UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
FABRIKANT SECURITIES CORPORATION
(8-9565)

INITIAL DECISION

Washington, D. C.
April 4, 1966

Sidney Ullman
Hearing Examiner

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	
FABRIKANT SECURITIES CORPORATION MARTIN FABRIKANT EDWIN LEBOW MORTON GINDIN NORMAN ABORN NATHAN ABRAMOWITZ D. RICHARD ENGEL, a/k/a RICHARD D. ENGEL IRVING FRIEDMAN STUART ISRAEL KENNETH JACOBS HENRY KALISH MARVIN KATZ, a/k/a MARTIN KARR EUGENE E. LEIGHTON STAN LUBOW HERBERT PATLIS BERNARD PORTNOY MAURICE ROSEN, a/k/a MARTY ROSEN BENJAMIN SAPORTA FRED WEISS MAREK WIESELTIER	INITIAL DECISION
File No. 8-9565	

BEFORE: Sidney Ullman, Hearing Examiner

APPEARANCES: Leonard H. Rossen, Stephen E. Karsch, Bertram Singer, Stanley Sporkin and Lawrence Williams, for the Division of Trading and Markets

Edward Labaton, of Kramer, Bandler & Labaton
Attorney for Nathan Abramowitz
295 Madison Avenue
New York 4, N. Y.

D. Richard Engel a/k/a
Richard D. Engel, pro se
102-20 Avenue L
Brooklyn 36, New York

(Continued)

APPEARANCES: (Continued)

Irving Friedman, pro se
1620 Ocean Avenue
Brooklyn 36, New York

Ronald J. Meiselman, of Meiselman & Minzer
Attorneys for Kenneth Jacobs
170 Broadway
New York, New York

Martin Elson and Harold Halperin, of
Elson & Halperin
Attorneys for Eugene E. Leighton
39 West 55th Street
New York, New York

Martin M. Frank and Jerry M. Kleinberg, of
Feldshuh & Frank
Attorneys for Bernard Portnoy
144 East 44th Street
New York, New York

Despite the lengthy list of names in the caption, this Initial Decision treats only with the responsibility of six of the above-named salesmen or employees of Fabrikant Securities Corporation (registrant), for violations of the securities laws in connection with the offer and sale of common stock. The six salesmen, hereafter sometimes referred to as "remaining respondents", are Nathan Abramowitz, D. Richard Engel, a/k/a Richard D. Engel, Irving Friedman, Kenneth Jacobs, Eugene E. Leighton, and Bernard Portnoy. The number of parties originally involved in these proceedings was substantially reduced subsequent to the Commission's order for public proceedings dated July 17, 1964, as amended ("Order"), by the consents of registrant and five individual respondents during the course of the hearing, and by the defaults and the failure of service, all as noted in the margin. 1/ The transactions now under direct consideration are

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1/ Norman Aborn, Marvin Katz, a/k/a Martin Karr, Stuart Israel, Stan Lubow, Benjamin Saporta, Fred Weiss and Marek Wieseltier defaulted by failing to file answers to the allegations in the Order and failing to appear in the proceedings.

During the course of the hearing, registrant consented to findings of wilfull violations as alleged in the Order, as did Martin Fabrikant, president of registrant, Edwin Lebow, vice-president of registrant, and Henry Kalish and Maurice Rosen, a/k/a Marty Rosen, salesmen. All such consents were made without admitting or denying the allegations of the Order. Morton Gindin, secretary-treasurer of registrant, also consented to an order barring him from being associated with a broker-dealer, again without admitting or denying the allegations of the Order.

The Commission, in its Findings, Opinion and Order In the Matter of Fabrikant Securities Co., et al., Securities Exchange Act Release No. 7600 (May 14, 1965), acted upon the above consents and defaults by revoking the registration of registrant as a broker and dealer, and by barring the consenting and defaulting respondents from being associated with a broker or dealer.

Herbert Patlis was never served with the Order. (However, he was found by the Commission to be a cause of revocation of the registration of Armstrong and Company. In the Matter of Armstrong and Co., Inc., Securities Exchange Act Release No. 7399 (August 20, 1964)).

offers and sales by the six salesmen to purchasers and prospective purchasers of the common stock of five issuers, viz; Aceto Chemical Co., Inc. (Aceto), Continental Fund Distributors, Inc. (CFD), Capital Consultants Corporation (Capital Consultants), Jefferson Financial Corporation (Jefferson), and Uneeda Vending Service (Uneeda).[2/]

On August 20, 1964, amendments to the Securities Exchange Act of 1934 (Exchange Act) became effective. By order dated November 9, 1964, the Commission directed that the public proceedings earlier ordered to be held pursuant to Sections 15(b) and 15A of the Exchange Act should be conducted pursuant to those Sections as amended August 20, 1964, and in accordance with the Commission's Rules of Practice as amended August 1, 1964. Thereafter, by further order dated November 18, 1964, the Commission directed that this Fabrikant proceeding be joined with a proceeding previously instituted by the Commission under the Securities Act of 1933, as amended ("Securities Act"), to determine whether a temporary suspension of the sale of the common stock of Uneeda under a Regulation A exemption from registration should be vacated or made permanent. In that order of November 18, 1964, the Commission determined that common questions of law and fact were

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2/ Somewhat less directly under consideration are offers and sales by the other salesmen named in the Order, as well as various practices of registrant, all of which were part of an alleged joint scheme to defraud purchasers of the securities. The Order alleges that all of registrant's salesmen participated with it in the scheme, acting in concert with each other and with registrant, and that each remaining respondent is accordingly responsible for the acts of all others. This is discussed, infra.

involved in both proceedings, and the joinder for hearing was ordered with respect to activities relating to the sale of Uneeda stock by registrant and its salesmen. In subsequent orders of November 20 and November 23, 1964, the Commission appointed the undersigned as Hearing Examiner and ordered that the common issues relating to Uneeda transactions be heard first. At the conclusion of the Uneeda suspension aspect of the consolidated proceedings and after the filing of proposed findings of fact, conclusions of law and briefs by counsel for the Division of Trading and Markets ("Division") and counsel representing registrant, I issued an Initial Decision dated June 10, 1965, in which I concluded that registrant had engaged in flagrant violations of the securities laws and that the temporary suspension from the Regulation A exemption should be made permanent. By order dated September 10, 1965, the suspension was made permanent by the Commission in Securities Act Release No. 4800.

The issues remaining for consideration are whether Abramowitz, Engel, Friedman, Jacobs, Leighton, and Fortnoy, singly or in concert with registrant and any or all of the respondents originally named, wilfully violated and aided and abetted such violations of (1) Sections 5(a) and (c) of the Securities Act[3/] and (2) Section 17(a) of the Securities Act and Section 10(b) and 15(c)(1) of the Exchange Act, and Rules 10b-5 and 15c1-2 thereunder, commonly known as the anti-fraud provisions,[3a/] during the period from October 1961 to September 1963 in

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3/ Sections 5(a) and 5(c), as applicable here, make unlawful the sale of unregistered securities.

3a/ The composite effect of the anti-fraud provisions, as applicable here, is to make unlawful the use of the mails or interstate facilities in connection with the offer or sale of any security by means of a device to defraud, an untrue or misleading statement of a material fact, or any act, practice or course of business which operates or would operate as a fraud or deceit upon a customer or by means of any other manipulative or fraudulent device.

connection with the offer or sale of the securities of any of the five issuers; and if so, what, if any, remedial action is appropriate in the public interest pursuant to Section 15(b)(7) of the Exchange Act. 4/

Hearings before the undersigned commenced on January 11, 1965, and continued intermittently through April 6, 1965. At the termination of the hearing on the alleged violations of the anti-fraud provisions, proposed findings of facts, conclusions of law and briefs were submitted by counsel for the Division and by the respective counsel for respondents Abramowitz, Leighton and Portnoy. By letter to the Commission dated June 16, 1965, a motion was made by Irving Friedman, who appeared pro se, to reopen the proceeding, to disregard the testimony of witnesses with respect to transactions in which he engaged, and to have said letter constitute his brief in this proceeding. The motion was denied by my order of July 6, 1965, except to the extent that Friedman's letter would constitute his brief in this proceeding. No proposed findings, conclusions or briefs were submitted on behalf of Engel, who appeared pro se, or by counsel for Jacobs.

The findings and conclusions herein are based on the record in the proceeding, including the exhibits, and on my observation of the

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4/ Section 15(b)(7) provides for the censure of any person or the barring of any person from being associated with a broker or dealer, or the suspension of any person from such association for a period not exceeding 12 months, if the Commission finds that such censure, barring, or suspension is in the public interest and that such person has wilfully violated or aided and abetted any violation of the Securities Act or the Exchange Act or any rule thereunder.

many witnesses who testified during the hearing.

Registrant

Registrant, a New York corporation, became registered with the Commission as a broker-dealer on June 10, 1961, pursuant to Section 15(b) of the Exchange Act, under its original name of Capital Consultants Corporation. (A corporation with the same name but separate corporate identity is one of the five issuers referred to above as "Capital Consultants". Registrant was the underwriter of the issue of Capital Consultant's stock and that issuer, in turn, was the owner of registrant's stock. The issuer was owned and controlled by Martin Fabrikant, who, through this ownership, controlled registrant.)

Martin Fabrikant entered the securities business in 1956 as a salesman of mutual fund shares and in 1959 became a registered representative of a member firm of the New York Stock Exchange by which he was employed until registrant was organized in 1961. Although the Order raised the question of expulsion of registrant from membership in the National Association of Securities Dealers, Inc., that issue became moot on December 27, 1964, when registrant was expelled by the Association.

The Order charges many violations of the securities laws by registrant apart from those committed by its salesmen in transactions relating to the five issues, and a substantial part of the Division's case consisted of evidence of practices and activities which violated the anti-fraud provisions but were not necessarily or not directly

related to offers or sales of the securities. These charges relate, among others, to failure and refusal of registrant to follow the orders of customers to sell stocks, the use of fictitious entries, the improper use of nominee accounts, the hiring of salesmen with no training and the failure to supervise them, and the sending of false confirmations of sales or "wooden-orders". 5/ The evidence of these charges helps to portray the background against which the offers and sales of the five issues were made by the remaining respondents.

It seems appropriate to point out, prior to a detailed discussion of the sales practices and techniques of registrant, that the evidence indicates that registrant used "boiler-room" techniques during the entire period of employment of each of the remaining respondents, i.e., January 1962 to August or September 1963. Of course, these techniques and the sharp practices varied from time to time with the methods of the individual salesmen currently employed and with Martin Fabrikant's needs and his current schemes and devices for extracting money from his customers. The situation appears to have worsened with the passage of time, and certain activities discussed below suggest the creation of stock of issuer corporations under schemes to mulct the public by fraudulent devices differing from and in some respects going beyond the boiler-room techniques or operations which are used to sell but not to create the securities by which the investing public is defrauded.

5/ The use of a "confirmation" which is sent not to confirm but to create or initiate a purchase is referred to as a "wooden ticket" or "wooden order". It violates the anti-fraud provisions of the securities laws. See Shelley, Roberts & Co., of California, 38 S.E.C. 744, 751 (1958); First Anchorage Corporation, et an. 34 S.E.C. 299, 304 (1952).

