Specifically, she learned during a telephone conference on Wednesday, December 12, 1990, between Earl Johnson and Darryl Spurlock, the engagement partner at Coopers & Lybrand, Barton's

independent auditors, that the auditors intended to issue a "going concern" qualification on Barton's financial statements. Such a qualification would note that while the financial statements were prepared on the assumption that the entity would continue in business, certain factors raised substantial doubt about the entity's ability to continue as a going concern. Spurlock also had concerns about a number of serious issues relating to the audit. In addition, as of December 15, Cook had received a copy of Barton's December 10, 1990 news release which disclosed that Barton could have a loss for the year.

Cook's motivation in preparing the December 15 release is apparent. Her own testimony establishes that she was working on three items of business relating to Barton: 1) a potential merger between Barton and Merrill Lynch client National-Oilwell; 2) a search for bridge or interim financing for Barton; and 3) an attempt to position Merrill Lynch to compete for a \$100 million offering associated with a contract Barton was negotiating to provide a fiberoptics communications line. These interests provided reasons for her to cooperate with Earl Johnson, Barton's Chairman, President and CEO, who was her primary Barton contact on Barton's financial statements. 2/

She had personal reasons as well. As a result of Cook's contacts with Barton, Earl Johnson retained Spencer Cook, Cook's spouse, to do consulting work for Barton.

2/ Cook wrote a letter dated January 2, 1991 urging the Barton board to retain Earl Johnson. In addition, on January 3, 1991, she spoke by telephone prior to a board meeting with Camarda to enlist his support for Earl Johnson before the board, and again that day called into the board meeting to express her support for Earl Johnson.

On December 14, 1990, the day before she prepared the news release, Spencer Cook signed an employment contract with Barton. Spencer Cook was given the position of Director of Marketing for Barton's ITSD subsidiary, and became the highest paid employee of Barton after Earl Johnson and McKinsey. The decision to hire Spencer Cook was Earl Johnson's; McKinsey, the head of the ITSD division, did not even know Spencer Cook had been hired in his division until he received an internal memorandum announcing the hiring.

Cook denied preparing the December 15 release, except for non-substantive edits. She further denied that she told Camarda, Brostrom, or McKinsey that she or Merrill Lynch was the analyst referred to in the release. According to Cook, she merely assisted the secretaries in reconciling the conflicting edits submitted by the various meeting participants, and made some non-substantive changes.

Cook did not proffer any witness who could corroborate this account, which cannot be reconciled with the testimony of any other witness. To accept Cook's story, one would have to believe that the five witnesses who gave a different version of the events for some reason fabricated their testimony so as to implicate her in the preparation of the release. However, none of the five had any apparent or established bias against Cook. Three -- Heffner, Camarda, and Brostrom -- had, prior to the hearing, personally met Cook only on December 15. The other two, Qualls and McKinsey, similarly had only a passing acquaintance with Cook. Respondent has alleged that all of these witnesses except Qualls had potential liability under the securities laws and therefore lied about Cook's involvement in the December 15

release. To credit this theory, one would have to believe that each of these witnesses separately and simultaneously decided to fabricate a story bearing striking similarities and implicating Cook. The record does not support that conclusion.

.COOK VIOLATED SECTION 10 (b) AND RULE 10b-5

Congress drafted Section 10 (b) "as a catch all clause to prevent fraudulent practices." Chiarella v. United States, 445 U.S. 222, 226 (1980). The Securities Exchange Act is designed to promote free and open public securities markets and to protect the investing public from suffering inequities from trading and inequities that follow from trading that has been stimulated by the publication of false or misleading corporate information releases. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 858 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969). It was not the intention of Congress "that the proscriptions of the Act would not be violated unless the maker of a misleading statement also participated in pertinent securities transactions in connection therewith, or unless it could be shown that the issuance of the statement was motivated by a plan to benefit the corporation or themselves at the expense of a duped investing public." Id. at 860. Nor does the law require that the Commission protect the public only when it is demonstrated that the release was made for an ulterior purpose. Those who prepare and issue information for the investing public must demonstrate that they were diligent in ascertaining that the information published was the whole truth and that it was disseminated in good faith. Cook has not made that showing.

