ADMINISTRATIVE PROCEEDING
FILE NO. 3-7401

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)
	)
ALLEN R. ASKER	)
	)

INITIAL DECISION

Washington, D.C.
February 14, 1992

Jerome K. Soffer
Administrative Law Judge

ADMINISTRATIVE PROCEEDING
FILE NO. 3-7401

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)	
	)	
ALLEN R. ASKER	)	INITIAL DECISION
	)	

APPEARANCES: Robert H. Davenport, Donald M. Hoerl, Jennifer J. Ausenbaugh and William B. McKean, for the Division of Enforcement, Salt Lake City Branch Office.

Allen R. Asker, respondent, pro se.

BEFORE: Jerome K. Soffer, Administrative Law Judge

On September 28, 1990, the Commission issued an Order Instituting Public Proceedings ("Order") pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 ("Exchange Act"), naming as respondent Allen R. Asker.

The Order alleges that respondent willfully violated Sections 5(a) and (c) and 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, in connection with the offer and sale and delivery after the sale to members of the public certain securities, namely notes and shares of the common stock of Phoenix Aviation, Inc. ("Phoenix Aviation")

The Order further alleges that the Commission had filed a civil injunctive action against respondent on May 21, 1990 as a result of which the United States District Court for the District of Utah issued an order of permanent injunction against Asker enjoining him from further violations of the securities laws.

The Order further directed that a public hearing be held before an Administrative Law Judge to determined the truth of the allegations set forth and what, if any, remedial action is appropriate in the public interest for the protection of investors. Hearings were held in Des Moines, Iowa, on March 5 and 6, 1991, and in Los Angeles, California, on April 2 through 5, 1991.

Respondent has appeared throughout pro se. Following the close of the hearing, the Division of Enforcement ("Division") filed proposed findings of fact and conclusions of law, together with supporting brief. Respondent thereafter filed his proposed findings of fact, conclusions of law and supporting brief to which the Division replied.

The findings and conclusions herein are based upon the evidence as determined from the record and from observing the demeanor of the witnesses. The preponderance of

evidence is the standard of proof that has been applied. 1/

The Parties

Respondent was granted a bachelor of science degree in education in 1965. He has been employed in the securities business as a registered representative since 1971 by a number of registered broker-dealers. His most recent employment had been with a broker in Los Angeles, Bear, Stearns and Company ("Bear, Stearns"), since December of 1983. He was asked to resign from that firm in September of 1988 because of his alleged failure properly to service his accounts resulting in client complaints against him.

In May of 1986, he sustained a brain injury from being struck on the head by a falling object while seated in a restaurant. In 1987, he sustained fractures to his left hip in a skiing accident. As a result, he has been receiving disability payments from the Social Security system. 2/

Phoenix Aviation, was originally incorporated in the state of Nevada on January 6, 1987 by Paul A. McShane, who was its president and chief executive officer. The business of the corporation was to market a small disassembled airplane in kit form in which the major components were to be manufactured by the company and the purchaser was to complete through assembly, at least 51% of the aircraft. 3/

1/ See Steadman v. S.E.C., 450 U.S. 91 (1981)

2/ Whatever the effect of his brain injury upon his mental faculties, Asker persisted in going ahead with this proceeding, stating that his memory had not been impacted and he has been so advised by his physician. From my observation, he was in no way handicapped in representing himself. He has exhibited an understanding of the issues and the capability of presenting his case pro se.

3/ Apparently, it is lawful to fly an airplane without F.A.A. certification so long as it is not used for commercial purposes, and the owner built at least 51 percent of the aircraft.

Aero Optima, a corporation affiliated with Phoenix Aviation was responsible for the development and manufacture of the kit airplane through sub-contracts with other companies. The design of the Phoenix airplane was to be based upon a predecessor model known as the "Optima" or "Falcon". 4/

Financing for Phoenix Aviation

In early 1987, Phoenix Aviation was in dire financial circumstances. It was unable to meet its current obligations and was in no position to proceed with the development of its sole source of future income, i.e., the Phoenix airplane kit. It had been attempting to raise funds through a public offering without success.

During the same time frame, respondent, himself a licensed pilot, became quite interested in the concept of the Phoenix airplane. Recognizing that unless the company received immediate funding in the sum of $100,000 it would not be able to continue in business, McShane and other officers of Phoenix Aviation approached respondent some time prior to May 1, 1987, who at that time held the title of "vice-president" at Bear, Stearns, to see whether he could induce his firm to arrange for underwriting or otherwise financing the corporation. However, he declined to do so since such a speculative "penny stock" issue would not have met the underwriting requirements of Bear, Stearns.