The Five Issues of Stock

(1) Uneeda

Registrant was a co-underwriter with Karen Securities Corporation in the underwriting of a public offering of the stock of Uneeda. In the Initial Decision which was the basis for the Commission's order permanently suspending the exemption of the Uneeda issue, the background of Uneeda and its business and operations, as well as the details of the public offering of its stock were discussed, but relatively few of the violations of the anti-fraud provisions were the subject of evidence adduced in the suspension proceeding. Following the conclusion of the suspension aspect, however, the Division introduced extensive evidence of violations by the registrant and salesmen, including the remaining respondents, the majority of which either directly or indirectly involved Uneeda stock. Many, though not all, are discussed below under the heading, "The Selling Efforts of Remaining Respondents".

Uneeda was incorporated in New York in 1950 and engaged primarily in the business of overhauling used vending machines and equipment and selling the product to vending machine route operators, distributors and exporters. On December 14, 1961, Uneeda filed with the Commission a notification and offering circular relating to a public offering of 73,500 shares of common stock at $3 per share for an aggregate amount of $220,500 for the purpose of obtaining a Regulation A exemption from registration requirements.

Registrant became the underwriter of the offering on a best efforts "all or none" basis, and appointed Karen Securities Corporation as co-underwriter.

Several aspects of the Uneeda business and prospects appeared favorable during the offering period or thereafter when registrant was making a market in the stock. Some of these are now asserted by remaining respondents as a valid basis for their enthusiasm in offering the stock to the public. The offering circular dated May 25, 1962, stated that the company had "entered into agreements for the formation of two foreign corporations", namely Uneeda, Ltd., of England, with a capital of $15,000, half of which would be contributed by Uneeda, and Staar-Uneeda, S.A., of Belgium, with a capital of $20,000, half of which would be contributed by Uneeda, and that a substantial part of the proceeds of the offering would be used for expansion into European markets. The proposed expansion created much enthusiasm in Uneeda's officers, but it also became a focal point of irresponsible representations by Martin Fabrikant and registrant's salesmen, as discussed, infra.

George L. Bickler, an attorney who became financially interested in Uneeda in late 1961 by purchase of a one-half interest in its stock, gave up his law practice in 1962 and until August 1963 devoted full time to the company. He testified that in early 1962 he went to Europe to develop the market for vending machines in conjunction with local citizens. Uneeda planned to establish refurbishing plants and spare parts or servicing depots for vending equipment in

the European countries, and it also arranged to act as exclusive European agent for Cavalier Corporation, of Chattanooga, Tennessee, a large manufacturer of vending equipment and a supplier of vending machines for bottled Coca Cola. In this connection, Uneeda employed Frank Murray, who had been with the Coca Cola Company for some 20 years. Murray introduced Bickler to William G. Raoul, of Cavalier Corporation, and a joint and concerted effort was made by Uneeda and Cavalier to expand into the European market. Bickler also travelled to Europe in the summer of 1962, and he testified that he "had laid what [he] thought was a very solid groundwork with all of the bottlers for the introduction of Cavalier products into Europe". The failure of this effort and of another trip in September 1962 by Bickler and Raoul, and the basic reasons for Uneeda's inability to penetrate the foreign market were testified to by Raoul and Bickler and are discussed in some detail below. Nevertheless, Bickler testified, at the earlier time of the public offering in May 1962, he had "exceedingly high hopes" of a profitable venture for Uneeda.

Subsequent to the public offering, the company's president, Nathan Hockman, sent to stockholders two letters, one dated July 16, 1962, and the other September 26, 1962. The July letter expressed enthusiasm for the company's growth and progress, and among other factors it mentioned plans for acquisitions and future expansion of the vending machine business in the United States and in "Europe, Australia, South America and other parts of the world", with a

"base of operations in Europe" already established and "initial orders on the books from Coca Cola of England, as well as a distinguished and prominent French vending firm". The letter contained not only unwarranted optimistic statements but also exaggerations and falsehoods discussed below in connection with "The Selling Efforts of the Remaining Respondents."

Similarly, the September letter, which announced Uneeda's acquisition of the Vercon Corporation, of White Plains, New York, with its patents for many products, was enthusiastic but false in respects discussed below. The letter represented that the company's largest gain was scored by its United Kingdom affiliate which, it stated, "has entered into an agreement with the Northern and Southern bottlers of Coca Cola...[to] replace their single drink obsolete equipment now on location with new multiple-drink vending machines, on a rental arrangement. Installations will begin in October 1962. Uneeda Ltd. anticipates that it will receive a gross rental income of approximately $3,000,000 over the next five years in the installation of equipment in these locations."

The acquisition of Vercon Corporation in September 1962 was also a basis for predictions of a successful future for Uneeda in an undated market letter issued in 1963 by J. Brad David, Ltd., a broker-dealer in New York City. This glib letter called Vercon merely the "tail wagging the dog", and after a glowing description of the Vercon enterprises and Uneeda's other operations, it estimated for Uneeda "gross sales and income of $1,000,000" and stated that pre-tax earnings "in excess of $1.00 per share are quite possible for 1963".

This is Uneeda, with emphasis on some of its "favorable" factors

relied upon as a valid basis for the enthusiasm of remaining respondents and used by them in their sales efforts.

(2) Aceto

Registrant and Karen Securities Corporation, acting as co-underwriters in February 1962, sold 88,000 shares of Aceto's common stock at $5 per share pursuant to registration under the Securities Act.

Aceto was incorporated in New York in 1947 and has been engaged in the purchase and resale of industrial chemicals bought from manufacturers abroad and resold domestically in industrial lots. In 1962 these operations accounted for 75 per cent of the company's business, the balance coming from the purchase abroad and resale domestically of unique chemical by-products and surplus chemicals. The company's earnings in 1961 were approximately $34,000 or 21¢ per share: in 1962 earnings were 16¢ a share, and in 1963 after deduction of a 50¢ per share non-recurring profit, the company earned 18¢ per share.

On March 19, 1962, a newspaper called "The Wall Street Daily Ticker", immodestly claiming to be "The Defender of the Average Investor", covered its front page with an article headlined "Aceto Chemical Buys Manufacturing Facilities", underneath which Aceto was described as an "Epxanding [sic] Research Chemical Operation". The article stated that earningsfor 1961 were 21¢ per share on sales of "over 1-1/2 million dollars", and that "for the fiscal year ended June 1962, sales are expected to exceed 2-1/4 million dollars, according to management". After describing plans to purchase a

chemical processing plant and the facilities of another company containing a laboratory which Aceto would use for research, the article also stated:

> "One of the research chemicals that is sold by the company is the chemical used in Brylcreem, one of the foremost hair preparations on the market today."

The article was used in the sale of Aceto stock to registrant's customers, Its false statements are discussed in connection with the high-pressure selling efforts of some of the salesmen.

(3) Capital Consultants

Capital Consultants was incorporated in New York in 1962. Registrant's officers, Martin Fabrikant, Lebow and Gindin, were also officers of Capital Consultants, in addition to Maurice Rosen, registrant's sales manager, and one Amelia Carr. As indicated above, Capital Consultants owned the stock of registrant. In the fall of 1962, registrant was the underwriter of an offering by Capital Consultants of 100,000 shares of common stock at $4 per share, pursuant to a claimed intra-state exemption from registration. According to the offering circular, the company intended to lend newly-raised capital to other businesses, to factor accounts receivable, and to finance inventory and other lines of endeavor. In the offering, 42,060 shares were sold to the public at $4 per share and 1000 shares were sold to remaining respondent Eugene Leighton for $1000 or 40¢ per share, producing gross proceeds of $169,440 and a net to the issuers of $116,000. All of the proceeds were loaned by the issuer to the registrant on a subordinated basis, and they were never repaid.

(4) Continental Fund Distributors, Inc. (CFD)

CFD was a New York corporation organized in 1960 and thereafter registered with the Commission as a broker-dealer. CFD was owned by Richard C. Jacobs, its president (apparently not related to Kenneth Jacobs, a remaining respondent, and hereafter referred to as "R. C. Jacobs"). He was also the president of Continental Growth Fund, which he described as an open end investment company. In May 1961, CFD acquired Niagara Investors Corporation (Niagara), a registered broker-dealer formed by R. C. Jacobs in August 1960 to take over the business of Niagara Investors Company, a broker-dealer of which he had been sole proprietor. Niagara's business and the business of its predecessor was the sale of diversified mutual funds until January 1962. In that month, a public offering of 296,000 shares of non-voting stock of CFD at 99¢ per share was commenced pursuant to a Regulation A exemption. Niagara was the underwriter of the offering. The Form 2-A indicates completion of the offering on March 22, 1962, and reports that registrant participated in the distribution. R. C. Jacobs testified that Niagara was having difficulty completing the sale of the 296,000 shares and that he met with Martin Fabrikant, who agreed to sell a portion of the issue.

CFD also acquired a general life insurance agency called Life Equities Corp., the sales force of which consisted for the most part of salesmen employed by Niagara to sell mutual funds. R. C. Jacobs testified that

at one time CFD planned to open a life insurance company but it was unable to obtain the required financing.

An undated research report on registrant's stationery stated, in part, with respect to CFD's issue, that it

> "...affords an opportunity to participate in the growth of a Mutual Fund Management Company and a Life Insurance Company, both of which have accelerated characteristics of growth because of the continuing nature of income resulting from present sales."

Registrant's report also stated that CFD was currently investigating the formation of a subsidiary for the acquisition of a major interest in situations of great growth potential and that "The Company is currently at a break-even point and looks for rapid growth in earnings now that it has turned the corner".

(5) Jefferson

Jefferson was also the brain-child of R. C. Jacobs, incorporated on November 26, 1962, as a venture capital company intended, according to his testimony, to provide financing for businesses and to acquire equity interests in "fast-growing companies and that sort of thing". He also testified that "...we wanted to give the CFD shareholders a way of participating in [Jefferson], and we gave them a warrant or option to buy the stock at the offering price in proportion to the number of shares they held".

In December 1962, 50,000 shares of Jefferson non-voting stock were offered to the public at $4 per share, and 70,000 were offered to stockholders of CFD at $3.25 per share, all pursuant to an intra-state exemption from registration. All of the voting shares were

beneficially owned or controlled by R. C. Jacobs.

This underwriting was handled by Niagara, and registrant acted as a member of the selling group. The proceeds of the offering were thereafter loaned to CFD on a subordinated basis with interest to be paid at six per cent per annum. The loan was not repaid.

Following the loan to CFD and the establishment on Jefferson's books of an account receivable for the accrual of interest, the payment of a dividend to Jefferson's stockholders was decided upon, even though no interest had been paid on the loan. This is discussed below, inasmuch as the dividend was widely proclaimed by some of the remaining respondents and used as a sales gimmick for selling Jefferson stock or for switching customers into it.

