UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
MILLARD M. MIER JOHN E. LALICH GERALDINE C. GILLESPIE CAROLYN J. HENDRICKSON
Leo G. MacLaughlin Securities Co.
File No. 8-6926

INITIAL DECISION

Sidney Gross
Hearing Examiner

Washington, D.C.
December 27, 1966

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In the Matter of
MILLARD M. MIER JOHN E. LALICH GERALDINE G. GILLESPIE CAROLYN J. HENDRICKSON
Leo G. MacLaughlin Securities Co. File No. 8-8623

BEFORE: Sidney Gross, Hearing Examiner

APPEARANCES: Arthur W. Fred for the Division of Trading and Markets

Sheldon M. Jaffe, Esq., 756 South Broadway, Los Angeles California, 90014, for Millard M. Mier

John E. Lalich, 1546 E. Portner Street, West Covina, California, 91790, pro se

Geraldine G. Gillespie, 448 W. Harriet Street, Altadena, California, 91001, pro se

This proceeding is brought pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"). It was instituted by the order for public proceedings issued by the Securities and Exchange Commission ("Commission") dated October 14, 1964, against Leo G. MacLaughlin Securities Co. ("registrant"), Jeanne Wilkins ("Wilkins"), Millard M. Mier ("Mier"), John E. Lalich ("Lalich"), Geraldine G. Gillespie ("Gillespie"), Carolyn J. Hendrickson ("Hendrickson"), Charlene V. Thompson ("Thompson") and Wilkins doing business as Bond & Share Co. ("Bond & Share").

Registrant, together with respondents Wilkins, Thompson and Bond & Share, failed to file answers as directed in the order for proceedings. Rule 7(e) of the Commission's Rules of Practice provides that upon failure of a party to file an answer, the proceeding may be determined against him upon consideration of the order for proceedings, the allegations of which may be deemed to be true. Accordingly, on January 5, 1966, the Commission revoked the registrations as brokers and dealers of registrant and Wilkins doing business as Bond & Share and barred Wilkins and Thompson from being associated with a broker or dealer. 1/

Hendrickson defaulted by failing to appear at the hearing. 2/ Her default is referred to the Director of Office of Opinions and Review pursuant to the Commission's Statement of Organization, Article 30-6.

As to Mier, Lalich and Gillespie, the remaining respondents, the order for proceedings alleges, in substance, that they, singly and in

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1/ Securities Exchange Act Release No. 7888.

2/ Under Rule 6(e) of the Commission's Rules of Practice a person failing to appear at a hearing of which he has been duly notified shall be deemed in default and the proceeding may be determined against him upon consideration of the order for proceeding, the allegations of which may be deemed to be true.

concert with registrant and the other respondents wilfully violated the anti-fraud provisions of the Securities Act of 1933 ("Securities Act") and Exchange Act in (1) the solicitation and acceptance of orders from registrant's customers and other broker or dealers while registrant was insolvent; (2) falsely representing that securities were being offered and sold to customers of registrant "at the market" and that securities were being sold for or bought from customers of registrant at bona fide market prices; (3) falsely representing to customers for whom registrant was acting as agent that registrant was obtaining the best possible prices in the purchase and sale of securities for these customers; and (4) permitting and arranging transactions to be made through Bond & Share to the detriment of registrant's customers.[3/] The order alleges, further, that these respondents aided and abetted (a) registrant's wilfull violation of the Exchange Act in failing to promptly file amendments to its application for registration as a broker or dealer to disclose changes of ownership of its common stock and in its officers and directors and persons having similar status or functions;[4/]

3/ The anti-fraud provisions alleged to have been violated are Section 17(a) of the Securities Act, Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder. The composite effect of these provisions as applicable to this case is to make unlawful the use of the mails or means of interstate commerce in connection with the purchase or sale of any security by the use 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 the use of any other manipulative, deceptive or fraudulent device.

4/ Rule 15b3-1, (formerly 15b-2, renumbered, Release 34-7700 dated September 10, 1965), promulgated under the Exchange Act requires a broker or dealer to promptly file a correcting amendment to his application for registration if any information contained therein is or becomes inaccurate.