Consequently, the parties came to an understanding whereby respondent would obtain investor financing for Phoenix Aviation in return for which he would paid ten

---

4/ Others involved with the proposed manufacture and marketing of "Phoenix" kits included John W. Fowler, Kenneth Klein, Ronald Willocks (an aviation marketing consultant), Raymond Hall (a financial planner, who became a franchised distributor of the Phoenix Aircraft), Michael McCarey (hired by Phoenix Aviation, Inc., from April through November 9, of 1987 as its vice-president in charge of sales), and Ruben D. Baca (who had prior experience in the manufacture of ultra-light experimental aircraft and hand gliders, and had been involved previously with McShane in the manufacture of the "Falcon" airplane).

percent of the funds received from investors under the following arrangement:

In return for moneys advanced, the investor was given a writing signed by McShane designated as a "Note" (copy of a typical note is attached hereto as Appendix I) in which Phoenix Aviation acknowledged a "loan" of the amount of money invested, with the promise to pay in cash to the investor within 180 days, a "return of capital" in double the amount of the "loan", with the excess moneys designated as "interest". The "note" further provided that the investor could either elect to be repaid in cash or to accept stock in the corporation based upon the value of the stock on the first day of trading as and when the corporation went public.

Asker began soliciting investments from among his customers at Bear, Stearns, members of his family and friends. Between May and July of 1987, investors advanced as a result of this solicitation a total sum of approximately $375,000, each "loan" ranging from as little as $1,000 to as much as $100,000.

Respondent's representations to his customers

The Division offered the testimony of 11 witnesses who invested in the notes as a result of transactions with respondent to varying degrees based upon his representations to them concerning the financial and other data involving Phoenix Aviation.

These witnesses were in basic agreement as to the representations made to them by respondent. Among others, he told them that this was a no-lose investment since they would receive after 6 months double their money back, guaranteed, with funds to be derived from an IPO; that orders had been received for hundreds of aircraft including orders from the U.S. and foreign governments; that the moneys were intended as a "bridge loan" to enable production to continue until the IPO was completed; that members of his family had invested and he (in a number of cases) was offering his personal guarantee against loss; that

the opening price of the stock under the offering would be $1 or $2 per share and would increase to $4 or $5; and that his was a good safe investment.

Fred Zinn and Floyd D. MaAtee are partners in an automobile tire business. Both of them had been customers of respondent during his employment at Bear Stearns where each maintained an account. In May of 1987, respondent contacted Zinn to advise him of an excellent investment in a company called Phoenix Aviation, an airplane manufacturer, whereby he could double his money in 6 months. In later conversations, which also involved his partner, McAtee, and in which McShane joined, the terms of the loan, as stated, were delineated, i.e., that in return for the "bridge loan" the corporation would issue a "note" under which at the end of six months the investor could elect to receive twice the amount of the loan in cash, in the stock of the company at $1.00 per share, or in a combination of cash and stock and that their investment would be protected by the corporation withholding from the receipts of the IP0 the sum of $400,000 to pay the obligations called for under the notes.

During these conversations, respondent told Zinn and/or his partner the representations stated above, and that research and development had already been done and was paid. He offered them his personal guarantee against loss. He stated that he had induced his mother and sister to invest in these notes.

Pursuant to this and later conversations which stressed the claimed forward progress of manufacture, Zinn, McAtee, their tire company and members of their respective families made investments between May 20 and July 13, 1987 amounting to $100,000. Although demand was made after the passage of six months for the payments called for under the

notes they were never made. 5/

Robert Davis, also in the tire business, was referred by Zinn and McAtee to respondent who thereupon contacted Davis to solicit his investment in Phoenix Aviation on the same promises made to the other investors that the moneys would be repaid in twice the amount after six months. Asker gave him some details about the corporation and the technicalities of the airplane that was being developed. Davis was further told by him that Phoenix had an order for 450 airplanes from the federal government and that the plane, which would cost $5,000 to build, would be sold to the government at a $7,000 per plane profit. Based upon the representations by respondent, Davis invested $10,000, which he gave directly to respondent "care of Phoenix Aviation". Davis never received any of the monies promised under the terms of the note, although he made a written demand therefor. He is one of the parties to the pending suit against respondent and others.

Douglas McDermott, the president and trust officer of a bank in Iowa, was also referred by Zinn and McAtee to respondent for investing in Phoenix Aviation. Similar to the other investors, respondent advised as to the terms surrounding the note. As a result of conversations with respondent, McDermott and an associate, M.J. Naylor, each invested $5,000 in July of 1987. They made demand for payment under the terms of the note but neither has received any return on the loan.