R. C. Jacobs testified that with voting control of both CFD and Jefferson, he decided in 1963 to merge the two companies in order to abolish the aforementioned loan owed by CFD and to obviate the need for dividing his attention between two companies: also, in the event he was "lucky enough to buy a company on favorable terms, to avoid the decision of which company to give it to and which group of shareholders to benefit". As a result of this contemplated merger, each Jefferson shareholder was to receive six shares of CFD for one share of Jefferson. The merger was never legally consummated, R.C. Jacobs said, because the necessary legal work was never completed, neither company having the financial resources to pay the legal fees

therefor. This "dividend" and the proposed but aborted merger were the basis for selling and switching arrangements involving thousands of shares of Jefferson stock by registrant's salesmen, including some of the remaining respondents.

Selling Efforts of Remaining Respondents

In discussing the evidence of selling activities, relative emphasis is given to transactions engaged in by the remaining respondents, since these bear immediately and directly on the involvement of the actor, as well as indirectly on his colleagues. This indirect reflection of the acts of one on the status and cupability of the others is opposed on a factual basis in the brief submitted by counsel for Abramowitz. In my view it is necessary and appropriate under the charges in the Order, the facts of this case, and the law as established in decisions by the Courts and Commission, to describe registrant and its operations by findings of fact predicated on credible evidence of activities of its employees, and to evaluate or judge the activities of each remaining respondent in the light of and against the background of his employment.[6/] This is so even though some of the salesmen defaulted in the proceedings or consented

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6/ Berko v. Securities and Exchange Commission, 316 F. 2d 137 (2d Cir. 1963); B. Fennekohl & Co., Securities Exchange Act Release No. 6898 (September 18, 1962); Hamilton Waters & Co., Inc., Securities Exchange Act Release No. 7725 (October 18, 1965); Wright, Meyers & Bessell, Inc., Securities Exchange Act Release No. 7415 (September 8, 1964).

to bar orders and others have not been charged with violations.[7/] Because of the plethora of evidence, covering well over 3000 pages of transcript and over 200 exhibits, findings of fact are not made with respect to many transactions of registrant and its salesmen, even though cumulative evidence further portrayed the boiler-room tactics of registrant.

(1) D. Richard Engel, a/k/a Richard D. Engel

Engel was employed in 1962, during the period of employment of the three other remaining respondents, Abramowitz, Friedman and Jacobs. Evidence of his activities related primarily to offers and sales of Uneeda, the one stock which was sold by all of the remaining respondents. As indicated above, Engel appeared pro se. He was in attendance for several days during the early part of the hearing, and he cross-examined some of the witnesses who testified regarding transactions with him. He filed no post-hearing documents, nor did he testify in the proceeding.[8/]

One of Engel's practices, especially with customers who had previously lost money by following his "buy" recommendations, was to

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7/ Mrs. Haline Czerwiak and Mr. Z. Kielczynski seemed from the testimony to be two extremely unsophisticated people employed as representatives by Fabrikant in 1962, apparently to sell securities to naive people of Polish descent. (Mrs. Czerwiak, immediately prior to her employment by Fabrikant, had been working in a bakery.) Some of the persons to whom they sold stock described them as honest and conscientious people who were themselves deceived by Fabrikant into believing that the price of the securities they sold must rise sharply within brief periods of time. Neither of these people, among other salesmen, was made a respondent in these proceedings.

8/ Engel was found to be a cause of the revocation of the broker-dealer registration of Albion Securities Corp., Securities Exchange Act Release No. 7561 (March 24, 1965).

pressure them into buying again by stating that if they did not make money with his current recommendation he would never sell them another share of stock. He called J.C., who had lost money with Engel during the latter's prior employment, and made such a statement. J.C. testified that on May 28, 1962, he bought 100 shares of Uneeda at the offering price of $3, after being assured he would "definitely profit" from the purchase. Engel also represented that Uneeda had contracts with the Coca Cola Company. On June 14, 1962, Engel sold J.C. another 100 shares of Uneeda at $4 per share, advising that only a limited amount of stock was available.

After Engel had left the Fabrikant firm, J.C. spoke with Rosen, the sales manager, who assured him that he would see that he lost no more money and that he would be taken out of Uneeda at a profit. Thereafter, without having authorized the transaction, he received a confirmation of the sale of 200 shares of Uneeda and of the purchase of 200 Capital Consultants, both on November 6, 1962, and both at $4 per share. When he telephoned to protest, Rosen assured him that the stock was good and that he should not worry about it. The witness retained the stock.

After Rosen left the firm, Weiss became the contact between registrant and J.C. Mrs. J.C. received a quote on the Capital Consultants stock from Weiss, and when she instructed him to sell he replied that it was too late in the day, and that he would have

to get approval from Martin Fabrikant, who was not then available. And when Mrs. J.C. called back again, under Weiss' instructions, Weiss was unavailable.

Marvin Katz succeeded Weiss as the salesman handling J.C.'s account, and he assured the customer that he need not be concerned about his holdings. To reduce the potential loss on Capital Consultants, he suggested a switch to Jefferson Financial, representing that it was about to merge with another company and that a stock split would increase the price and yield a profit. The switch was made on May 14, 1963, when 200 shares of Capital Consultants at $2-1/4 were switched to 100 Jefferson Financial at $4-1/2 per share.

And on June 13, 1963, a little over one year after his first transaction with Engel a t registrant's firm, the circle back to Uneeda was completed when Katz sold J.C. another 100 shares of Uneeda at $4-1/2 per share, assuring him that it would be only a matter of two or three weeks before he would profit by the purchase. He repeated this assurance several times, advising that brokers can do things to "fluctuate the price of a stock" and that it would move within two or three weeks.

None of the salesmen with whom J.C. dealt ever questioned him concerning his financial condition or his investment needs or desires. None advised that Capital Consultants and Jefferson could be sold only to residents of New York.

But to return to Engel's transactions. In late spring of 1962, while Alan F. Conwill was Director of the Commission's Division of Corporate Regulation, he received in the mail on registrant's letterhead a list of ten over-the-counter stocks. One column listed prices at which the stocks had purportedly been recommended by registrant, another listed "current market prices" which were substantially higher, and a further column set forth recommendations of "target areas" or prices for which the stocks should be held. The letter also read, in part:

> "Prudent, profitable stock investment requires the kind of thorough-going investigation and painstaking analytical work which is a service rendered by our very able Research Dept.
>
> "Thus you enjoy an important advantage--the willingness to benefit from the experience of qualified experts."

Mr. Conwill returned to Engel a postcard after checking a box indicating his interest in speculative over-the-counter securities.

Thereafter he received an offering circular on Uneeda's stock issue, and two or three days later a telephone call from Engel at the Commission's offices in Washington, D. C. Engel advised that Uneeda had been brought out at $3 per share, that the price was then $4-1/2 per share, and that if Conwill invested in the stock he would double his money in about six months. He also said it was realistic to say that over a longer period the price would reach $12 per share, but that he could let Mr. Conwill have only 200 shares inasmuch as not much stock was

available, adding that Conwill was the kind of man with whom he wanted to do business. When Mr. Conwill expressed surprise inasmuch as Engel did not know him, Engel stated that Conwill was a friend of the registrant's sales manager, from whom Engel had gotten his name. On learning the sales manager's name, Mr. Conwill stated that he did not know the man, but Engel replied that no doubt Conwill was a friend of a friend of the sales manager. Ultimately, Mr. Conwill advised that he was employed by the Securities Exchange Commission and was then being called at his office at the Commission. After a pause Engel said "That ties it" and hung up.

G.S., an attorney practicing in New York City, received a telephone call in June 1962 in which Engel advised that although Uneeda had been brought out at $3 and was already trading at $4, Engel had set aside for G.S. a certain amount of stock at $3, and that there was "nothing to lose". G.S. refused to buy, but was later visited at his office by Engel, who advised that he felt bad because G.S. had lost so much money on his prior recommendations. He personally guaranteed that G.S. would be out of the stock at a profit, and said that if G.S. did not make money on the stock Engel never wanted him to be his customer. On June 6, 1962, G.S. bought 100 shares of Uneeda at $3 per share.

On June 11, 1962, G.S. bought 200 shares of Aceto at $6-3/4 per share after Engel assured him he would definitely be out of the stock within a couple of weeks at a profit, and recommended that he

buy as much as he could. Engel also stated that registrant controlled the market on this stock and again "personally guaranteed" a profit.

After Engel left registrant's firm, Rosen inherited the G.S. account and attempted to sell Uneeda stock with representations concerning profitable European operations, but G.S. did not buy the stock.

Irving Friedman

Friedman did not appear as a witness in the proceeding and, as indicated above, his letter to the Commission requesting that the proceeding be reopened and that the testimony of witnesses who appeared against him be disregarded, constitutes his brief.

Mrs. G.B., a housewife, testified that around June 6, 1962, Friedman telephoned and advised that Uneeda had contracts for supplying Coca Cola machines in the United States and all over the world. She bought 75 shares at $4 per share. About a month later she received another call from Friedman, who advised that Uneeda had gotten a wonderful new deal with firm commitments not only for new machines but also to service and replace parts for old machines which the "GI's had been using all over the world". This was an additional feature which would really make Uneeda's sales and income "zoom". Mrs. G.B. had "paper losses" on Friedman's recommendations made at another brokerage house and he assured her repeatedly that if she took her losses they would be made up on Uneeda. He stated that the amount of available stock was limited,

assured her that "the sky's the limit" for the price, and that she surely could be taken out at $8 per share. When she was reluctant, Martin Fabrikant came to the telephone and reassured her of the accuracy of what she'd been told by Friedman. She bought 50 shares at $3 per share on July 11, 1962.

About ten days later Friedman telephoned, stating that he had 200 shares of Uneeda which had been promised to someone else but had not been paid for, and that although the market price was then $3-3/4 to $4, he could give it to her for $3-1/4 because of the prior commitment at that price. When she declined, he said he would hold the stock for her because she was such a nice person to deal with and he wanted her to recover her losses. Thereafter, she received a confirmation for the purchase of 200 shares at $3-1/4 per share. She called Friedman and asked him to cancel the purchase, but Martin Fabrikant came to the phone and threatened during the conversation: "If you sell one share of your 125, I will cancel this 200." Mrs. G.B. told him to cancel and she received a cancellation in the mail.

The high pressure tactics used by Friedman can perhaps best be indicated by the series of telephone calls to Mrs. G.B., all on August 3, 1962, in his effort to sell additional shares of Uneeda. On the first call she advised him that she was dressing to leave for a hospital, where her brother was on the critical list. Friedman persisted, and thereafter at ten-minute intervals on at least three occasions he called to advise each time that Uneeda had gone up another

1/8 point. During one of the calls Mrs. G.B.'s husband instructed Friedman to sell the stock at the last-quoted price, but the salesman advised that he could not accept the sell order from the husband. Mrs. G.B. thereupon ordered the stock sold, but Friedman's market quotations then reversed directions and he stated, "Oh, it's 3-7/8, 3-1/2, 3-3/8, going down, down, down." Mrs. G.B. threatened to report Friedman's tactics as boiler-room operations and her stock was sold at $3-5/8 per share.

Mr. E.S. also had done business with Friedman at the latter's prior place of employment. On June 7, 1962, Friedman telephoned him at Middleport, New York, and sold him 100 shares of Uneeda at $4 per share after representing that the company was doing very well in this country and intended to do business in Europe, and that it was also negotiating for a franchise in South America.