(b) registrant's wilfull violation of the net capital rule;[5/] (c) registrant's refusal to produce its books and records for examination by representatives of the Commission;[6/] (d) registrant's failure to keep and preserve certain of its books and records;[7/] and (e) the making of false and fictitious entries in registrant's books and records.[8/]

Proposed findings of fact, conclusions of law and briefs have been filed by the Division of Trading and Markets ("Division") and by counsel for Mier. Lalich and Gillespie appeared pro se. Neither has filed proposed findings and conclusions or briefs. However, Lalich refers to his letters to the Commission dated July 28, 1966 and September 12, 1966 in

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5/ Section 15(c)(3) of the Exchange Act prohibits the use of the mails or interstate facilities by a broker or dealer in security transactions otherwise than on a national securities exchange, in contravention of the Commission's rules prescribed thereunder providing safeguards with respect to the financial responsibility of brokers and dealers. Rule 15c1-3 provides, subject to certain exemptions not applicable here, that no broker or dealer shall permit his aggregate indebtedness to all persons to exceed 2,000 per centum of his net capital computed as specified in the rule.

6/ Section 17(a) of the Exchange Act, in substance, as pertinent here, provides that the books and records of a broker or dealer shall be subject to reasonable examination by representatives of the Commission at any time or from time to time.

7/ Section 17(a) of the Exchange Act requires registered brokers and dealers to make and keep current such books and records as the Commission may prescribe as necessary and appropriate in the public interest or for the protection of investors. Rule 17a-3 specifies the books and records which must be maintained and kept current. Rule 17a-4 specifies the books and records which must be preserved.

8/ The requirement that records be kept "obviously intends that such records be true records, and that the entries shall not be false or fictitious." Lowell, Neibuhr & Co., Inc., 18 S.E.C. 471, 475 (1945).

lieu of proposed findings.[9/] The Division has filed replies to both Mier's brief and Lalich's letters.

Registrant was a broker or dealer registered with the Commission since 1954. Late in January 1961 Frank D. Rose ('Rose"), then President of registrant, entered into a transaction involving the sale of the stock of registrant. The only evidence of the nature of the transaction is found in the testimony of the respondent, Mier, and in certain lists of stockholders prepared after the sale. Mier, an attorney, testified that he was called by a Mr. Rogers, a business broker, to "act as escrow holder of the stock". The transaction contemplated reduction of registrant's outstanding capital stock to ten shares and the issuance of certificates of stock in denominations of 9/10 of a share each to designees of the purchasers and seller except that Mier was to receive 6/10 of a share as his fee for acting as attorney or escrowee and the remaining 4/10 of a share was issued to another individual. The total purchase price was $30,000 of which $5,000 would be paid on account. All the stock was to be held in escrow by Meir pending payment of the balance of $25,000.

Many of the violations alleged in the order for proceedings are conceded or undisputed. It is necessary, however, for a full understanding of the case that they be related in some detail. It is undisputed that following the sale of registrant's stock, despite repeated written

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9/ Lalich's letter of July 28, 1966 submitted to the Commission an offer of settlement with a copy directed to the Hearing Examiner. The letter contains a variety of statements regarding Lalich's employment and duties during his tenure with registrant. The Commission rejected the offer by its response of August 31, 1966. Lalich's letter of September 12, 1966 advised that he did not have the funds to retain counsel to prepare findings and conclusions, referred to his earlier letter of July 28, 1966, announced that he did not intend to go back into the securities business and pleaded for leniency.

and oral requests by the Commission, registrant failed to promptly file amendments to its broker-dealer registration occasioned by the change of ownership of the registrant's stock, the change of directors, the change of control whereby Wilkins and Logan[10/] became persons of status and functions similar to that of officers of the registrant within the purview of item 3 of the Form BD application for registration as a broker or dealer.[11/] Nor does the record disclose the filing of an amendment consonant with the list of its officers and directors as of January 31, 1962.[12/]

Registrant's violation of the net capital rule as of May 31, 1962, at which time it had a net capital deficiency in the amount of $256.00, is not controverted.[13/] Also uncontested is registrant's

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10/ A list of stockholders dated April 7, 1961, furnished by Gillespie to a representative of the Commission at that time contains the names of twelve stockholders including Mier and Gillespie. Mier identified four of these names holding a total of 3-1/10 shares, in addition to Gillespie, a holder of 9/10 of a share, and himself, as designees of the purchasers. Gillespie identified the same persons plus one other on the list holding 9/10 of a share as either relatives or friends of Wilkins and Logan.

11/ Peoples Securities Company, 39 S.E.C. 641 (1960).

12/ The exhibit is dated January 31, 1961 erroneously. Gillespie's testimony and the letter forwarding the list to the Commission establish that the actual date was 1962.

13/ The computations resulting in this deficiency did not take into consideration an obligation by registrant to the telephone company in an amount of about $5,500 not shown on registrant's books. It may also be noted, in respect of the discussion in Mier's brief relating to the "haircut", that the deduction of 30% from the value of registrant's securities required by Rule 15c3-1(c) is mandatory without regard to the general condition of the securities market.

involvency as of June 29, 1962.