Amy Seward, a school teacher, is the sister of the respondent. In April or May of 1987, he approached her to take monies out of her savings and IRA accounts, and to invest

---

5/ The McAttees along with almost all of respondent's investors in the Phoenix notes have brought suit against him, McShane, Bear, Stearns, and several corporations affiliated with Phoenix Aviation, in the United States District Court for the Southern District of Iowa seeking the recovery of actual and punitive damages, which action is still pending.

the proceeds in a loan to Phoenix Aviation and obtain a doubling of her investment in six months.

As a result of this solicitation by respondent, Seward invested over $23,000 out of her savings and IRA accounts and also induced her husband to invest $5,000 of his money. These investments were sent to McShane and in due course she received corporate notes in the usual form as set forth in appendix I. Thereafter, respondent continued to be very "upbeat" about the investment and urged her to mortgage her home in order to make additional investment. She never received any monies from Phoenix Aviation, although respondent, as her brother, personally advanced her $10,000 which she needed to pay off another loan.

Robert Hamell, another individual referred by Zinn to respondent, was induced by his representations heretofore described to invest $5,000 in Phoenix. In addition to other representations, respondent further told him that the U.S.Government had ordered 450 of the airplanes and that 50 more units would be sold to the government of Ecuador to be used in crop dusting. Hamell unsuccessfully made several requests for return of his monies.

Jeffrey L. Thurston, a longtime acquaintance and customer of respondent, was solicited by him to make an investment in Phoenix Aviation on the usual terms. As a result of the representations by respondent Thurston made two loans to Phoenix Aviation amounting to $14,000, none of which has been repaid.

Dean C. Jones, a professional actor, has known respondent for the past nine or ten years and from time to time made investments with him in various types of securities. In June of 1987, respondent prevailed upon him to invest in Phoenix Aviation pointing out that he would thereby double his investment in six months. The respondent told him of the virtues of the aircraft being developed by Phoenix, and that it was a no risk investment

since he would personally make good any losses that Jones might sustain. Respondent further told him that the company had orders for hundreds of the airplane, Asker explained as he had with other investors, that the investments would be used similar to a "bridge loan" to keep the aircraft in production until such time as a stock issuance was effected.

As a result of the respondent's representations, Jones invested sums totaling $100,000 on the terms set forth in the "notes". 6/

In November, a month before the due date, Jones advised respondent and McShane of his intention to take payment in cash rather than in the form of stock. McShane advised that the corporation did not have the funds to pay him. Jones then asked respondent to make good on his guarantee, without success. Jones has not been repaid any part of the sums invested, and has instituted suit against Phoenix Aviation, McShane and respondent independent of the one pending by the other investors as a class.

Michael R. Simmons, who had then been engaged to Joni Speaks, a long time acquaintance of respondent, were both contacted by respondent seeking an investment in Phoenix Aviation. They ultimately invested a total of $20,000, receiving the usual note giving them the right to take cash or stock at the end of six months. The most important factor determining their decision to invest was the personal guarantee by respondent against loss. Following their marriage, respondent gave them 4,000 shares of Phoenix Aviation stock as a wedding gift.

Within 3 months after the investment, and to their surprise, they received from the company a stock certificate representing 20,000 shares, although they had not requested this

---

6/ For his purposes, Jones had his attorney prepare separate written contracts which embraced these terms. Although the agreements were signed as of February 20, 1988, its terms were dated back as of June 9, 1987, with repayment due six months later.

form of payment. Respondent advised them that although the stock was restricted they should hold on to it asserting that once the IPO was issued the value would eventually increase to $20 a share.

Albert F. Barker, a surety bond underwriter, had been a brokerage customer of respondent for some 12 to 15 years. In May of 1987, respondent solicited an investment by him in Phoenix Aviation on the usual terms. Barker agreed to lend $25,000 to Phoenix Aviation provided Asker and McShane would personally guarantee the investment. In accordance with this request, the note that McShane sent to Barker representing the $25,000 loan bore the additional statement that "all terms and obligations of this note are guaranteed personally and jointly and severally by Allen Asker and Paul McShane" followed by the signatures of both these individuals. This is the only note in evidence that contains such an additional guarantee. Barker had several discussions with respondent from time to time concerning the status of Phoenix Aviation and was always given glowing reports as to the condition of the company.