On June 12, Friedman again called E.S. at Middleport, suggesting that he buy more Uneeda and also recommending that he sell 100 shares of Dynamics Corporation of America in order to finance this transaction and the prior purchase as well. On Friedman's representations that Uneeda looked better than Dynamics and that E.S. would be foolish not to make the change, E.S. agreed to the transaction. On June 18, Friedman again called and sold E.S. 50 shares of Aceto at $5.50 per share.

On July 12, Friedman called and advised that the market had weakened on Uneeda, so that it could be bought for $3-1/4 and was

a "better buy than ever" at that price. He suggested that E.S. buy as much as he could get, recommending that he sell 100 shares of Transportation Corporation of America and purchase 300 shares of Uneeda with the proceeds. E.S. agreed, and the trades were accomplished, 300 shares of Uneeda being purchased at $3-1/4 per share. On August 2, Friedman called and suggested that Uneeda was "beginning to run away", that it had moved to $3-7/8, and he recommended that E.S. sell another 100 shares of Transportation Corporation of America to finance a purchase of 200 shares. The trades were made.

E.S. testified that when he was reluctant to act, Friedman would sometimes call two or three times a day, using much persuasion and various pressures to induce purchases. He spoke frequently of the short supply of stock and of the stock getting stronger, and he often urged the need for quick action. On September 6, 1962, E.S. purchased another 100 shares of Uneeda at $4-1/2 after Friedman advised that it was really moving up and that this was a "whale of a good time to get in on some more of it".

After Friedman left registrant's firm, Rosen called E.S. and interested him in a purchase of Capital Consultants, advising that the stock was under the guiding force of Martin Fabrikant, whom he described as a "whiz and a boy-wonder who turned anything that he touched into gold". Rosen also advised that Basic Economics, which was in the same field as Capital Consultants, once had a low of about $2 or $3, but was then selling in the 20's, and suggested

that Capital Consultants would be very similar in its operations and that the same thing could happen to its price. On October 31, 1962, E.S. bought 100 shares of Capital Consultants at $4 per share.

In late December 1962, Rosen again called and pressured E.S. to trade 800 shares of Uneeda for 800 shares of Capital Consultants, advising that although both were selling at $4, Uneeda wasn't as good as they had anticipated. He recommended that E.S. get out of Uneeda and into something that would go. One of the bases upon which Capital Consultants was urged was that it would own not only Fabrikant Securities Corporation but also other companies in which it would invest. Before E.S. consented to the transaction he asked the advice of Friedman, who had been calling E.S. in an effort to sell him securities from his new employment. Friedman advised that the trade was "all right" and when Rosen called again on December 27, 1962, E.S. agreed to the trade.

At no time was E.S. told that Capital Consultants could be sold only to residents of New York State: nor did he receive any offering circular or other written material on any of the stocks. He had asked Friedman for information on Uneeda, but was told that there was nothing current.

Kenneth Jacobs

Jacobs was employed on a part-time basis from January 1962 to the end of 1962. He has a college degree in Health and Physical Education, and for several years prior to his employment by registrant

had been teaching in the New York City High School system. The teaching continued during the employment as a registered representative. Jacobs testified at the hearing that he spent relatively few hours each day at registrant's office during the school year; that most of the other salesmen had left before he would arrive, and that during the summer vacation of 1962, following the break in the stock market of May 1962, business was slow and he spent little time at registrant's office.

In May 1962, Jacobs telephoned R.L.S., whose name he probably had gotten from a salesman in the drug industry, and said that Uneeda showed great promise in the growing vending machine industry. He spoke of Uneeda's progress and of its potential expansion overseas, and stated that although no one would guarantee a price rise, there was a possibility that the stock would go up four or five points in six months. R.L.S. bought 100 shares at the offering price of $3.

Subsequently, Jacobs called R.L.S. and advised that Uneeda had risen a couple of points and suggested that Capital Consultants, a newly formed corporation, might show expansion in the near future and he "left it to the judgment" of R.L.S. whether to trade the two stocks on an equal basis. R.L.S. agreed to the trade.

P.P., a pharmacist from Brooklyn, did business with registrant in early 1962 when Jacobs called and suggested the purchase of Aceto. Jacobs stated that he was a friend of one of P.P.'s friends, and therefore would recommend only what he thought was very good.

He stated that Aceto stock "was going to be moved" and that he would watch the stock for P.P. and keep him informed. On February 15, 1962, P.P. bought 100 shares at $5 per share.

P.P. testified that he thereafter received telephone calls from Jacobs every couple of weeks and was advised that the stock was in good shape and that "The boys were ready to move it," and Jacobs would keep an eye on it. Six months later Jacobs called and advised that Aceto had declined to $3.50 and expressed surprise that P.P. hadn't gotten out at $7 a share, remarking that the mutual friend had been told to get out at that price and that Jacobs assumed P.P. had received this message. At this time Jacobs recommended a purchase at $3.50, promising to keep P.P. informed on its progress. P.P. bought another 100 shares on August 22, 1962.

Prior to this time, in May 1962, Jacobs sold P.P. 300 shares of Uneeda at $3 per share. He advised that the stock was worth much more than the offering price and that it was going to be moved. Soon thereafter, Jacobs recommended that P.P. buy Jefferson Financial stock, which he said would "go a lot faster". He advised that the company was paying a dividend and that its growth prospects were much greater than Uneeda's. The customer preferred to consider the matter and when Jacobs subsequently called, P.P. stated that he would retain the Uneeda.

In November, Jacobs called and touted Capital Consultants, inasmuch as it represented a holding by registrant in the companies it had

recommended and in which it had been given shares as brokerage commissions. He also stated that Uneeda was then about $3 a share and that although Capital Consultants was selling for $4 a share, P.P. could trade the stocks on a share-for-share basis. P.P. asked that Jacobs try to get $4 a share for the Uneeda and advised that he would think about buying the Capital Consultants. However, a couple of days later he received confirmations dated November 11, 1962, for the sale of 100 Uneeda and the purchase of 100 Capital Consultants, both at $4 per share. He had not authorized the transaction, and when he telephoned Jacobs he was advised that he could not have the sale without the purchase, and the transactions were cancelled.

M.R.S. is chairman of a Department in a New York City High School, who knew Jacobs casually from the school system. In February 1962, Jacobs telephoned and described his new employer, Martin Fabrikant, as a man who was brilliant in the field of finance and a person with whom he was very close. He suggested that M.R.S. would make a lot of money by an association with them. On February 9, M.R.S. bought 300 shares of Aceto, following several telephone calls during which Jacobs advised that the stock had excellent potential and would rise to around $15 within a six-month period. Jacobs also advised that Aceto's stock was controlled by Martin Fabrikant, who was one of the underwriters, and that the latter would "kill those who were selling short".

On April 3, 1962, Jacobs telephoned M.R.S. and sold him 500 shares of CFD at $1 per share, representing that CFD had great potential, that it would merge with another large investment fund and that the stock should have a real precipitous rise. He said that although Martin Fabrikant was not the underwriter of the stock, he had inside information on it. He stated that CFD was basically a holding company for insurance stock and proclaimed the potential for the insurance field at that time.

On May 7, M.R.S. sold his 300 shares of Aceto as a result of a telephone call in which Jacobs stated that Martin Fabrikant would no longer be associated with Aceto; that he was pulling out and there was "no telling where Aceto could go because there was going to be no floor under the market...." Martin Fabrikant, according to Jacobs, was pulling out because of an investigation of another underwriting firm from which he wanted to disassociate himself.

On June 4, M.R.S. bought 1,200 shares of Uneeda following several telephone calls in which Jacobs recommended large purchases in order to make a killing because of Uneeda's tremendous potential. He stated that Fabrikant would be the sole underwriter and could manipulate the stock through short sales, and he gave assurances that this was a "100 per cent sure investment" and that in six months the stock should reach $20. He advised of "fantastic contracts" in the European market, stated that Uneeda would have almost the sole

distributorship of machines in certain areas, and that through Frank Murray's association with Uneeda it would have exclusive distributor rights not only with used machines but also with new machines. He also said that he could not get the 1500 shares in which M.R.S. then indicated an interest, and that M.R.S. was lucky to get the 1200 shares which Jacobs could and did sell to him.

In July 1962, M.R.S. was called at his Massachusetts summer camp for children, and Jacobs recommended the purchase of 300 shares of Uneeda which M.R.S. did not get in the last-mentioned transaction. He said that although Uneeda hadn't moved as yet, it was consolidating its position and the stock would take off in a short time. M.R.S. bought 300 shares. In August, after another call to Massachusetts, M.R.S. bought 200 additional shares at $3.50,Jacobs assuring him that the 50-cent rise showed that the stock was on the move and that there was no stopping it.

M.R.S. confirmed with Martin Fabrikant the glowing remarks about Uneeda, and Fabrikant indicated that $20 per share was a very conservative figure for the stock because of its tremendous potential and the contracts it was negotiating.

On August 28, M.R.S. bought 500 shares of Aceto at $3.25 per share as a result of a call from Jacobs in which he advised that Fabrikant was going back into Aceto and "We should see it at $6 within a very short period of time." At this time M.R.S. also

spoke to Martin Fabrikant, who indicated that a rough copy of the quarterly report showed a very fine earnings picture. Jacobs stated that Martin Fabrikant had mentioned to a number of people that the stock they previously had bought at $6 should be held, and that $6 was then a conservative figure.

In September, after his return from the camp, M.R.S. bought 100 more shares of Aceto at $2 per share when Jacobs advised that because of pressures and readjustments a block of stock hanging over the market had depressed the price. And in December he bought 100 shares at $1-3/8, when he was told by Jacobs that the company itself was buying a large number of shares because Fabrikant could not continue his "sponsorship" for a number of reasons, particularly because he was having trouble holding up the price of Uneeda stock, and that until he cleared this up he couldn't go back into Aceto and "more or less push up the stock price".

In December 1962, Jacobs advised that the bottom had dropped out of Uneeda, that there was no way of getting a fair price for it, and suggested that M.R.S. switch his Uneeda stock into Capital Consultants, which he represented as a new company that was buying registrant's firm, and through this purchase it would have a large ownership of Uneeda stock. He advised that M.R.S. would have two things going for him, i.e., the interest in registrant's firm through Capital Consultants as well as a substantial ownership in Uneeda. He stated that Fabrikant would try to push and promote the

Capital Consultants stock inasmuch as it was his own, and convinced M.R.S. that he had no alternative but to make the switch. He also indicated that Capital Consultants would find interesting situations in which to invest and he mentioned several potential investments. Although all of these were speculative, M.R.S. agreed to the switch, testifying that he believed he had no alternative, and that the Uneeda investment did not appear to be sufficiently strong to warrant retention. He testified "I felt that I had to go along with the primary business which would be Fabrikant's business, and my [Uneeda] stock would be involved in that."