The fraud practiced by registrant on its customers in the purchase and sale of securities through Bond & Share is undisputed.[14/] The record establishes that from virtually the date of the sale of registrant's stock and throughout the remaining one and one-half years of registrant's existence it engaged in the practice of executing its customers' orders through Bond & Share. In respect of buy orders, registrant usually acted as principal. Registrant would relay its customers' orders to Bond & Share who would purchase the securities. The purchase price to the customers would be burdened with two mark-ups, one by Bond & Share and the second by registrant. Sale orders by registrant's customers, where registrant usually acted as agent, would also be executed through Bond & Share occasioning two mark-downs. Moreover, registrant was a member of the National Association of Securities Dealers ("NASD'). Bond & Share had no such membership. Bond & Share's purchases and sales for registrant's customers were transacted with NASD members. Thus, the customer also lost the benefit of the inside prices that could have been available to registrant, as an NASD member, if it had dealt directly with the NASD member who sold to or purchased from Bond & Share. It is readily apparent that the interposition of Bond & Share in these transactions operated to the detriment of registrant's customers, resulted in false representations by registrant that the prices paid were obtained by the customers were reasonably

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14/ Registrant utilized the mails in transmitting confirmations and securities in effecting transactions otherwise than on a national securities exchange.

related to the prevailing market prices,[15] was inconsistent with registrant's obligation to obtain the best possible prices for its customers in agency transactions and constituted a violation of the anti-fraud provisions of the securities acts.[16]

Nor is it disputed that registrant's books contained fictitious entries relating to transactions involving over three thousand shares of the stock of Chase Capital Corporation ("Chase"). Registrant's books disclose sales, as agent, for sixteen customers, of 3,100 shares of Chase stock at prices of 13-1/4 or 13-1/2. Investigation of ten of these names demonstrated either that they were deceased, that the addresses shown on registrant's books were non-existent and that the customers were unknown at adjacent addresses, that they were unknown at the addresses given and that they had no accounts with registrant and never owned Chase stock. Checks totalling about $20,000, either issued by registrant or through certified checks bought with registrant's funds, to the order of seven of these names carried the last endorsement of a Conrad Thompson who never was seen but whose name was traced to the office of Ten-Eyck, an alias used by Logan.[17]

15/ Landau Company, 40 S.E.C. 119, 1126 (1962).

16/ H.C. Keister & Company, Securities Exchange Act Release No. 7988 (November 1, 1966).

17/ Conrad Thompson was unknown at the address shown on his account on registrant's books. The address was identical with that of Charlene V. Thompson, a respondent herein, who originally held 9/10 share of registrant's stock and was a director of registrant. Prior to June 1962 she relinquished her stock interest in registrant and became employed by Bond & Share. Charlene Thompson told a Commission investigator she didn't know a Conrad Thompson and that her father, long since deceased, was named Charles Thimpson.

It is also undisputed that registrant failed to maintain and preserve its books and records. After registrant's offices were closed on June 29, 1962, its books were located by the Division, as stated in Division's brief, "in an unmarked office, not as MacLaughlin's address of record, under circumstances clearly indicating abandonment of the records". However, these records did not include, among other things, the minute book, the contracts of January 1961 covering sale of registrant's stock nor the various subordination agreements entered into with Mier which will be discussed infra.

Mier

The Division contends that Mier was a 'person with similar status or function" or a co-controller of registrant with Wilkins and Logan and consequently has equal responsibility with them for the registrant's various violations of the securities laws. Mier denies having such status or responsibility.

Apart from the Division's investigators, the only witnesses who testified in the proceeding were Gillespie, Mier and Lalich. Of the three, only Gillespie was called by the Division. The others took the witness stand in defense. Neither Rose nor respondents Wilkins, Thompson, Hendrickson nor any of the other nominees of the purchasers or sellers of registrant's stock were called as witnesses. Logan is deceased. The Division urges that Mier's testimony lacks substantiation

although some of the above-mentioned persons were 'no doubt, available [to Mier] for testimony, particularly Mr. Rose." But those persons were equally available to the Division. It is appropriate to state at this point that after having heard Gillespie and Mier and observed their demeanor, the Hearing Examiner is persuaded that Gillespie made every effort to recount truthfully all the facts within her knowledge and credits her testimony. On the other hand, Mier's testimony is so replete with equivocation as to warrant little, if any, reliance.

Division's position that Mier was a co-controller of registrant is predicated on the numbered contentions discussed below.