In making the loan, Barker relied totally upon the recommendation of respondent plus the written guarantee. He also on his own made several purchases of the restricted stock of Phoenix Aviation from another brokerage. In addition, he purchased 20,000 shares directly from respondent at $1.25 per share for the sum of $25,000 which respondent was selling out of his own private inventory. Barker has not received any return of his $25,000 investment. 7/

7/ Testimony was given by two additional customer-witnesses relating to events occurring outside of the relevant period set forth in the Order, i.e., from May through August of 1987. Richard Hillway, a friend of Amy Seward, was approached by respondent to invest in Phoenix Aviation as a result of which he made two purchases of stock directly from respondent, the first on October 29, 1987 when he (continued...)

In the face of the testimony of the investor-witnesses, respondent asserts that he never solicited any of them to invest in any way in Phoenix Aviation, or to purchase its notes. He denies that he had any understanding or arrangement with the company or with McShane whereby he would seek out investors in return for a commission or other consideration (which would have been contrary to the rules of Bear, Stearns, his then employer). According to respondent, all he ever did for the company was to recommend to Mr. McShane the names of persons who might become investors, including friends, brokerage customers, acquaintances and family members who would then contact or be contacted by McShane. Any arrangements for loans or investments between those parties were done, according to respondent, without any payment of a commission or any involvement or even knowledge on his part.

Respondent further denies ever having seen the notes that McShane gave to the investors, that he ever orally or in writing undertook to guarantee personally in any way the investments made, that he made any representations as to production of aircraft, the number of orders received by Phoenix Aviation, the financial condition of the company, the likelihood that the stock would rise in value from as little as $.50 per share to as much as $4.00 or $5.00 per share, or that the notes of the corporation would be a good and safe

---

7/(...continued)
paid respondent $1,250 for 1,000 shares and again in November of 1987 when he purchased directly from respondent an additional 1,800 shares and paid him $2,200. These transactions were outside the corporation. He dealt only with respondent. A later demand by Hillway for respondent to purchase the stock back at the same price was refused.

Gregory Pinnell was interested in purchasing for his own use one of the Phoenix aircraft and made a down payment of $10,000. As a result of solicitations from some members of the corporation (not further identified in the testimony) he loaned the company an additional $10,000 in 1988, also beyond the relevant period. None of these moneys was repaid.

investment. He claims that his only involvement, other than introducing clients, friends and family to McShane, was to serve as an adviser to the Board of Directors of Phoenix Aviation as to financial and other technical matters. 8/

After careful consideration of the testimonial and documentary proof in this record, including observation of the demeanor of the witnesses, it is concluded that respondent did, in fact, make the representations as testified to by the investor-witnesses and that respondent's denials thereof are not worthy of belief. Thus, respondent's denial that he ever guaranteed to save harmless investors in the "loans" to Phoenix Aviation is belied by the written guarantee signed by him and McShane and given on behalf of A.F. Barker for his $25,000 investment.

Respondent's denial that he ever received a commission or other consideration (except for the "worthless" restricted stock) for his money raising efforts on behalf of Phoenix Aviation is not supported by the record. Thus, three members of the corporate Board of Directors (John W, Fowler, Ronald H. Willocks and Michael McCarey) attested to the fact that the corporation, being in desperate financial difficulties, had agreed to pay respondent ten percent of all investments that Asker was able to attract. 9/

Further, a letter dated May 1, 1987 addressed to Allen Asker by McShane, as president and chairman of the Board of Directors, spells out clearly that there existed an

---

8/ Respondent claims that he received permission orally from an official at Bear, Stearns to serve on the corporation's "board of advisers". However, testimony of the associate director in charge of compliance at the Los Angeles office of Bear, Stearns was that such activity on the part of a registered representative without approval was forbidden. There is no proof in the record to support respondent's assertions that he had such permission.

9/ McCarey tells of one instance wherein he physically turned a commission over to respondent.

agreement, as it pertained to Asker's guarantee of those monies he caused to be delivered to the Company, that he would be paid a commission amounting to ten percent thereof plus specified numbers of shares of the company's stock. This letter, Exhibit 18 in evidence, copy of which is annexed as Appendix II, was called to the attention of each member of the Board of Directors in a memorandum date May 12, 1987 prepared by McShane. 10/ Moreover, in an internal memo dated May 18, 1987 from McShane to 3 other officers concerning the financial condition of Phoenix Aviation, Inc., he states "I am also going to ask Allen to hold off on his commission for the monies currently coming in". 11/ (Underlining added).

Concerning respondent's assertions that he never received any remuneration from Phoenix Aviation, the record shows that between June 15, 1987 and February 3, 1988, Asker received from the corporation and a corporate affiliate checks totaling $18,000. It further appears that between October, 1987 and January, 1988 the Corporation, as urged on by McShane, gave respondent 183,000 shares of its non-registered stock, 200,000 shares to Asker's wife, and 1,100,000 shares to his mother and/or a corporation nominally owned by her but organized by respondent.