Nathan Abramowitz

The fourth of the remaining respondents employed by registrant during the year 1962 is Nathan Abramowitz, whose employment began in March and ended in October of that year. Prior to this employment he had been working, during a period of ten years, for five over-the-counter firms, all of which sold speculative and unseasoned securities. Abramowitz is a former attorney now 67 years of age. The record shows that he was disbarred during World War II for having committed a Federal offense for which he subsequently received a Presidential pardon in 1956. At the time of the hearing he was employed as a registered representative by Morris Cohon and Company, a broker-dealer in New York City. He was represented by counsel at the hearing and testified as a witness in defense of his activities.

G.A.P., of Lake Ronkonkama, New York, knew Abramowitz as early

as 1954 from the salesman's prior employment, and had been purchasing low-priced securities from him since that time. In June 1962, Abramowitz called and advised that if G.A.P. bought Uneeda Vending he could make up all of his losses. When the customer said he had no money to invest in speculative stocks, Abramowitz stated that although Uneeda was selling at $4 a share, the company's outlook was terrific. G.A.P. quoted Abramowitz as saying that Uneeda was buying used vending machines in this country and rebuilding them and sending them to Europe; that Uneeda had concessions in England, France and Belgium and was working to get others in additional European countries, such as Germany and Italy. He also quoted Abramowitz as saying that Uneeda was working with Coca Cola and was going to get the agency for Europe. When G.A.P. reasserted that he had no money, he was advised to sell "General Bowling" stock, which Abramowitz had sold him at a prior brokerage employment. On June 14, 1962, he bought 100 shares of Uneeda at $4 per share.

Abramowitz called several times thereafter to sell more stock, but G.A.P. advised that he had no additional money to invest and that he would be satisfied with a profit on the 100 shares of Uneeda. Abramowitz was persistent, however, and ultimately convinced him that he should buy more shares, stating that although they were then selling at $4.50 per share he would see if he could get them for $4, and assuring G.A.P. that he was "going to make money on this stock". He also stated that he himself had bought Uneeda shares.

G.A.P. bought 200 shares at $4 on August 6, 1962. In one of his conversations with the customer Abramowitz stated that Uneeda would be a $10 stock.

After Abramowitz left the registrant's firm, he called G.A.P. to sell him additional securities but G.A.P. did no more business with him. However, another salesman called and convinced him that he could sell 100 shares of Uneeda "at a profit" and could buy Jefferson Financial for the same price per share, requesting the latter as a better situation. G.A.P. permitted the switch of 100 Uneeda into 100 Jefferson Financial, each at $4.50 per share, on April 23, 1963.

Only two investor witnesses testified with respect to transactions with Abramowitz. The second was M.F.H., who had dealt with the salesman during his earlier employment at Cortlandt Investing Corporation. In May 1962, Abramowitz called M.L.H. and recommended that he buy CFD units, and the purchase of 400 units at $1-3/8 was paid for by the sale of 100 shares of Madigan Electronics at $6 per share. Abramowitz had sold the Madigan stock to the witness at his prior employment, but now advised that the Madigan stock wasn't going anywhere, that it wasn't turning out as well as he'd expected, and he strongly recommended CFD. M.F.H. acted on this recommendation.

Later in May, M.L.H. bought 100 shares of Uneeda during the offering period at $3 per share after a call from the salesman, paying for it by the sale at $5.25 per share of another 100 shares of Madigan Electronics originally bought on Abramowitz' recommendation. And he purchased another 100 shares of Uneeda at $4.50 per share on August 14, 1962, after Abramowitz telephoned and advised that Uneeda was very fortunate to have made a contract with the European Coca Cola Company for the distribution of Coca Cola,

and that the contract would result in profitable business. He also stated that he hoped the company would be paying dividends within a reasonable time, that the price of the stock had gone up, and that it would be more than double within the year.

(Prior to this last purchase, the witness had sold his Uneeda stock through Cortlandt Investing Corporation, with which Abramowitz was then no longer associated.)

Bernard Portnoy

Portnoy's association with the securities business began in 1939. He was employed by registrant from January 1963 to June 1963, following ten years as a registered representative selling speculative over-the-counter securities for eighteen different broker-dealers, most of whose registrations have since been revoked by the Commission. As indicated below, he traveled from firm to firm over the years with Aborn and Katz, all sharing commissions earned by deceiving the public, and all moving from one employer to another as opportunities arose to push worthless stock into the portfolios of unsuspecting investors as well as speculators looking for quick action. Portnoy was represented by counsel in the proceedings and testified on behalf of respondent Leighton and in his own behalf.

In January 1963, K.F., of Watertown, New York, was contacted by Martin Fabrikant, who said he had received his name from a customer list of Banner Securities Corporation, a broker-dealer whose registration was revoked by the Commission in December 1962.

Martin Fabrikant attempted to sell K.F. 1000 shares of Uneeda and then 1000 shares of Capital Consultants, using wooden tickets both times. K.F. refused to accept the stocks. The first wooden ticket came on the Uneeda stock and when K.F. rejected it Martin Fabrikant called him and advised that some adjustment would have to be made. He attempted to sell him Capital Consultants stock, and K.F. asked for information on it. Instead, he received a wooden ticket for the purchase of 1000 shares, which he rejected. Thereafter, soon after entering registrant's employ, Portnoy took over the K.F. account, and on January 23, 1963, sold K.F. 500 shares of Pentron Electronics Corporation at $2-3/8 per share.

Five days later, as a result of a recommendation by Portnoy, the customer sold his 500 shares of Pentron at $2-1/4 per share and bought 250 shares of Uneeda at $4 per share. The basis for this transaction was a series of representations by Portnoy that Uneeda was on the brink of a break-through and had negotiated a contract with Coca Cola, as a result of which it would develop rapidly. Around this time Portnoy also sent the customer a copy of the above-described September 26, 1962, letter to the stockholders of Uneeda.

On April 23, Portnoy called K.F. and informed him that he had sold the customer's 750 shares of Uneeda at $4.50 per share and had bought 750 shares of Jefferson Financial at the same price per share. This was done without authority from K.F. or any discussion of the trade. When he protested, he was told that the transaction had been effected after Portnoy had discussed it with Martin Fabrikant and they'd concluded that it was to K.F.'s advantage. Portnoy also stated

that Martin Fabrikant was on the inside of the Jefferson Financial situation, and that the company was earning money and paying a dividend.

On May 21, prior to leaving for a vacation, K.F. wrote to Portnoy, directing that his Jefferson stock be sold and the proceeds remitted to him. When he returned, he called Portnoy to inquire why the transaction had not been effected and was advised that Portnoy and Martin Fabrikant had talked it over and decided it was foolish to sell Jefferson Financial "on the brink of a break-through and a merger". He stated that within ten days CFD would take over Jefferson on an exchange basis of six shares of CFD for one of Jefferson, and that the exchange would favorably affect the price. After Portnoy had left registrant's employ, K.F. insisted on the sale when he spoke with Martin Fabrikant, and was told that there was no market for Jefferson but that it would work out fine inasmuch as Martin Fabrikant was on the inside. Despite his directions to sell the stock, it was never sold.

Dr. E. is an elderly real estate operator and part-time medical doctor who knew Portnoy from his previous employment. In January 1963, Portnoy called and advised that he had gone to work for registrant because it was a reliable broker-dealer firm. In that month Dr. E. bought 100 shares of Uneeda at $4 per share, after being advised by Portnoy that the company had patents on certain valuable machines, that it was expanding substantially and that the stock had

a "very bright future". Portnoy also represented that the price of the stock would rise to $8 or $9 a share and that registrant and he had inside information on all stocks which they sold. He also stated that Uneeda was being offered to a limited number of customers and he guaranteed that the Uneeda stock would be repurchased at any time at the $4 purchase price.

On March 1, Portnoy advised the customer that Uneeda was doing better than ever and that it would pay dividends in the near future. Dr. E. bought 200 additional shares at $4 per share. Portnoy also suggested large profits by stating that all of Uneeda's earnings were then being put back into the business so that it could expand into South America and Europe.

On March 8, and again on March 13, Dr. E. bought two blocks of 200 shares each at $4 per share during telephone conversations in which Portnoy reaffirmed registrant's control of the Uneeda stock and the availability of inside information on the company. He stated that registrant could control the price of the stock by the amount it made available and could manipulate the price.

On April 23, 1963, a day on which Portnoy was very active in switching his customers from Uneeda stock to Jefferson Financial, he sold 500 shares of Dr. E.'s Uneeda at $4.50 a share and bought 500 Jefferson Financial at the same price, both transactions without the knowledge or permission of the customer. Thereafter, when Portnoy informed Dr. E. of the transactions, he also advised that Jefferson

was a very good company which was in the business of making secured loans and buying other businesses. He stated that there was a greater possibility that the stock would rise to $8 or $9 per share than for Uneeda to make this rise, and advised that Jefferson would soon combine with CFD and would pay dividends. Although requested to do so, he failed to send the Doctor any brochures or other material on CFD or Jefferson.

C.W.B., of Westfield, New York (six miles from Buffalo), did business with Portnoy when he was telephoned in May 1963. On May 21, C.W.B. bought 200 shares of Jefferson Financial at $4.50 per share and at the same time sold 200 shares of Uneeda at the same price. (The Uneeda stock had been purchased from a different brokerage house.) The switch was suggested by Portnoy when the customer advised that he had no funds available for the purchase of Jefferson stock. Portnoy advised that Jefferson was a much better investment than Uneeda and he described Jefferson as a small personal loan company which was growing and prospering and paying a dividend. He stated that the stock looked like a good growth stock, and that there was a stock split or a stock dividend in the offing.

On June 12, Portnoy called C.W.B. and now recommended that the customer buy Uneeda stock, advising that he had looked further into it, and either that the stock was better than he had thought when he previously advised the sale or that the situation in Uneeda had

changed and was then more favorable for Uneeda's progress. He also said Uneeda had a contract with the Coca Cola Company for repairing machines used in its European operations. The customer bought 200 shares of Uneeda at $4.50 per share. The following day Portnoy called again and succeeded in selling the customer another 100 shares of Uneeda at $4.50 per share.

A.H., a corporate executive, bought 100 shares of Uneeda on February 27, 1963, as a result of a telephone call from Portnoy advising that he had heard of A.H. through a mutual friend. He stated that Uneeda's operations looked very promising and would prove profitable enough to justify a higher price than the $4 at which it was selling.

On March 12, A.H. purchased another 200 shares of Uneeda at $4 per share. And on April 23, he sold his 300 shares of Uneeda at $4.50 per share, at the same time purchasing 300 shares of Jefferson Financial at that price. The transaction was made on Portnoy's representations that Jefferson looked extremely promising and should be purchased "at once", whereas Uneeda "may not be getting ahead for the time being". Portnoy represented that in not more than six months A.H. should see the Jefferson stock very much higher than its purchase price, and A.H. should see a couple of dollars per share profit in six months to a year. Portnoy advised A.H. to go as far as he could to get into the stock.

On May 7, A.H. bought an additional 100 shares of Jefferson

at $4.50 per share after Portnoy represented that Jefferson was about to merge and that the holdings would increase in value even apart from Jefferson's business operations. Portnoy urged A.H. to buy as much as he could.