(1) Gillespie's testimony that Mier usually presided at stockholders and directors meetings and that Mier was present at luncheon meetings she attended together with Wilkins or with Wilkins and Logan to discuss registrant's business affairs; and

(2) Although Mier was attorney for registrant, registrant made no checks payable to Mier leading to the assumption that the source of his compensation was the profits fraudulently extracted from registrant's customers through the interposition of Bond & Share in the processing of their securities transactions.

Gillespie testified that she was hired as registrant's office manager by Wilkins. She requested training prior to accepting the employment and spent several days at Bond & Share's offices. She commenced her employment with registrant late in January or early February 1961 with the

title of Assistant Secretary and thereafter became registrant's Secretary and a director. It is readily apparent, however, that apart from the signing of minutes and other documents requiring the Secretary's signature, Gillespie's duties and functions were little more than that of an office worker. She acted only on instructions which she received principally from Wilkins and Logan. She reported all problems that arose to Wilkins and the latter,with Logan's participation,made all decisions. Gillespie had no knowlege of the actual beneficial ownership of registrant's stock. She was aware that a certificate of registrant's stock had been issued in her name but she never had possession of the certificate, never asked for it and did not appoint Mier, as trustee or escrowee, to hold the certificate.

Gillespie testified,further,that she met Mier through Wilkins in 1958 or 1959 and continued to meet him socially, on occasion, thereafter.Mier usually presided at stockholders and directors meetings which she attended and he sometimes was present at luncheon meetings arranged for the purpose of discussing registrant's business affairs at which Wilkins or Logan or both were also present. Mier was present when Lalich paid her off after she resigned and took part in her discussions regarding severance pay. On the other hand she stated that Mier had no desk in registrant's offices, she did not receive instructions from him relating to the transactions in Chase stock or any other facet of the operation of registrant's business, he did not supervise either registrant's salesmen or trades,he had nothing to do with registrant's day-to-day inventory or the running of the business, she never showed Mier the registrant's

financial records, she made no checks payable to Mier nor did she have knowledge of any checks made by registrant payable to Mier. Moreover, Lalich, who was registrant's President and sales manager since January 1962, also testified he had no discussions with Mier relating to registrant's business activities.

The record demonstrates that Mier was both a member of registrant's board of directors [18/] and registrant's attorney. [19/] Although obviously not conclusive, it is noteworthy that Gillespie recalls no instance, to her understanding, in which Mier acted other than as an

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18/ Although the record does not disclose the date of Mier's election to the board, the list of officers, directors and stockholders as of January 31, 1962 includes Mier as both director and a holder of 6/10 share of registrant's stock.

Mier does not deny being director and was told "at the start' that he would be a director. He testified at different points in the record that he doesn t know when he was elected a director; he was told "by someone' that it was in 1962; he doesn't recall ever being elected a director. He admitted he was a director at a hearing in an injunction proceeding against registrant instituted by the Commission during the first days of July 1962. See S.E.C. v. Leo G. MacLaughlin Securities Co., et al. (U.S.D.C., S.D. Cal., Cent. Div., 1962), No. 62-897-WM.

19/ Mier first denied that he was ever retained officially by registrant as its attorney. Later he said he didn't recall it. Still later he testified he rendered legal services to registrant from the first meeting of directors following the sale of registrant's stock until registrant closed its doors. But there is no question that Mier was the attorney for registrant. Registrant's Board of Directors adopted a resolution on February 1, 1961 making Mier "the attorney for this corporation'. Mier signed a notice of an annual meeting of stockholders dated February 16, 1962, as "attorney at law . In addition he was registrant's co-counsel in the injunction suit referred to above.

attorney. Her testimony regarding the absence of any activity on Mier's part in respect of the day-to-day operations of the registrant does not aid Division's case. Moreover, his attendance at the luncheons with Gillespie and Wilkins, and sometimes Logan, to discuss registrant's business affairs and his presence when Lalich paid Gillespie her salary following her resignation are consistent with his functions as attorney for the registrant. His presiding at meetings of the Board of Directors and stockholders is not necessarily inconsistent with his status as a member of the Board. Absent further evidence than that established by this record, none of the activities set forth above warrant the inference that Mier was co-controller of registrant. The direct and rational relation which an inference should have to the facts from which it is drawn [20/] are lacking here.

Further, the record shows that registrant made no checks payable to Mier and discloses no compensation to him other than his 6/10 share. The Division would infer from these facts that Mier's pecuniary reward must have come from the profits fraudulently obtained through the interposition of Bond & Share in registrant's transactions for its customers. But the record is completely bare of any direct or indirect evidence sufficient to justify such an inference. It appears to be pure conjecture.

(3) That Mier made four subordinated loans [21/] to registrant in order to bolster registrant's net capital ratio:

20/ Jones on Evidence, Fourth Ed., Vol. I, Sec. 104.