Respondent assert that the monies given him were in repayment for loans he allegedly made to officers of Phoenix Aviation, although there is no testimony or other

---

10/ Respondent denies ever having received this letter or that it represents the agreement set forth therein, and that it was taken surreptitiously from McShane's private files. He further asserts that since the shares of stock were valueless anyway, the letter was of no significance. McShane, when called as a witness by respondent, never offered any testimony concerning this letter.

11/ During the course of McShane's testimony as a witness for respondent, he announced that he would answer no more questions on cross-examination, asserting his fifth Amendment rights against self-incrimination. In view of this assertion, he was barred from giving further direct testimony which could not be subject to cross-examination.

proof from him or anyone else concerning the existence of such loans. 12/ McShane asserts that the shares of stock were given to respondent out of gratitude for the work and advice he so "freely" gave, allegedly without hope of remuneration, and that he literally forced upon a reluctant Asker and his family to accept the shares of stock given for supposed financial advice and assistance. Besides, said McShane, the gesture was meaningless since the stock being restricted, was worthless. However, as seen, respondent was able to sell shares of this "worthless" stock at about $1.25 per share, to Albert F. Barker ($25,000) and Richard Hillway ($3,450). This inconsistency and what was done with the proceeds of these sales is not otherwise explained.

Discussion and Conclusions

The Permanent Injunction

On July 16, 1990, based upon the transactions which are the subject of this proceeding, the United States District Court for the District of Utah issued an order of permanent injunction against respondent, based upon his consent, enjoining him from further violations of Sections 5(a), 5(c) and 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. 13/ The issuance of this injunction, by itself, provides a

---

12/ It should be noted that respondent did not offer himself as a witness so as to refute or explain the allegations made against him. Of course, acting as his own lawyer, he did make unsworn statements, arguments and contentions, but these were not subject to cross-examination. He did testify briefly as a witness called by the Division, and gave sworn testimony in several pre-hearing depositions in this proceeding and in outside civil actions which have been admitted into evidence.

13/ S.E.C. v. Phoenix Aviation, Inc. et al., Civ. File No. 90-C-451S.

proper basis for the imposition of sanctions as the public interest requires. 14/

However, the Order for Proceeding charges, as additional grounds for a sanction, that Asker also violated the registration and anti-fraud provisions of the securities laws. The substance of these violations, if proven, will also be considered in arriving at an appropriate sanction.

The Nature of the Phoenix "Notes"

The initial question for determination is whether the notes given to investors were required to be registered prior to their sale or, if not that they were exempt from the registration requirements.

Section 2(1) of the Securities Act defines a security as, inter alia, "any note, stock * * * evidence of indebtedness * * * [or] investment contract * * *"

The notes and the shares of Phoenix Aviation stock are specifically cited in the statute as being "securities". Even if the "notes" are deemed to be misnamed, they meet the tests of "evidence of indebtedness" and of "investment contracts" (see S.E.C. v. Howey

---

14/ Section 15(b) (4) of the Exchange Act provides as follows:

> (4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated-
>
> * * *
>
> (C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

Co., 328 U.S. 293, 298 (1946).

Section 5(a) and (c) of the Securities Act makes it unlawful to sell or offer to sell an unregistered security. Respondent virtually concedes, and the record in fact shows, that both the "notes" and the stock of Phoenix Aviation, were unregistered securities. Respondent asserts in his brief his belief that the notes were exempt from registration. However, he clearly had the burden of establishing that the notes were exempt. S.E.C. v. Ralston Purina Co., 346 U.S. 119, 126 (1953); S.E.C. v. Holschu, 626 F.2d 663, 641 (9th Cir. 1980). This he clearly failed to do. He offered no piece of evidence that these securities, whether deemed notes, evidence of indebtedness, or investment contracts, were in fact exempt. 15/ It is therefore concluded that Asker had violated Section 5(a) and (c) of the Securities Act. Because of his close contacts with the president, other officers and the Board of Directors of Phoenix Aviation, he clearly knew that the notes and shares of stock were not registered. For example, he advised several investors (Barker and Hillway) that the stock was restricted and could not be publicly traded.

The test of primary liability for Section 5 is whether the defendant was a "substantial

---

15/ It has not been overlooked that the notes involved herein had maturity dates of less than nine months, and that the Exchange Act provides that debt instruments with maturity dates of less than nine months are excluded from the definition of "security" (Section 3 (a) (10), 15 U.S.C. 78c(a) (10)). This is also found in the Securities Act (Section 3 (a) (3). The courts have concluded that this exclusion and exemption are limited to " 'prime quality negotiable [commercial] paper of a type not ordinarily purchased by the general public, that is, paper used to facilitate well-recognized types of current operational business requirements and of a type eligible for discounting by Federal Reserve banks.' " Zabriskie v. Lewis, 507 F.2d at 546, 550, (10th Cir. 1974).