Cook Made Material Misstatements of Fact in the
December 15 News Release

1. False and Misleading Projections

The December 15, 1990 release contained false and misleading analysts' projections for 1991. The release claimed that analysts projected Barton's 1991 revenues at \$80-\$110 million, income at \$17-\$20 million or \$.85 - \$1.00 per share, and cash flow at \$20-\$22 million or \$1.00 - \$1.10 per share. These figures represented a substantial increase over Barton's 1990 anticipated performance -- the 1991 predicted revenues were nearly triple the estimated 1990 revenues of \$27 million cited in the release. The release went on to quote Earl Johnson as stating that he knew of no other companies trading at multiples of 2.2-2.5 times analysts' estimates of revenue and 2.0-2.2 times analysts' estimates of operating cash flow -- a statement which conveys the impression that Barton stock was undervalued and a good buy.

These projections are misstatements of fact for which liability under Section 10 (b) and Rule 10b-5 can be imposed. In this context:

predictions may be regarded as "fact" within the meaning of the antifraud provisions of the securities laws. . . . Most often, whether liability is imposed depends on whether the predictive statement was "false" when made. The answer to this inquiry, however, does not turn on whether the prediction in fact proved to be wrong; instead, falsity is determined by examining the nature of the prediction -- with emphasis on whether the prediction suggested reliability, bespoke caution, was made in good faith, or had a sound factual or historical basis.

Rubinstein v. Collins, 20 F.3d 160, 166 (5th Cir. 1994) (quoting Isquith v. Middle South Utilities, Inc., 847 F.2d 186, 203-4 (5th Cir.), cert. denied, 488 U.S. 926 (1988)).

In this case, the "analysts'" projections contained in the release constitute misstatements of fact for which Cook is liable. The projections are false and misleading because they are attributed to analysts, when in fact they were apparently the company's numbers. The release therefore gave the inaccurate impression that an independent third party had generated the projections.

The projections were also vastly inflated; according to Spurlock, the company did not have the capability to finance the significant growth that the projections represented. The statement attributed to Earl Johnson that Barton's stock price was trading at a comparatively low multiple of analysts' estimated 1991 revenues and operating cash flow was also fraudulent; it adopted the baseless analysts' projections and insinuated that Barton's stock was undervalued relative to other companies in the industry.

Cook had neither a genuine belief, nor a reasonable basis for believing, that the projections were accurate. By December 15, she knew that Spurlock intended to issue a going concern opinion on Barton's 1990 financial statements and that he had concerns regarding a number of issues presented by the audit, including Barton's failure to meet prior projections, significant liability issues arising from Barton's reversal of a third quarter transaction, and Barton's payroll tax delinquency. Moreover, despite her assurances to Brostrom and Camarda, she knew that neither she nor Merrill Lynch had done "due diligence" to support the projections. She in addition was not aware of any other analyst's research which would support the projections.

In defense, Cook produced no objective evidence that the projections had any

reasonable basis. Cook proffered only her own unsubstantiated assertion that she believed that the 1991 projections could be met, provided that the company obtained bridge financing; built, installed, and turned on a fiber optics line that was the subject of contract negotiations between Barton and Sprint; and that the oil industry generally realized a certain level of success. However, as of December 15, Barton had not obtained bridge financing, and had not signed a contract with Sprint. Moreover, these caveats were not disclosed in the December 15 release. Nor does her unfounded rationalization take into consideration the information she had received from Spurlock about Barton's financial state.

2. Cook's Other Misstatements

The December 15 release stated that the "two prior releases of December 10 and 14, 1990 were incorrect and unauthorized by Management and the Board." This statement is intended to mislead investors into believing that the two prior releases were discredited. Thomas Noulles, Barton's outside counsel, testified that both releases were issued upon the advice of counsel and that they were correct. Noulles further understood that the releases were issued with the consent of management and, in the case of the December 14 release, of the board. The only question regarding authorization to issue a release arose when Noulles brought the December 14, 1990 release out of the December 14 board meeting and gave it to Qualls to send to the news services; the directors had, unbeknownst to Noulles, wanted to make additional non-substantive edits before the release went out. No questions were ever raised about the authorization for the December 10 release.

The December 15 release also stated that Barton's profits for fiscal year 1990 would increase. Spurlock had advised Barton as of December 10 that Barton would most likely sustain a loss of approximately \$1 million for the year. Barton's December 10 news release disclosed the possibility that the company would suffer a loss; Cook had received this press release by December 15.