21/ March 14, 1961 - $5,000
August 18, 1961 - 4,500
January 31, 1962 - $4,000
February 28, 1962 - 13,600

Not all subordination agreements covering these loans have been produced and those introduced in evidence are copies furnished by Gillespie to the Commission during the course of its inspections.

Gillespie testified that the first time she was told by a Commission representative that registrant's net capital ratio was low ; she communicated this information to Wilkins. Thereafter she received funds from Mier under subordination agreement. Mier's testimony as to the circumstances surrounding these loans was to the effect that Gillespie called to tell him registrant's net capital ratio was off and registrant would be put out of business; that if Mier furnished the loan he'd be put on retainer of $50 a month; that he made these loans without seeing registrant's books but merely on the advice that registrant had ample assets to meet all obligations; that he did not know registrant's financial condition at the time he made the loans and never requested a financial statement. Having first testified that Gillespie requested the loans on each occasion and that he relied entirely on her request, he later stated that he might have asked Wilkins whether it was safe to make the loans 22/ and also that he believes Rose spoke to him about the loans on some occasions.

The Hearing Examiner agrees with the Division that Mier 's testimony that he advanced to registrant over $25,000 under subordination agreements without any information of registrant's financial condition taxes belief. Indeed, even Mier's brief states that "logic and common business practice would indicate that a creditor would see the financial statements of a company at the time a

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22/ It is noteworthy that Mier's testimony also includes the statements that he did not know, in 1961, that Wilkins had anything to do with registrant. Two of Mier's subordinated loans were made in 1961.

loan was made . . . ." Assuming, however, that the making of the loans are enough to raise the inference that Mier was aware of registrant's financial condition, a finding, predicated on this inference, that he was also a co-controller of registrant would be too remote and uncertain and not a permissible deduction from the evidence established by the record.

The Commission's decision in The Whitehall Corporation[23/] cited by the Division is not apposite. There, the Commission found that a corporate respondent, acting through its President who was also a respondent, took a leading role in the organization and financing of the applicant for registration as a broker or dealer, became its controlling stockholder of record, kept informed, in general, of applicant's activities and actively participated in certain of its activities which were found to constitute a violation of the securities laws. Assuming, as the Division argues, that Mier's subordinated loans constituted financing of registrant, the other salient factors in Whitehall are absent here and that case is clearly distinguishable from the instant matter.

(4) Division's rejection of Mier's explanations of his initial involvement with registrant and its assertion of his previous knowledge of and involvement with Wilkins and Logan:

Mier first knew Wilkins in 1957 or 1958 when he represented her in a divorce action. He continued his acquaintance with her on a social basis. He first learned of registrant through Wilkins who asked him to

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23/ 38 S.E.C. 259, 274.

examine the papers involved in a proposed purchase of registrant by Wilkins' brother-in-law. That deal fell through and was followed shortly by the sale of registrant's stock set forth above.

Gillespie first received subordinated loans from Mier after reporting to Wilkins that registrant's net capital ratio was low. Further, Mier admits he might have discussed with Wilkins the advisability of making his subordinated loans. There is little question, therefore, that Mier knew of Wilkins involvement with registrant. But such knowledge does not warrant the inference that Mier's involvement with registrant was tantamount to co-control.

Mier asserts that he first learned of Logan's connection with registrant through a reading of the order for proceedings in this case. He denies any relationship with Logan other than his attempt, in 1959, to obtain a contribution for Occidental College from Logan, who he had contacted through Wilkins. Mier denies ever having any transactions in the stock of Quail Valley Country Club ("Quail"), a predecessor of Chase. Yet the record discloses that in September 1959 Mier & Simpson[24/] drew three drafts totalling $10,500 on Carlo Thompson covering the sale of 2,100 shares of Quail stock. Mier's explanation, that he represented one, Matheson, who was attempting to obtain control of Quail Valley Country Club, is hardly consistent with the sale of 2,100 shares of Quail stock on Matheson's behalf. No other explanation for the sale is offered.

The similarities between the Quail and Chase stocks and between the names Carlo Thompson, to whom Mier sold the Quail stock, and Conrad

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24/ Then the name of Mier's law firm.

Thompson, the last endorser on checks issued in connection with the registrant's transactions in Chase stock, are self-evident. The Division relies on these similarities to support its contention that

> "All roads to the location of any one of the numerous Thompsons in the record have led to Logan. It is thus apparent that Mier had business dealings with Logan preceding the MacLaughlin take-over, and since both were involved in MacLaughlin, their common interest is reasonably inferable."