On June 13, Portnoy sold A.H. 100 shares of Uneeda Vending at $4.50 per share, advising that it would not be long before they would see the price higher. On several occasions Portnoy assured A.H. that although he didn't know how much money the latter would make through his dealings with Portnoy, the one thing that was certain was that A.H. would not lose, because of registrant's connections and inside information.

Mrs. W.P., a housewife, and W.P., a disabled veteran then retired on a 100 per cent disability, frequently spoke with Portnoy when he called their home and shop, both located in the same building in Hillsdale, New Jersey. On February 26, 1963, during a call from Portnoy in which he advised that he had only 100 shares of Uneeda left and was going to give W.P. a first choice because he was a new customer and Portnoy was sure he would make some money for him, W.P. bought "the 100 shares" at $4 per share and sold 100 Pentron Electronics at $2.25 per share on Portnoy's further assurance that Uneeda was a better stock. (Portnoy had sold the Pentron to W.P. at an earlier date.) Portnoy also assured W.P. that he would double his money within 30 days on the Uneeda stock.

On May 14, Portnoy called and stated that inasmuch as W.P. was a relatively new customer he couldn't keep from him inside information on another stock which was going up and which Portnoy would like him to get in on. He urged W.P. to sell the Uneeda Vending stock and buy CFD units with the proceeds, representing that CFD was going up "very fast". W. P. sold 100 Uneeda Vending at $4.50 and bought 350 units of CFD at $1.25.

About two weeks later Portnoy spoke to Mrs. W.P. on the telephone, greeting her with "Hello, honey," and demanding that a $900 check be sent in as payment for a purchase of additional CFD stock allegedly made by W.P. Mrs. W.P. denied the purchase but Portnoy replied that the stock was ordered and would have to be paid for, but could then be resold. When Mrs. W.P. protested that the order could not have been given because they did not have the $900, Portnoy put another man on the telephone and both men threatened that a lawsuit with court costs and attorneys' fees would follow a refusal to pay the $900. In the conversation Portnoy also assured her that if she paid, the total investment of approximately $1300 in CFD would double.

Two weeks later Portnoy called, again greeting Mrs. W.P. with the "Hello, honey" salutation, and advised her that the firm would be willing to stand the loss on the stock and would take no action for payment. He attempted to interest Mrs. W.P. in other stocks but she declined.

Eugene Leighton

Leighton was employed by registrant from March to June 1963.

He has a history of employment in the securities business as a telephone contact man in 1955 for J. A. Winston & Co., where he obtained leads on prospective customers for the firm's salesmen by taking names from industrial lists and from the yellow pages of the telephone book. Thereafter, he became a registered representative for J. A. Winston & Co. and for several other broker-dealers whose registrations also have since been revoked by the Commission.

At the time of the hearing, Leighton was employed as a registered representative by R. L. Ferman & Company, an over-the-counter dealer in securities. He was represented by counsel at the hearing and testified in his own defense and on behalf of Portnoy, with whom he had been closely associated, at least during his employment by registrant.

Mrs. D.B., a housewife, was called by Leighton in March 1963. Leighton had received her name from her former registered representative, James De Mammos, following a conversation in which De Mammos told her that he would no longer handle her account and would recommend another salesman to her. In her first conversation with Leighton the customer advised him of the stocks which she and her husband held, and explained that she was no longer interested in buying securities as speculative as those then held, but she indicated that she was interested in reasonably speculative stocks. She had

been purchasing more conservative securities from member firms of the New York Stock Exchange.

Mrs. D.B. had sustained paper losses on her speculative stocks, and indicated that she was interested in selling them. Leighton recommended the purchase of Uneeda stock, with which he was familiar, and advised the sale of the speculative stocks for the investment in Uneeda. On March 14, the customer bought 100 Uneeda at $4 per share. The first purchase followed Leighton's representations concerning Uneeda's products and business, including a frankfurter cooking machine being produced for the Chock-Full-O'Nuts Company, for which he stated the company would have orders. He also advised that the stock was a good buy and that the price would go to $5 and had very good possibilities of going beyond that, to $6 or $7 or even higher.

Thereafter, Leighton sent Mrs. D.B. the J. Brad David letter, and on the basis of this letter and further conversation with Leighton she bought 100 Uneeda at $4.25 per share on March 19, 1963. The letter influenced her thinking inasmuch as it confirmed Leighton's statements with respect to Uneeda's expansion in the European market. Leighton pointed out that the rise in price from $4 confirmed earlier predictions which he had made.

On June 13, Mrs. D.B. bought 50 shares of Uneeda at $4.50. In connection with this purchase, Leighton represented that Uneeda would manufacture a copying machine which would compete with the Xerox machine but which would produce for 5¢ per copy an item which the Xerox machine produced for 16¢ per copy. He also said that Martin Fabrikant

was on Uneeda's board of directors and could advise his salesmen what the company would do before anyone else would learn of it, and that this inside track would be available.

Mr. G.G. did business with Leighton at the registrant's firm prior to March 1, 1963, by purchasing shares of Pentron Electronics. He told Leighton of his prior losses in speculative stocks bought through a broker-dealer firm named William, David and Motti, and Leighton said he would get him into stocks which would recoup his losses. On March 1, 1963, Leighton sold the Pentron for G.G. and put him into the Uneeda Vending with the proceeds. Leighton represented that Uneeda was growing, expanding to Europe, and building its business in such a manner that the stock would rise a few dollars in a short time. One week later, on March 8, G.G. purchased 300 shares of Uneeda at $4 per share. Leighton assured G.G. that he couldn't go wrong with the purchase, that it would go up in a short time, and according to G.G.'s testimony, that he would make "a couple of dollars on it".

On April 23, the same date on which Portnoy executed a large number of transactions of switching his customers into Jefferson Financial stock, Leighton switched G.G.'s 500 shares of Uneeda Vending into 500 shares of Jefferson Financial at $4.50 per share. The basis for this transaction was Leighton's advice that Uneeda Vending hadn't reacted as well as Leighton anticipated, but that he had a flash that Jefferson Financial would merge with CFD, and G.G. could definitely make

money on the Jefferson faster than on Uneeda. Leighton represented that quite a bit of G.G.'s losses would be made up by purchasing the Jefferson. He advised that the quicker the trade was made, that is, before the news got out and while they were on the ground floor, the better it would be for G.G.

Mrs. A.G. of Syria, Virginia, an elderly, wealthy woman whose husband died in February 1964, testified that for a period of approximately six years prior to the date of the hearing Leighton frequently called her husband with regard to securities transactions and often spoke with both the husband and Mrs. A.G. at the same time. Shortly before March 5, 1963, Leighton called and suggested the purchase of Uneeda Vending stock, advising Mr. G. that he thought he could make enough to recoup losses on other securities he had purchased. Leighton spoke optimistically about the potential of the European market for Uneeda. He also represented that he was buying the stock himself and getting it for friends, and that the purchasers were within a rather select group who were given this opportunity to buy Uneeda stock. He indicated to the husband that it was because of their friendship that he was being given the opportunity to make the purchase. On March 5, Leighton sold 2000 shares of Uneeda to the customers at $4 per share. In June he sold 1000 shares at $4-3/8 per share. During the course of these transactions Leighton sent to Mr. G. the J. Brad David letter.

Material Misrepresentations and Omissions Relating to the Securities

In the above discussion of Uneeda as one of the five issuers of stocks sold by registrant, emphasis was given to factors asserted by some of the remaining respondents as justification for their respective selling activities.[9/]

Conversely, however, some of Uneeda's problems were testified to by William G. Raoul, of the Cavalier Corporation, which has done business with the Coca Cola Company for many years and is one of the leading manufacturers of vending machines for dispensing Coca Cola. The opportunity for the development within the United States of Uneeda's business in dispensing Coca Cola was not nearly as favorable as indicated by Uneeda in the letters to stockholders or as portrayed by registrant and its salesmen to investor witnesses. Cavalier sells its machines to Coca Cola bottlers and distributors, and although the machines are approved for such sale by the Coca Cola Company, no contracts are entered into between the latter company and any manufacturer of machines, including Cavalier. And of course no contract existed with Uneeda. Moreover, the bottlers are loyal to their sources of supply and for over thirty years there has been little change in their purchasing practices. Raoul testified "The bottler could buy from anyone, but he tends to buy

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9/ In general, those remaining respondents who testified have denied the statements attributed to them by the investor witnesses as set forth, supra, and as credited by the Hearing Examiner.

from the people he has known through the years." Raoul also testified that there are about five or six suppliers of vending machines which dispense Coca Cola, the three major suppliers being Cavalier, Westinghouse and Vendo, and competition apparently is fairly intense.

Also, with respect to the European market there was never any agreement, written or oral, between Uneeda and the Coca Cola Company, and the representations of existing contracts and pending negotiations for contracts were unwarranted. Nor were there any exclusive grants of market areas from the Coca Cola Company to Cavalier or any of its competitors, and of course no such grant was ever made to Uneeda.

In its efforts to enter the European market, Uneeda was beset by many problems described by Raoul and Bickler. In 1962 it succeeded in interesting Cavalier in the potential market on the Continent and in the British Isles, and arrangements were made under which Cavalier sold machines to Uneeda for eventual leasing or sale in Europe. But the number of machines sold by Cavalier to Uneeda was minimal. Raoul testified that from February 1962 through June 1962 Uneeda's purchases approximated only $5,000 in coolers, spare parts, and coin mechanisms. For the entire year from December 1962 to December 1963, sales approximated $49,000. Raoul said:

> "We had the feeling that some business could be done, and in the course of time it might be developed. But it certainly wasn't going to happen very quickly."

The relationship between the two companies consisted for the most part

of efforts to develop business of a substantial volume but without any success.

Mr. Raoul also testified that Cavalier previously had an agent representing it in all overseas foreign markets. The agent developed no substantial business in Europe, and some of the reasons were detailed by Raoul in his direct and cross examination. He stated that the bottlers in England refused to finance the purchase of vending machines and they would not make a major or substantial selling effort. The market for soft drinks could not be developed without strong promotion by the bottlers, but Raoul stated, for example;

> "When you call on a Coca Cola bottler in Europe, he gives you coffee to drink and that, there, tells you more about the market than anything I know."

He also testified that factory workers in Europe make it a practice to bring the empty bottles home in their lunch bags and have their wives turn them back to the stores for cash refunds. He also discussed the problems of large coins, particularly in England, modification of voltage, and other difficulties which indicated little chance for development of a successful vending machine operation in the foreign market. These difficulties persisted up to the time of the hearing.

Bickler also testified that Uneeda never had a written contract with the Coca Cola Company and it was clear, of course, that no prospect for such contract ever existed. Nor was there any

warrant for representations that Uneeda was undergoing a large expansion project in Europe, that its successful operations were assured, that it anticipated receiving a $1,000,000 contract, or that the stock might be listed on the American Stock Exchange.[10/]

Equally unwarranted were the representations that Uneeda had Coca Cola concessions in European countries and the possibility of getting an agency for Europe; that a limited amount of Uneeda stock was available; that it was being sold to a select group or to insiders; that registrant could "fluctuate" the price; that there was a need for buying it quickly; that there was reason to anticipate the payment of dividends; that it was a better stock than Pentron Electronics; that it was negotiating contracts in South America, or for the many other affirmative misstatements of material facts. Nor was there basis for representing that Uneeda would have orders for Vercon's machine for cooking frankfurters or that Savin's machine would produce the same item as the Xerox machine, but at 5 cents per copy instead of 16 cents.