In short, it is the character of the note, not its maturity date, which determines coverage under the registration provisions of the securities laws. In the present case, the notes of Phoenix Aviation, plainly are not the specialized type of high quality paper intended to come within the commercial paper exemption. See United State v. Roylance, 690 F.2d 164, 168-69 (10th Cir. 1982).

and necessary participant in the sales transactions." SEC v. Holschuh, 694 F.2d 130, 140 (7th Cir. 1972). Asker's role in the sale of the notes of Phoenix Aviation, satisfies this test perfectly, because without his actions, the notes would not and could not have been sold. He was the contact person for the investors, having known most of them personally and as customers over a period of years. He initiated the contact with virtually all of the customer-witnesses, and acted as liaison between them and Phoenix Aviation. Without him the investors would never have heard of the company, let alone make an investment in it.

The Anti-Fraud Violations 16/

The Order for Proceedings further alleges that Asker made untrue statements of material facts and omitted to state material facts in connection with the offer, purchase and sale of the notes and common stock of Phoenix Aviation, Inc.

16/ Section 17(a) of the Securities Act makes it unlawful for any person in the offer or sale of any securities to do any of the following:

"(1) to employ any device, scheme or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser".

Section 10(b) of the Exchange Act makes it unlawful, in connection with the purchase or sale of any security to use or employ "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors".

Rule 10b-5 promulgated thereunder, extends, in effect and with a few language changes, the provisions of 17(a) relating t the sales of securities to both the purchase or sale thereof.

It is clear from the testimony of the customer-witnesses as heretofore detailed, that Asker made certain representations to them which were untrue and upon which they relied when making the investments as represented by the "notes". These representations included the opportunity to double their money in six months, risk free, and predictions of substantial price rises in the stock of Phoenix Aviation. Equally untrue were statements as to the number of planes on order, that all research and development had been completed, and that the aircraft was ready for sale and in production.

Respondent further represented that sufficient money would be withheld from the projected IPO to meet the payment terms promised in the notes, even though there was no basis to believe that the issue would ever get off the ground.

Moreover, Respondent failed to advise his customers that Phoenix Aviation had orders for, at most, three or four aircraft; that the only completed aircraft was a prototype (as distinguished from a production type) which, after assembly, had been grounded for being unsafe and would require many more months more of testing.

Respondent further failed to advise that the investment he was soliciting was not, as he told them, "risk-free", "a sure thing", and "no-miss" but, rather that such an investment was highly speculative, and not suitable to some investors (including his sister) who were using money set aside for retirement and for the education of their children.

Despite the fact that the had reason to believe the financial condition of Phoenix Aviation was precarious, respondent failed to seek examination of the books of the corporation, or to pursue any investigation into the production facilities and the state of production, which, as a member of the corporation's Board of Advisers, he was empowered to do. Instead, he chose to rely solely on the representations of McShane.

As a result, Asker had no reasonable basis for recommending the notes and common

stock of Phoenix Aviation to the investors as a "good investment" or one involving no risk. It has long been held that when a salesman recommends securities to his customers, he is under a duty to insure that his representations have a reasonable basis. As the Court of Appeals for the Second Circuit held in Hanly v. SEC, 415 F.2d at 595-597 (1969):

> Brokers and salesmen are under a duty to investigate . . . Thus, a salesman cannot deliberately ignore that which he has a duty to know and recklessly state facts about matters of which he is ignorant . . .
>
> In summary, the standards . . . are strict. [A salesman] cannot recommend a security unless there is an adequate and reasonable basis for such recommendation. He must disclose facts which he knows and those which are reasonably ascertainable. By his recommendation he implies that a reasonable investigation has been made and that his recommendations rest on the conclusions based on such investigations . . .
>
> A salesman may not rely blindly upon the issuer for information concerning a company, although the degree of independent investigation which must be made by securities dealer will vary in each case. Securities issued by smaller companies of recent origin obviously require more thorough investigation. (Footnotes omitted, emphasis added.) See, also, Matter of John R. Brick & Company, et al., 46 S.E.C. 43, 49 (1975); Matter of Lester Kuznetz, 48 S.E.C. 551, 554 (1986).