The record fails to disclose any business relationship between Mier and Logan but, rather, that the sole contact between them involved Mier's seeking of a contribution from Logan. There is no evidence, direct or indirect, no matter how remote, that Matheson was Logan, or had any relationship with Logan, or that after the sale by Mier of Quail stock in 1959 he either owned Quail or Chase stock or had any knowledge of Logan's ownership of Chase stock or any connection with registrant's transactions in Chase stock. Further, the name "Thompson" is too common to sustain an inference that Carlo Thompson was a fictitious person without additional evidence. But, even accepting Division's contentions that Carlo Thompson "leads to Logan" and that Mier, therefore, had business dealings with Logan prior to the "MacLaughlin takeover", this is hardly enough to support the "common interest" or co-control of registrant by Mier with Logan and Wilkins, urged by the Division.

(5) An unfiled and incomplete (lacking page 1) amendment to registrant's application for registration as a broker and dealer, dated March 9, 1961, and furnished to an investigator for the Commission by Gillespie in April 1961:

> The document contains the following statement over Mier's initials "Mr. Mier is the beneficial owner of the following shares:

F. D. Rose 9/10 Shs.
H. Lee Pechota 9/10 Shs.
G. Burtness 9/10 Shs.
A. Fisher 9/10 Shs.
E. L. Rose 9/10 Shs.

"The stock is split up in this manner as it is his intention to place this stock so no beneficial owner will own more than nine-tenths of one share." (Underscoring added.)

Division urges that the underscored word, "beneficial", is a typographical error and should read "record". Thus, the critical phrase would read "so no record owner will own more than nine-tenths of a share." On its face, the Division's suggestion is wholly reasonable and furnishes the only solution which would construct a meaningful sentence. Of course, the crux of the quoted portion is the opening clause, i.e., "Mr. Mier is the beneficial owner of the following shares:" on which the Division relies to reach the conclusion that Mier was the beneficial owner of forty-five per centum of registrant's stock which, when added to the 6% he had received for his services, would give him beneficial ownership of 51% of the registrant's stock and therefore control of registrant.

There is no doubt that the document constitutes an admission against Mier's interest. Whether it is sufficient to sustain Division's contention requires consideration of the other evidence in the record. The above quotation follows directly a list of the stockholders of registrant which is identical with the list referred to above dated April 7, 1961. It is pertinent that the five persons named in the quoted portion

appear to be designees of Rose, the seller.[25] To repeat, the document is dated March 9, 1961, about six weeks after the sale of registrant's stock was consummated. The testimony of Gillespie and Lalich indicates that at that time the $25,000 balance of the purchase price was still outstanding[26] and the record lacks any explanation of why Rose would transfer beneficial interest in those shares to Mier. Moreover, Rose continued to be present at registrant's offices and continued to be a factor in registrant's operations at least as late as early 1962. Lalich, seeking a new job, testified that he spoke with Rose at registrant's premises before joining registrant in January, 1962. He was in closest touch with Rose who convinced him "there was money to be made" and "it is possible to get ahold of the company and to get ahold of the stock". Rose told Lalich registrant needed a new president. Rose came in every other day. He had an office on the premises. Although Lalich became a nominal stockholder,[27] he never received the stock but was told by Hallam, then registrant's

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25/ See footnote 10, supra, where it is shown that neither Gillespie nor Mier named any of these persons as either designees of the purchasers or designees of Wilkins or Logan. Division's brief accepts Gillespie's testimony as to Wilkins' and Logan's designees.

26/ Gillespie testified that she received instructions not only from Wilkins and Logan but also from Rose "who was there as an advisor. He wanted to stay there until his money was paid, and to this day I guess it never was." Lalich learned in or after January 1962 that "moneys were coming to [Rose] on the sale of the business * * *."

27/ Lalich is included as President and the holder of 9/10 share on the list of registrant's stockholders, directors and officers dated January 31, 1962.

cashier, and Rose that he would have an option to buy the stock if he stayed with registrant for one year.

In the absence of any evidence furnishing a reasonable explanation consistent with both Rose's continued presence at registrant's premises for the purpose of protecting the unpaid portion of the purchase price of the stock and the unfiled proposed amendment to the Form BD, the Hearing Examiner is constrained to the view that the weight of the evidence overcomes the purport of the unfiled document and supports the conclusion that Mier was not beneficial owner of the 45% of the registrant's stock referred to therein.

Each of the matters urged above by the Division as establishing Mier's co-control of registrant has been considered separately. But even when taken together, the facts as to Mier's relationship to registrant and its controllers and the permissible inferences therefrom do not warrant a finding of co-control by Mier.