10/ A "possible one million dollar contract" and "possible listing on the Exchange" are among literally scores of representations which would further portray registrant's boiler-room techniques but which were not specifically detailed above, inasmuch as the discussion of selling efforts was substantially confined to activities of the remaining respondents. These two representations were made by respondent Israel on or about June 6, 1962, to an investor witness, C.M.

For a cursory recital or listing of other boiler-room practices of registrant, however, see that heading, infra.

The failure or omission to mention the many problems that Uneeda was encountering, as well as the competition for the business it hoped to acquire, the absence of meaningful earnings and other negative factors, some of which are mentioned above, was equally reprehensible and violative of the duty owed by securities salesmen to their customers. Shearson, Hammill & Co., Securities Exchange Act Release No. 7743, November 12, 1965; N. Sims Organ & Co., Inc., 40 S.E.C. 573 (1961)

The financial statements in CFD's offering circular reflect an operating loss in excess of $29,000 for the five-month period ending May 1961, and inasmuch as Niagara's losses were great and Jacobs was making an effort to keep it in business, most of the proceeds raised in the CFD offering were required to pay Niagara's creditors and were so used. It never owned a life insurance company and never reached a "break-even" point. By the summer of 1962, operating losses of CFD were over one-quarter million dollars and it had no prospect of achieving financial stability. As indicated above, the money which it borrowed from Jefferson was never repaid.

Jefferson was an equally disastrous venture which appears to have been used solely for the purpose of raising money by mulcting the public, and without any real expectation that it would engage in successful business ventures. As stated above, the lending of substantial amount of money to CFD was used to create an account receivable which obviously would never be paid but which was used as a basis for the

declaration of a dividend. 11/

Jefferson loaned no money to any other business, never purchased control of a company, and of course never operated at a profit. Its sole business was the lending of money to CFD, and, as Jacobs testified, "It never had enough money after lending money to Distributors to buy any business."

It seems almost unnecessary to point out the lack of any basis for the representations in the selling efforts with respect to the potential of CFD or Jefferson. There is no evidence to support an expectation or belief that an investment in either of these companies would be profitable. The representations made with respect to rises in prices, potential business operations, mergers, and dividends were blatantly unwarranted and fraudulent.

11/ The extent to which Martin Fabrikant dictated or actually participated with R. C. Jacobs in these machinations which defrauded the public was by no means fully developed by the evidence, and such development was neither necessary to this administrative proceeding at the hearing stage nor to the conclusions reached herein. R. C. Jacobs did testify, in part, that Martin Fabrikant

> "...probably knew more of the bad facts, in the sense he knew how much in debt all of the many companies were and every bit of money that would come into Jefferson would be...." [Witness interrupted.]

And further that:

> "In other words, Fabrikant certainly knew right along that Jefferson never had any cash stick to its ribs in any real sense and certainly it was sophisticated enough to know you can't do anything nowadays unless you have a large amount of cash, at least to make a down payment."

The evidence indicates that when pressured by customers to sell a stock which did not perform as promised, Martin Fabrikant resorted to a new stock to sell and switch customers into, or to a new angle on an existing stock.

Aceto's earnings, as indicated above, could not serve as a foundation for optimistic representations regarding the company's profits or a rise in the price of its stock. The article in the Wall Street Daily Ticker was false and inaccurate in at least two respects. The testimony of Aceto's management indicated that a sales prediction of $2-1/4 million for the fiscal year ending June 1962 had never been made but rather that sales of $1,450,000 had been predicted, and the misstatement was promptly corrected by a letter from management to the newspaper. The statement that the company sold a chemical compound used in Brylcreem also was false. Moreover, a reading of the reprint itself would indicate that no reliance should have been given this article as a basis for representing to customers the desirability of a purchase of Aceto stock at that time.

The lending to registrant of the proceeds raised in the offering of Capital Consultants stock is part of a pattern which should have raised doubts in the mind of any intelligent securities salesman. Capital Consultants had a loss in excess of $100,000 by the fall of 1963. It should have been obvious to any person closely associated with registrant's business as a salesman of its offerings that the subordinated loan by Capital Consultants to registrant might be uncollectable, if, indeed, he did not know that the new funds would be used to bail out the old company. The dangers should have been recognizable especially by salesmen with backgrounds of experience in firms using boiler-room techniques in selling stocks.

Other Boiler-Room Practices of Registrant

Because the emphasis in this Initial Decision has been on the selling activities of the remaining respondents, an inadequate and incomplete portrayal of registrant's operations would result from a failure to mention even briefly some of the many additional fraudulent activities of registrant not detailed above, which were committed by Martin Fabrikant personally and by salesmen who defaulted or who consented during the hearing to findings of wilful violations and bar orders. 12/

A running list should include reference to registrant's sales of Uneeda stock during the offering period at prices in excess of the $3 offering price; Rosen's promise on a Saturday that a customer's profit from a purchase of Uneeda stock would equal a year's pay if the stock were bought before the following Monday, when the price would rise to $4, although Monday was still within the offering period; the frequent and persistent pressures on local and long-distance telephone, including turn-over of the customer to another salesman or to Martin Fabrikant in an effort to change the customer's negative response; the unreasonable withholding of stock certificates despite customers' demands for delivery; the false entry in registrant's books of stock "purchased"; registrant's employment of naive, unsophisticated and inexperienced sales personnel and not only its failure

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12/ Moreover, it is apparent that as a result of the consents and defaults listed in footnote 1, the Division's presentation of evidence of fraud was substantially curtailed. Even so, the record is replete with evidence of fraudulent selling activities, sometimes only tangentially testified to, by Aborn, Patlis, Lubow, Weiss and Saporta, among others.

to train and supervise them, but more, its deliberate deceit of such persons with the expectation that their unwarranted enthusiasm would produce sales to equally unsophisticated friends and acquaintances, frequently of foreign descent; the practice of hiring salesmen with backgrounds of employment by firms using boiler-room techniques with the knowledge and expectation that such techniques would continue to be used in selling registrant's offerings; the almost invariable failure of salesmen to concern themselves with the financial condition and the investment needs and objectives of their customers; the almost constant use of the telephone, including long-distance calls, for soliciting purchases by unknown persons, and pressuring them to make hasty decisions and to sell securities then held and to purchase registrant's current recommendation; and of course the frequent loading and reloading of customers and switching their stocks, either with or without their consent. In addition, at least one sale of Capital Consultants stock was made to a New Jersey resident with advice to use a relative's New York address.

This is a "broad-brush" portrayal of registrant's type of operations over the entire period with which we are concerned under the Order. It is especially relevant because of the Division's contention, as stated in footnote 2, above, that the remaining respondents acted in concert with registrant and all other salesmen and therefore are chargeable with all fraudulent activities which took place from October 1961 to September 1963, even though I do not accept this conention, for reasons stated below.

Violations of Law and Rules

It should be clear from the above that each of the remaining respondents has violated the anti-fraud provisions of the securities laws by making untrue and misleading statements of material facts, and by acts and practices which operated as frauds upon his customers, including the failure to state material facts regarding securities offered and sold. Each of the remaining respondents made predictions as to future price levels and price increases unsupported by reasonable basis in fact, actions characterized by the Commission under similar circumstances as a hallmark or badge of fraud. Alexander Reid & Co., Inc., 40 S.E.C. 986 (1962); Albion Securities Co., Inc., Securities Exchange Act Release No. 7561 (March 24, 1965). The optimistic statements, made without reference to negative, adverse or speculative factors, were materially false and misleading. Cf. Midland Securities, Inc., 40 S.E.C. 635 (1961); Underhill Securities Corp., Securities Exchange Act Release No. 7668 (August 3, 1965).

In the context of the boiler-room techniques used by registrant throughout the period with which we are concerned, the obligation of the remaining respondents to deal fairly with their customers required a high degree of inquiry and disclosure with respect to information supplied by registrant and any of the issuers. Nor should any of them have relied on the information furnished by registrant or an issuer, especially where that information purported to reflect dramatic or phenomenal increases in business activity and profit potential. Cf. Crow, Bourman

& Chatkin, Inc., Securities Exchange Act Release No. 7839 (March 15, 1966); Hamilton Waters & Co., Inc., Securities Exchange Act Release No. 7725 (October 18, 1965); B. Fennekohl & Co., Securities Exchange Act Release No. 6898, (September 18, 1962); Lawrence Securities, Inc., Securities Exchange Act Release No. 7146 (September 23, 1963); Amos Treat & Co., Inc., Securities Exchange Act Release No. 7341 (June 11, 1964); The Richmond Corporation, Securities Act Release No. 4584 (February 27, 1963).

In their individual sales activities each of the remaining respondents wilfully violated Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b(5) and 15c1-2 thereunder. 13/

No registration statement was filed with the Commission with respect to the offer or sale of the shares of Uneeda. The exemption from registration provided by Section 3(b) of the Securities Act and Regulation A promulgated thereunder became unavailable with respect to the Uneeda stock because of the fraudulent sales campaign of registrant and the activity during the offering period by respondents Engel, Jacobs, Friedman and Abramowitz, among other salesmen, in violation of Section 17(a) of the Securities Act. 14/ The availability of a Regulation A exemption

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13/ The concept is well-established in broker-dealer proceedings that wilfulness does not require an intent to violate the law but is fulfilled if the person knows what he is doing. Hughes v. S.E.C., 174 F. 2d 969, 977 (C.A.D.C., 1949); Thompson Ross Securities Co., 6 S.E.C. 1111, 1122 (1940).

14/ Respondents used the mails and interstate facilities in their transactions.

depends upon compliance with its terms and conditions. Fraudulent sales activity in the distribution must violate a condition implicit within Regulation A that the distribution not be conducted in fraud of purchasers. I believe it follows, therefore, that in their sales of Uneeda stock during the offering period these four remaining respondents aided and abetted registrant's wilful violation of the registration provisions of Sections 5(a) and 5(c) of the Securities Act.[15/] Cf. Batten & Co., Inc. v. S.E.C., 345 F. 2d 82 (1964), aff'g Batten & Co., Inc., Securities Exchange Act Release No. 7086 (May 29, 1963); Searchlight Consolidated Mining Co. 112 F. Supp. 726 (D. Nev., 1953).

Nor was a registration statement with respect to the shares of Capital Consultants filed with the Commission, the offer of the

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15/ As indicated in the Initial Decision of the undersigned on the Uneeda Vending suspension, the distribution of Uneeda stock was not completed until a date subsequent to June 7, 1962. The four named respondents sold Uneeda stock prior to that date. However, inasmuch as Portnoy and Leighton were not employed by registrant until 1963 and did not sell the unregistered stock during the offering period, I find no Section 5 violations in the evidence of their sales.