Cook Violated a Duty to Barton's Shareholders

Cook had a duty to refrain from making the affirmative misstatements of fact contained in the December 15 release. A third party, such as Cook, who ordinarily would have no legal duty to a company's shareholders is nonetheless obligated to speak truthfully if she makes a statement regarding a material issue and permits the company to use it. This rule applies with particular force where the speaker is a professional or other person with greater access to information than the investing public. Ackerman v. Schwartz, 841, 848 (7th Cir. 1991). For example, in Ackerman, plaintiffs alleged that Schwartz, an attorney, had provided to promoters of a fraudulent securities venture an opinion letter which was circulated to investors in the promoters' materials. Id. at 843, 848. Schwartz contended that the plaintiff investors could not state a claim because he had no legal duty to them. The court rejected a district court finding that Schwartz could not be held liable, stating: "Federal law requires persons to tell the truth about material facts once they commence speaking, but with rare exceptions does not oblige them to start speaking." Accord, Kline v. First Western Government Securities, Inc., 24 F.3d 480, 486 (3d Cir. 1994). Moreover, a failure to investigate further may support an inference that when Cook expressed her opinion she had no

genuine belief that she had the information on which she could predicate that opinion.

Id.

Cook, as a third party, did not have any obligation to prepare a release on Barton's behalf, or to correct any misstatements made in releases prepared by Barton. She prepared the December 15 release, however, and held herself out as the analyst responsible for the projections. She permitted the company to issue her work by suggesting the preparation of the new release, preparing it, and distributing it for comment to directors and officers. She therefore assumed a duty to speak truthfully regarding all material matters contained in the release.

Cook asserts in defense that as a matter of law, she did not have any duty to investigate or ensure the accuracy of the December 15 release, and that the Division may not shift to her the duties held by Barton's officers and directors, whose approval was needed to distribute the release. This assumes that Cook did not prepare the release and had no independent liability. Although Cook could not issue a release for Barton on her own, it does not absolve her of responsibility. Analysts play an important role in providing the investing public with an accurate and complete basis upon which to make investment decisions. See SEC v. Bausch & Lomb, Inc., 420 F. Supp. 1226, 1230-31 (S.D.N.Y. 1976), aff'd, 565 F.2d 8 (2d Cir. 1977); In the Matter of Investors Management Co., Inc., Securities Exchange Act Release No. 9267, [1970-71 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,163 (July 29, 1971). It does not serve the public policy of full and accurate disclosure to permit analysts to avoid responsibility when they permit a company to use their expertise to disseminate

misstatements to investors.

Cook's involvement was instrumental in securing the acquiescence of the meeting participants. Heffner testified that Cook was introduced to him by Earl Johnson as an analyst who had studied Barton's potential. She then participated in the discussion at the December 15 meeting relating to whether a new release should be issued, and suggested substituting a revised release. After Earl Johnson stated that Cook would prepare a release for review, Cook left the room, and later returned with a release. Cook also gave a lengthy presentation regarding Barton's status in the industry, reaffirming the impression that she was a knowledgeable source regarding the company's prospects. Heffner thereafter acquiesced in the issuance of the release based on his belief that Cook was a "credible source." This belief was hardly unreasonable, given what Heffner observed at the meeting. McKinsey, Camarda and Brostrom were similarly reassured by Cook's explicit endorsement of the release's projections. 3/ These considerations support a finding that Cook had a duty to refrain from making material misstatements under the circumstances presented by this case.

Cook's Misstatements Were Material

The false and misleading statements that Cook included in the December 15 release were unquestionably material to investors. Basic, Inc. v. Levinson, 485 U.S.

3/ Respondent points out that the Commission alleged in the Order Instituting Proceedings, ¶ H, that the directors present reviewed and approved the release based on their reliance on Cook and Earl Johnson for its accuracy. The proof of the directors' reliance is one fact which, along with others, demonstrates Cook's culpability with regard to the release. There is nothing in the Order Instituting Proceedings that would require the Division to show there was reliance on Cook by someone.

224, 231-2 (1988) (information is material if "it would be viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"); TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). Financial projections such as those contained in the December 15, 1990 release may be considered material. Camarda, a major shareholder in Barton, testified that the release, and in particular the projections it contained, were significant to him in making investment decisions with regard to his Barton stock. Another major shareholder, Brostrom, testified that the fact that the projections were made by an analyst was of most importance to him.

The misstatement in the first paragraph of the release that the two prior releases of December 10 and 14 were "incorrect and unauthorized" is also material. The December 10 and 14 releases were issued at the insistence of the company's outside counsel, who had advised Barton that much of the disclosure included in those releases was required. The statement that the prior releases were incorrect and unauthorized, along with the heading of the December 15 release which stated it "supersedes" the prior releases, plainly suggests to investors that the two prior releases were to be discounted, and the more favorable information contained in the December 15 release considered instead. Since many of the disclosures in the December 10 and 14 releases were significant, *i.e.*, that Barton had failed to pay payroll taxes, and could have a loss for the year, the suggestion that these releases should be disregarded was plainly material.