Perhaps the record fails to present the complete background of Mier's relationship with Wilkins, Logan and registrant, the sale of registrant's stock and the part played by Mier in registrant's activities thereafter. But the record constitutes the boundaries of the decisional process. So much of the circumstances which the record does disclose may justifiably arouse many suspicions. However, suspicions are not evidence. Nor can Mier's denials and the general unreliability of his testimony serve as the basis for findings of fact not predicated on evidence contained in the record.

The Division also relies upon the following two occurrences on June 29, 1962, the date on which registrant closed its doors:

(6) Mier's subordinated funds and securities totalling over $27,000 were returned to him by registrant; and

(7) Mier denied the Commission access to registrant's books and records:

On June 29, 1962, registrant closed its doors, On the same day Mier obtained repayment of the cash and securities which were the subject matter of the subordination agreements.[28/] As shown above, as of May 31, 1962, registrant had a net capital deficiency of $256 without consideration of an unrecorded liability of $5,500. After withdrawal of the subordinated funds and securities registrant had a net capital deficiency of over $28,000 as of June 30, 1962,without regard to the aforesaid unrecorded liability. Division's computations also disclose that as of June 30, 1962, registrant had a deficit of $9,196.00 and was insolvent.[29/]

28/ Mier's explanation of the circumstances surrounding the return to him of about $27,000 in cash and securities is typically conflicting. He testified, first, that the cash and securities were sent to him. He was told registrant "was closed down and they were returning my securities." After a few pages of transcript his testimony continues, in substance, as follows: He denies requesting that they be delivered; he doesn't believe he was informed to expect to receive the cash and securities and he thinks the delivery was a surprise to him; he doesn't know who sent them; he thinks they came in the mail but doesn't recall; they probably were personally delivered; there was no accompanying letter; he doesn't know who instructed that they be delivered to him. In the light of the surrounding circumstances and the testimony quoted above, it is manifest that Mier knew that registrant had closed its doors when he received the cash and securities.

29/ The June 30, 1962 figures, which are unchallenged, do not include the subordinated funds and securities since they had been returned to Mier. As of May 31, 1962, registrant's books indicated it was barely solvent. Apparently this result did not include obligations to trade creditors about which the Division did not learn until sometime in June, 1962.

By June 29, 1962 the registrant was virtually stripped of its officers. Gillespie, Cyril Hallam, registrant's cashier and Assistant Secretary and Stanley M. Freeman, its Vice President, all resigned on June 25, 1962. Lalich, its President, resigned on June 28, 1962. Hendrickson, theretofore a bookkeeper for registrant [30/] and its Assistant Secretary replaced Gillespie as Secretary.[31/] Perhaps, therefore, as of June 29, 1962, Mier might have been described as the senior official remaining with the company. But whether he thereby became a co-controller of the registrant on that date and therefore bears responsibility for the consequences of the withdrawal of his subordinated cash and securities is of no import since that action, although constituting a breach of the subordination agreements,[32/] did not result in violations of either the net capital rule or the prohibitions against engaging in business while insolvent.

30/ Gillespie testified that Hendrickson was registrant's bookkeeper until she (Gillespie) resigned.

31/ The minutes of a special meeting of the Board of Directors held on June 25, 1962 report the election of Hendrickson as Secretary and refer to Robert Dukat as cashier. Howard W. Rhodes, co-counsel with Mier for registrant and Hendrickson, advised the court at the hearing in the injunction proceeding held on July 5, 1962, that as far as he knew Hendrickson was the only officer of the registrant.

32/ Copies of agreements made "as of March 1, 1961" and "as of February 21, 1962" covering loans of $5,000 and $9,500, respectively, are in evidence and contain the provisions required by Rule 15c3-1 under the Exchange Act. The registrant's books carry the advance of securities as a subordinated loan as of February 28, 1962, as shown in footnote 21, supra.

Violations of the net capital rule and the proscriptions involving insolvency are predicated upon the use of the mails or means or instrumentalities in interstate commerce in the "offer or sale of any security"[33/] or "in connection with the purchase and sale of any security"[34/] or "to effect any transaction in, or induce the purchase or sale of, any security."[35/] The record is devoid of any probative evidence that registrant offered or effected any transaction in securities between June 29, 1962, the date on which Mier withdrew the subordinated cash and securities, and July 5, 1962, the date on which he returned them following the hearing in the injunction proceeding held on that day. Indeed, it appears that upon registrant's refusal on June 29, 1962 to permit the Commission's representative to examine registrant's books and records, (discussed infra,) the Commission forthwith obtained a temporary injunction. Sometime after registrant closed its doors it commenced liquidation. But none of the schedules introduced in evidence by the Division based upon registrant's books and records disclose transactions beyond June 28, 1962 with the exception of certain notations of payment on the schedule entitled "Customers Accounts as of June 30, 1962." However, none of those notations indicate any payment earlier than July 6, 1962, after the subordinated cash and securities had been returned by Meir.