The Abramowitz brief argues that no Section 5 violation occurred inasmuch as suspension of a Regulation A exemption for violation of Section 17(a) does not void the exemption ab initio, citing 1 Loss, Securities Regulation (2d ed.) 628-9. The argument goes further than the suggestion of Professor Loss and his statement in the year 1960 that "As to all this the Commission has not spoken." Moreover, the Hearing Examiner appears to be foreclosed by the above-cited decision of the Commission in 1963 in a sufficiently analagous situation in Batten & Co., affirmed by the Court of Appeals for the District of Columbia, supra.

Apart from the issues of possible civil liability, the question whether a technical violation of Section 5 exists is an interesting but academic issue, at least at this stage of the proceeding, because such technical violation should not, and it does not here, have any significance with respect to the imposition of sanctions.

Capital Consultants stock having been made to the public under a purported reliance upon an intra-state exemption from registration provided by Section 3(a)(11) of the Securities Act. As indicated above, shares of the stock were sold to at least one resident of the State of New Jersey. The intra-state exemption was therefore not available. Universal Service Corporation, 37 S.E.C. 559 (1957). It follows that the sale of Capital Consultants stock by Jacobs was made in violation of Sections 5(a) and 5(c) of the Securities Act.

The Division's theory that because all of the remaining respondents acted in concert with registrant and all other salesmen in a scheme to defraud by offering and selling the stocks of the five issuers, each is therefore "responsible for the violations of law committed by all other respondents during the period from October 1961 to September 1963" is predicated on the concept of conspiracy, under which all conspirators are held responsible for the acts and for the declarations of all other conspirators performed in furtherance of the conspiracy. The Division cites numerous cases in support of this proposition which is so well-established in both civil and criminal law--yet so dangerous and difficult in application. Cf. United States v. Borelli, 336 F. 2d 376 (C.A. 2, 1964).

We are not here considering a broker-dealer operation created and continued by a group of men under an express agreement or understanding to defraud the public by the sale of one or more selected securities. This is not to suggest that an express agreement is a sine qua non of conspiracy. But an agreement, or understanding, is a necessary element

in both civil and criminal conspiracy. As the Court said in Borelli, supra:

> "...the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant." (page 384)

The Court also stated that as to each defendant,

> "...the scope of his agreement must be determined individually from what was proved as to him. If, in Judge Learned Hand's well-known phrase, in order for a man to be held for joining others in a conspiracy, he 'must in some sense promote their venture himself, make it his own,' United States v. Falcone, 109 F. 2d 579, 581 (2 Cir.), aff'd, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940), it becomes essential to determine just what he is promoting and making 'his own.'" (page 385)

And at page 385 the Court quoted, continuing:

> "'Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it.' United States v. Peoni, 100 F. 2d 401, 403 (2 Cir. 1938). Although this may further complicate the already complex charge in a narcotics conspiracy trial, a requirement necessary to protect a defendant from over-extension of a legal doctrine may not be dispensed with simply because it somewhat lessens the attractiveness of prosecuting for conspiracy rather than for substantive crimes."

Similarly, in Levine v. United States, 383 U.S. 265 (1966), the Supreme Court recognized this principle in addressing specific questions to the Solicitor General and in reversing the convictions of the petitioners on substantive offenses in the following language:

> "In response to specific questions addressed by this Court, the Solicitor General has made a two-pronged concession: He concedes that an individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had

> joined or after he had withdrawn from the conspiracy; and second, he concedes that in this case some of the convictions for the substantive offenses must be reversed because they are inconsistent with this principle.* On the basis of this concession, and upon consideration of the entire record, we vacate the judgment of the Court of Appeals insofar as it affirms petitioners' convictions for the substantive offenses." (*Footnote deleted.)

The Division has not limited the alleged responsibility of any respondent to the period of his employment, and suggests that although Friedman may have been employed for only three months in 1962 and Abramowitz for seven months in that year, each remained responsible for the actions, for example, of the team of Aborn, Katz and Portnoy, which came to registrant in 1963 and continued its practice of splitting commissionson sales in boiler-room operations. I believe the concept of a single, total conspiracy for the entire period, comprised of all respondents and relating to the sale of the five stocks is not consistent with the facts in this proceeding or with the applicable law.

But I do not believe it is necessary or helpful to the proceeding to attempt to define the extent of participation of each remaining respondent in any conspiracy, for I reject the contention that each was not at least generally cognizant of the sales practices and techniques being used at registrant's place of business during his employment. Conversely, each knew that registrant was operating with boiler-room techniques and each could not fail to observe the fraudulent direction given to the business by Martin Fabrikant. This is true not only as to those men who had prior experience in the sale of speculative, low-priced securities, i.e., Portnoy, Leighton, Engel and Abramowitz, it is true also of Jacobs, who started as a neophyte

but worked closely with his friend, Martin Fabrikant, for the entire year 1962 and in November and December was using high-pressure tactics in touting worthless stocks. And it is true of Friedman, whose sales tactics, including but not limited to high-pressure and turn-over of customers to Martin Fabrikant, denote crude sophistication and familiarity with boiler-room operations. As stated above, the actions of all remaining respondents must be evaluated in the light of the nature of the activity in which registrant was engaged during their respective employments. Cf. citations in footnote 6, page 8, supra.

The Public Interest and Sanctions

The remaining questions involve the sanctions which the public interest requires to be imposed on the remaining respondents.

As stated above, the Commission has already found Engel to have been a cause of the revocation of a broker-dealer. Moreover, his activity while employed by registrant would not suggest any change in his course of dealing with customers. Nor did he testify in his own behalf or submit proposed findings. Under the circumstances of this case his failure to testify supports an inference that his testimony, if produced, would not have been favorable.[16/] An order should issue, barring him from being associated with a broker or dealer.

Nor did Friedman testify or submit proposed findings which require consideration of any mitigating circumstances. The nature and extent of his participation in registrant's scheme to defraud reveal a lack of concern

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16/ N. Sims Organ & Co., Inc., 40 S.E.C. 573 (1961)

for his customers, and the issuance of an order barring him from association with a broker or dealer is appropriate.

Portnoy's transactions were undertaken with no regard for honesty or for his customers' financial well-being. His testimony in his own behalf and on behalf of Leighton to the effect that he visited Uneeda's Vercon plant in White Plains in order to make an independent investigation of the company is rejected as a fiction, despite its corroboration by Leighton. It is part of a larger mass of Portnoy's testimony which the Hearing Examiner regards as incredible. Although some of his customers were sophisticated investors or speculators, as he contends, this does not, of course, excuse the fraudulent representations made to them. Hamilton Waters & Co., Inc., supra. The public interest requires that he be barred from association with a broker or dealer.

Jacobs testified that at the time of the hearing he was employed by a brokerage house, Arthur Kuris & Co., dealing in puts and calls, and that about 95 per cent of his business was being done with brokers rather than with members of the general public. I believe that Jacobs was unfortunately a victim of misplaced confidence in his friend, Martin Fabrikant, and that, regrettably, because of his total lack of prior experience in the securities business and his misplaced confidence, he credited the materials and information furnished him. For about eleven or twelve months of part-time employment with registrant, Jacobs accepted from Martin Fabrikant and passed on to his customers unreliable information concerning the five stocks here involved, and, in unsophisticated fashion, related Martin Fabrikant's asserted ability "to move them".

Without excusing Jacobs' faults, some little consideration is given to the obvious fact that the witness M.R.S. was much more sophisticated in the securities field than Jacobs, and that in making his investment decisions he frequently "by-passed" the salesman and relied on the assurances and advice he received from Martin Fabrikant. While the evidence and Jacobs' testimony does not indicate his transformation from a naive securities salesman in his early days of employment to one whose actions became responsible as he gained experience, there is basis in Jacobs' naivete and in his relatively frank and honest testimony at the hearing, for concluding that proper experience and exposure should have a salutary result and that permanent bar from his association with a broker or dealer may not be required in the public interest. I believe it is appropriate that Jacobs be barred from such association, provided that after a period of four months he should be permitted to apply to the Commission for authorization to re-enter the securities business on an appropriate showing that he will be adequately supervised. I conclude that an order to that effect should be issued.

Leighton was an extremely sophisticated salesman with an extended record of activity in the securities business prior to his employment by registrant. Although he continued in registrant's employ for the relatively brief period of approximately four months, there can be no question but that he was completely aware of the boiler-room techniques used by registrant and by his colleagues. His association with Portnoy

and with Aborn and Katz was close; he was well-acquainted with their tactics and selling practices, and although his own selling techniques were not so crude as Portnoy's, largely because of his intelligence, he acted without regard to what he knew were the best interests of his customers and in defiance of his obligation to them. He was also sufficiently experienced to recognize that he should not have relied on the J. Brad David letter and on other information received from registrant and the issuers of the securities he sold. The new products being developed by Uneeda were untested as profitable ventures and should not have been the basis for his representations.[17/] I reject his story that he visited the Vercon plant with Portnoy, among other portions of his testimony. The public interest requires that he be barred from association with a broker or dealer.

Abramowitz had substantial experience in the securities business prior to his employment by registrant. The small amount of his earnings over the period of his employment for approximately seven months with registrant, i.e., approximately $1375 according to the evidence, probably reflects his relatively conservative attitude towards his customers rather than a lack of ability. The two witnesses who appeared against him were not approached "cold" but had dealt with him since 1954, and they were sophisticated investors. But the evidence of his violations, albeit they resulted from bad judgment and recklessness born in an unenviable environment rather than from a deliberate intention to deceive or defraud, when viewed in the light of his exposure to and

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17/ Cf. Alexander Reid & Co., Inc., supra.

cognizance of the activities of registrant and the other salesmen, require that he be suspended from association with a broker or dealer for a period of time.

Although the cases cited by Abramowitz' counsel in his brief in support of a sanction less severe than a bar from further association with a broker or dealer are quite inapposite, and although each case must stand on its own facts with respect to the sanctions to be imposed,[18/] I agree that the ultimate sanction is not required. I believe that an order suspending Abramowitz from such association for a period of 60 days would serve the public interest.[19/]

Accordingly, IT IS ORDERED that D. Richard Engel, a/k/a Richard D. Engel, Irving Friedman, Bernard Portnoy, and Eugene E. Leighton are barred from association with a broker or dealer; that Kenneth Jacobs is barred from association with a broker or dealer, provided however that after four months from the effective date of this order he may apply to the Commission for authorization to re-enter the securities business on an appropriate showing that he will be adequately supervised; and that Nathan Abramowitz is suspended from association with a broker or dealer for a period of 60 days from the effective date of this order.

18/ Federal Communications Commission v. Woko, Inc., 329 U.S. 223, 228 (1946)

19/ To the extent that the proposed findings and conclusions submitted to the Hearing Examiner are in accord with the views set forth herein they are accepted, and to the extent they are inconsistent therewith they are expressly rejected.

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) of the Commission's Rules of Practice, this initial decision shall become the final decision of the Commission as to each of the above-named respondents unless he shall file a petition for review or the Commission determines on its own initiative to review. If any party shall timely file a petition for review or if the Commission takes action to review as to a party, this initial decision shall not become final with respect to such party.

Petition for review of this initial decision may be filed in accordance with Rule 17(b) of the Commission's Rules of Practice within 15 days from service.

Sidney Ullman
Hearing Examiner

Washington, D. C.
April 4, 1966