Cook Acted With Scierter

Cook acted with the requisite state of mind, or scienter, in including the false statements in the December 15 news release. She exhibited "an extreme departure from the standard of ordinary care... which presents a danger of misleading... that is either known to [her] or is so obvious that [she] must be aware of it." In re Phillips Petroleum Securities Litigation, 881 F. 2d 1236, 1244 (3rd Cir. 1989) (quoting Healey v. Catalyst Recovery of Pennsylvania, Inc., 616 F.2d 641, 649 (3d Cir. 1980)).

Cook knew, by December 15, that Barton's financial condition was precarious. She was present in Earl Johnson's office on December 12, 1990 during at least part of a telephone conversation taking place over a speaker phone between Earl Johnson and Spurlock. Cook wrote in notes that she took at the time of the conversation "opinion subject to a going concern." It is apparent from her notes that she overheard Spurlock telling Earl Johnson what he told him a number of times between December 10 and 14, 1990 -- that Coopers & Lybrand intended to issue a going concern opinion on Barton's 1990 financial statements. Such an opinion would have indicated that there was a substantial likelihood that Barton would not remain in business for another year. Cook lied about this fact, claiming that Spurlock said he would provide an audit opinion subject to a going concern qualification without closing out some audit issues.

Cook was also aware as a result of the December 12 conversation that Spurlock was concerned about three issues, which she also listed in her notes. These were: 1) Barton's prior projections; 2) a sale improperly recorded in the third quarter, which posed significant liability issues; and 3) Barton's failure to pay taxes, an event which could accelerate its long term debt. Cook therefore learned during the December 12

conversation information from which she should have deduced that Barton could not meet the projections she included in the December 15 release. The projections showed Barton virtually tripling its revenues in 1991 and enjoying substantially increased income; these estimates cannot be reconciled with the fact that there was substantial doubt as to Barton's viability in the coming year, that it was not current in its tax payments, causing its lenders to accelerate its long term debt, and that it was already failing to meet prior projections. Cook had or could have had sufficient knowledge to realize that the projections had no reasonable basis. The record shows that she had no genuine belief that the projections were reasonable.

Cook's self-serving testimony that she believed that the 1991 projections contained in the release could be met does not rebut this strong proof of scienter. Cook acknowledged that she believed that, to meet the projections, Barton had to satisfy certain conditions, including obtaining financing and completing its anticipated fiber optics project. As of December 15, however, Barton had not met these conditions, which in any event were not disclosed in the release.

The statement that the December 10 and 14 releases were incorrect and unauthorized was also made with scienter. Cook knew from the discussion at the December 15 meeting that Barton's lawyers had been involved in the preparation of the two prior press releases. She also testified that it struck her as odd for attorneys to send out a release without company authorization. Nonetheless, she did not check with the attorneys to determine whether in fact the prior releases were "incorrect and unauthorized" before including the statement in the release.

COOK'S ACTIONS REQUIRE THAT SHE BE SANCTIONED FOR HER VIOLATIONS OF SECTIONS SECTION 10 (b) AND RULE 10b-5

In this proceeding, the Division seeks to bar Cook from association with any broker, dealer, municipal securities dealer, investment adviser, or investment company under Section 15 (b) (6) of the Exchange Act [15 U.S.C. §78o (b) (6)], based on her wilful violations of Exchange Act Section 10 (b) and Rule 10b-5. The Division also seeks an order, pursuant to Section 21C of the Exchange Act, that Cook permanently cease and desist from committing or causing any violation and committing or causing any future violation of Section 10 (b) and Rule 10b-5.

Cook committed securities fraud by preparing the false and misleading December 15, 1990 release. In doing so, she demonstrated cavalier disregard for the interests of Barton investors who were entitled to accurate disclosure regarding the company's financial performance and other material matters. In committing the violation, Cook not only prepared the false release, but also lied to two investors when she asserted that due diligence had been done that supported the analysts' projections. She also lied to a Barton officer when she told him that he could respond to inquiries regarding the identity of the analysts, "Merrill Lynch and others following the stock." Her violation was therefore not only egregious, but also involved dishonesty and thus, a high degree of scienter.