The antifraud provisions prohibit securities brokers and dealers from making statements about the price of security which is unsupported by an adequate and reasonable basis. Eisenberg v. Gagnon, 766 F.2d 770, 775-776 (3rd Cir. 1985), cert. denied 474 U.S. 946 (1985). Both the Commission and the courts have held that "the predictions of very substantial price rises to named figures with respect to a promotional and speculative security of an unseasoned company cannot possibly be justified . . . . [S]uch predictions have been a hallmark of fraud." Alexander Reid & Co., 40 S.E.C. 986, 991 (1962); Accord: M.G. Davis & Company, Inc., 44 S.E.C. 153 (1970), aff'd sub nom: Levine v. SEC, 436 F.2d 88 (2nd Cir. 1971).

Materiality

It is further concluded that the omissions and misrepresentations found were

material. Under the circumstances herein, where respondent was guaranteeing the fulfillment of the transaction, there is a substantial likelihood that a reasonable investor would considered these misrepresentations and omissions important in making investment decisions. TSC Industries, Inc. v. Northway, Inc. 426 U.S. 839 (1976).

Scienter

One of the element required to be established to show a violation of Rule 10(b)-5 and the first subsection of Section 17(a) is that respondent acted with "scienter", defined as "a mental state embracing intent to deceive, manipulate, or defraud". Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193, n.12 (1976). Scienter is established by knowing or intentional conduct. Aaron v. SEC, 446 U.S. 680, 690 (1980). It may also be established by reckless conduct. Nelson v. Serwold, 576 F. 2d 1332, 1337-8, (9th Cir.), cert. den., 439, U.S. 970 (1978). Courts recognize that absent an admission by defendant, scienter may be inferred from circumstantial evidence which "can be more than sufficient". Herman & McLean v. Huddleston, 103 S. Ct. 683, 692 n.30 (1983).

It is clear from the record herein that the respondent had the necessary mental intent to deceive or defraud his customers when he recommended as "risk free" and a "good buy" the securities (i.e., the notes and common stocks) of Phoenix Aviation. Because of his close contact during the relevant period with the officers, directors and management personnel of the corporation, he had to know that the claimed production and marketing programs were lagging to the point of non-existence, and that the funds collected through the sale of the notes were not being used for their claimed purpose of keeping up production

But even if the necessary fraudulent intent were lacking, respondent at the very least

acted recklessly, 17/ particularly in his failure to investigate the financial circumstances and extent of production of saleable aircraft which would have disclosed the very risky nature of the involved securities. There is no justification for his recommendations that his customers (including his sister) invest and reinvest in the securities of Phoenix Aviation.

Finally, respondent has been found to have violated subsections (2) and (3) of Section 17(a) which do not require that scienter be shown as an element of the fraud alleged. (Aaron v. S.E.C., supra, at page 690.

Public Interest

In having been found that respondent had violated the anti-fraud and registration provisions of the securities laws and having been permanently enjoined from further violations thereof, it becomes necessary to consider what sanction, if any, would be in the public interest.

In assessing a sanction, due regard must be given to the facts and circumstances of each particular case, since sanctions are not intended to punish a respondent but to protect the public interest from future harm. See Berko v, S.E.C., 316 F.2d, 137, 141 (2d Cir. 1963) and Leo Glassman, 46 SEC 209, 211 (1975). Sanctions should also serve as a deterrent to others. Richard C. Spangler, Inc., 46 SEC, 238, 254 n.67 (1976).

In imposing administrative sanctions, the Commission may take into account such factors as:

* * * the egregiousness of the respondent's actions, the isolated or recurrent nature of the

---

17/ Respondent would be acting recklessly if he had reasonable ground to believe material facts existed that were misstated or omitted, but nonetheless failed to obtain and disclose such facts although he could have done so without extraordinary effort. Keirman v. Homeland, 611 F. 2d 785, 788 (9th Cir. 1980).

infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that his occupation will present opportunities for future violations. See Steadman v. S.E.C., 603 F.2d 1126, 1140 (5th Cir., 1979), affirmed on other grounds, 450 U.S. 91 (1981).

The record herein shows that respondent made material misrepresentations to investors concerning the financial condition of Phoenix Aviation, Inc., the status of its manufacturing activities, the projected value of the securities involved, and his disregard of his employer's rules and those of the Stock Exchange with respect to outside employment and his guarantee against losses. He failed to disclose what he knew or should have known about the corporation's precarious financial and operational condition.