Cook repeatedly did not tell the truth in this proceeding. She had one version during the investigation when she did not know that this proceeding would be instituted and another when it was apparent that she might be sanctioned for her role in the

dissemination of false information to investors in Barton. Five witnesses tied Cook to the preparation of the false release or to the baseless projections contained in it. In the face of this compelling evidence of fraud, Cook denied that she prepared the release, claiming that she was at most a "scrivener" who performed only routine editing of the document. She further denied the conversations with Brostrom, Camarda, and McKinsey. It is not possible to find Cook liable for securities fraud based on the testimony of the Division's witnesses and at the same time conclude that Cook testified truthfully.

Cook told another significant lie regarding the December 12 conversation between Earl Johnson and Spurlock. She testified that she overheard Spurlock say to Earl Johnson "that if they needed the audit done sooner, for instance, to get the financing sooner, if they would be willing to accept the audit without closing out these back items, 12 through 35, that he could give them the opinion subject to this qualifier. That the opinion could be had sooner if it was subject to a going concern." Spurlock denied this account, stating he "would not have said that," because it would have been contrary to professional auditing practice to issue a going concern opinion if the audit was not complete.

Cook's testimony at the hearing deviated from prior sworn testimony she gave during the Division's investigation of this matter. It appears that Cook changed her story with the intent to downplay her involvement with Barton. These changes included:

- In her investigative testimony, Cook swore that on Sunday, December

16, she called newspapers at Earl Johnson's request in an attempt to get them to retract the December 14 release. At the hearing of this matter, she denied having done so. She offered no explanation of this discrepancy.

- In her investigative testimony, Cook denied that she wrote the page of notes which contained the same figures that appear in the December 15 release during the December 15 meeting. At the hearing of this matter, she acknowledged that these notes were taken at the meeting, and that she calculated the multiples appearing on the notes at the meeting. However, she claimed to have copied the figures from the release into her notes on December 15 merely to verify the accuracy of the multiples.
- Cook testified during the investigation that one possible reason for her attendance at the December 12 meeting was that she was considering covering Barton in a research sense. She never mentioned that she was there in connection with a review of Barton's contract with Sprint. But at the hearing, she denied ever considering research coverage of Barton, and claimed she attended the December 12 meeting only to review the Sprint contract and gather information on the potential merger with National-Oilwell.
- Cook testified during the investigation of this matter that she was aware of the details of the December 14 press release as of December 15. During the hearing, however, she claimed to be unaware of the contents of the December 14 release.

Cook's lack of candor demonstrates that she has failed to recognize the wrongful nature of her conduct, and that it is in the public interest to bar her from the industry.

Cook's violation was a one time occurrence; she has no prior history of securities violations. In addition, the record contains evidence that Cook may have been misled in some respects by Earl Johnson. Given these circumstances, a bar from association with any broker, dealer, municipal securities dealer, investment adviser or investment company, with a right to re-apply in three years, as opposed to a permanent

bar, will sufficiently protect the public. Cook will also be ordered to cease and desist from committing or causing any violation and committing or causing any future violation of Section 10 (b) of the Exchange Act and Rule 10b-5 thereunder. 4/

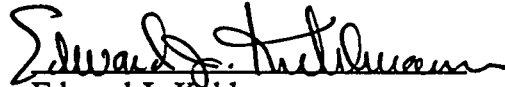
ACCORDINGLY, IT IS ORDERED that pursuant to Section 15 (b) (6) of the Securities Exchange Act of 1934, the respondent Suzanne L. Cook is barred from association with any broker, dealer, municipal securities dealer, investment adviser or investment company, with a right to re-apply in three years to the appropriate self-regulatory organization, or if there is none, to the Commission.

IT IS FURTHER ORDERED that pursuant to Section 13C the respondent is to cease and desist from committing or causing any violation and committing or causing any future violation of Section 10 (b) of the Exchange Act and Section 10b-5 of the rules thereunder.

Pursuant to Rule 17 (f) of the Rules of Practice, this initial decision will become the final decision of the Commission as to any party who has not, within fifteen days

4/ The respondent raises various other arguments which have been considered and rejected. All proposed findings and conclusions of the parties have been considered, as have their arguments. To the extent such proposals and contentions are consistent with this initial decision, they are accepted. In cases where applicable, the demeanor of the witnesses has been considered in assessing their testimony. The conclusions reached are based upon a preponderance of the evidence.

after service of this initial decision, filed a petition for review pursuant to Rule 17 (b), unless the Commission, pursuant to Rule 17 (c), determines on its own initiative to review the decision. If the respondent or the Division timely file a petition for review, or the Commission takes action to review, the initial decision will not become final.



Edward J. Kuhlmann
Administrative Law Judge

April 27, 1995
Washington, D.C.