In further determining where the public interest lies, consideration has also been given to his untruthful statements with respect to these representations and omissions, particularly in the face of the testimony of his customer-witnesses who suffered significant losses as a result of his conduct. He has failed to recognize the egregiousness of his conduct. He considers the permanent injunction against him to be a mere "consent decree" and hence of no major consequences. He persists in claiming that he was not to be compensated for the activities on behalf of Phoenix Aviation, despite documentary and verbal proof to the contrary. It is further concluded that respondent's violative conduct was wilful. 18/

What emerges from this record is an undertaking by respondent to obtain financing

---

18/ It is well established that a finding of wilfulness does not require an intent to violate the law; it is sufficient that the once charged with the duty consciously performs the acts constituting the violation. See Tager v. S.E.C., 344 F.2d 5, 8, (C.A. 2, 1965); and Arthur Lipper & Co. v. S.E.C., 547 F.2d 171, 180 (1976).

for Phoenix Aviation for a commission in such a way as to conceal it from his then employer, Bear, Stearns (such as by having the shares of stock earned given in his wife's and mother,s names and by designating the cash he received as repayment of non-existent loans, such as for gasoline credit card charges).

The failure of respondent to recognize the magnitude of his misconduct becomes a strong indication that he could very well repeat such conduct in the future. Arthur Lipper Corp., et al. 46 S.E.C. 78, 101 (1975), rev. on o.g., 547 F.2nd 171, 184 (2nd Cir. 1976) cert. den., 434 U.S. 1009 (1978).

Based upon all of the factors stated, it is concluded that a sanction barring respondent form association with any broker or dealer, with the right to apply after two years to become so associated in a non-proprietary and non-supervisory capacity, upon a satisfactory showing that he would be adequately supervised, would comport with requirements that a sanction should not be a punishment, should tend to ensure that respondent will not repeat such conduct, and should serve as a deterrent to others in the industry who may be inclined to act in a similar fashion. 19/

ORDER

Under all of the circumstances herein:

IT IS ORDERED that, from the effective date hereof, respondent Allen R. Asker be barred from association with any broker or dealer, provided that after two years he may

---

19/ In their briefs and arguments, the parties have requested the Administrative Law Judge to make findings of fact and have advanced arguments in support of their respective positions other than those heretofore set forth. All such arguments have been fully considered and the Judge concludes that they are without merit, or that further discussion is unnecessary in view of the findings herein.

apply to become so associated in a non-proprietary and non-supervisory capacity upon a satisfactory showing to the Commission that he will be adequately supervised.

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

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

Jerome K. Soffer
Administrative law Judge

Washington, D.C.
February 14, 1992

APPENDIX

I

N O T E

PHOENIX AVIATION, INC. does hereby acknowledge receipt of the loan for ten thousand ($10,000.00) Dollars and promises to pay to Fred I. Zinn and Marv E. Zinn as joint tenants with right of survivorship the sum of ten thousand ($10,000.00) Dollars as return of capital plus an equal amount in cash for a total of twenty-thousand ($20,000.00) Dollars, one hundred eighty (180) days from the date set forth below.

The return of capital plus interest shall be paid in stock issued in PHOENIX AVIATION, INC. in an amount equal to the total amount due based upon the "value of the stock on the first day of trading" when said company becomes a public corporation. In the event it is desired that said repayment shall be in U.S. Dollars, then Fred I. Zinn and Marv E. Zinn shall notify PHOENIX AVIATION, INC. no later than twenty (20) days prior to the due date of said payment.

In the event such notification is not forthcoming then it is understood that the repayment shall be in stock of PHOENIX AVIATION, INC. as allowed by law.

PHOENIX AVIATION, INC. has caused this note to be executed on its behalf by its undersigned duly authorized officer, on this twenty-first day of May, 1987.

PHOENIX AVIATION, INC.
By Paul A McShane 5-19-87
President

APPENDIX I

(From Exhibit 26, in evidence)

A P P E N D I X

II

PHOENIX AVIATION, INC.

May 1, 1987

Allen Asker
c/o Bear Stearns
1800 Century Park Easr
Los Angeles, CA 90067

Dear Allen,

Per our recent conversation the following is my understanding of the agreement that exists between you and Phoenix Aviation, Inc. as it pertains to your guarantee of those monies which you will cause to be delivered to the company:

Should you guarantee $150,000.00 you will receive $15,000.00 cash and 75,000 shares of Phoenix Aviation stock.

$100,000.00= $10,000.00 cash and 50,000 shares
50,000.00= 5,000.00 cash and 25,000 shares.

On behalf of the coporation and personally, Allen, I would like to express our sincere appreciation and heart felt thanks for your belief in the Phoenix and your support.

God Bless You,

Paul A. McShane

Paul A. McShane
President
Chairman of the Board

APPENDIX II
(From Exhibit 18, in evidence)

2385 Camino Vida Roble, Carlsbad, CA 92009 (619) 931-9055