It is concluded, therefore, that the allegations that Mier wilfully violated or aided and abetted in registrant's willful violations of the securities laws in respect of registrant's net capital deficiency and insolvency as of June 29, 1962 have not been proven. Since the record

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33/ Securities Act, Section 17(a).

34/ Exchange Act, Section 10(b).

35/ Exchange Act, Section 15(c)(1).

does not establish that Mier was a co-controller of registrant prior to June 29, 1962 he was not responsible for registrant's earlier violations.

Mier's refusal on the afternoon of June 29, 1962, to permit the Commission's representative (who was present on registrant's premises) to examine registrant's books is not contested. Section 17(a) of the Exchange Act provides that registrant's books and records are subject to reasonable examination by Commission representatives.

During the morning of June 29, 1962, both Hendrickson and Dukat refused to permit continuation of the inspection of the registrant's books which the Commission had begun on June 28, 1962. Hendrickson said she had been so instructed but did not say who had issued those instructions. The inspector then asked to speak to Mier and waited in registrant's office. Mier telephoned early that afternoon and told the inspector he would not be permitted to examine the books and records. No explanation was offered at that time. Mier's belated excuse that the company was attempting to clarify its financial and bookkeeping position is unacceptable. The Commission was entitled to full cooperation. There is no reason why, with reasonable cooperation, an inspection could not have proceeded side by side with registrant's own work on its books.[36/]

36/ Although the Court's response during the course of the hearing on the injunction to the Commission's request for instant inspection, i.e., that there didn't seem to be any harm in the Commission withholding its inspection "until Monday", may serve to mitigate or absolve registrant's denial of access to its books and records on July 5, 1962, the Court's statement may not be used as a retroactive excuse.

It is unnecessary to determine, in respect of this situation, whether Mier became a co-controller on June 29, 1962 by reason of registrant's lack of responsible officers. Moreover, whatever question may arise as to Mier's responsibility, as an attorney, for the improper advice to his client need not concern us here. Mier became personally involved by reason of the return of his subordinated cash and securities on the same day he denied the Commission access to registrant's books and records. Manifestly, Mier aided registrant's deliberate disregard of the obligations imposed on it by the Exchange Act.[37/] The inference that Mier's denial was tied to a desire to prevent disclosure of his withdrawal of the subordinated loans is inescapable. It is pertinent that his "voluntary" return of the cash and securities to registrant was not offered until after the injunction action had been instituted.

Accordingly, the Hearing Examiner concludes that Mier aided and abetted in registrant's willful violation of Section 17(a) of the Exchange Act.

Lalich

Lalich commenced his employment with registrant at the beginning of January 1962. Since that time and until his resignation on or about June 28, 1962, he was its President, a director and holder of record of 9/10 of a share of registrant's stock. Division urges that he is accountable for all of registrant's violations which occurred prior to his resignation on June 28, 1962.

Gillespie testified that Lalich had been hired as President and sales manager and that she had been told by Wilkins that she was to take orders from Lalich who was in complete charge of registrant's

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37/ Whitney-Phoenix Company, Inc., 39 S.E.C. 245 (1959)

office. However, her testimony indicates, further, that the instructions she actually took from Lalich had no relation to the operation of the business apart from Lalich's function as a salesman and sales manager. In some respects, including the circumstances surrounding his employment with registrant and the date of such employment, Lalich's testimony was vague and evasive,[38/] Those portions of his testimony relating to his actual activities are sustained by the record or remain unchallenged, i.e., that he was sales manager; his only compensation was his straight commission on his own activities as a salesman and an override on the commissions of other salesmen; he did not sign checks, check confirmations, interfere with the cashier department or do any "detail work." The agreement entered into between Lalich and registrant, dated January 3, 1962,[39/] confirms his testimony as to his employment as sales manager, the nature of his compensation and the fact that he had nothing more than an option to purchase the 9/10 share recorded in his name.

38/ Although Lalich persisted in his denial that he did not start with registrant before late January or early February 1962, an amendment to registrant's Form BD filed with the Commission on January 19, 1962 was executed by Lalich, as President, on January 2, 1962.

39/ This agreement was submitted by Lalich as an attachment to his offer of settlement of July 28, 1966. Since Lalich appeared without counsel and the Division has filed a brief replying to Lalich's letters, the Hearing Examiner gives consideration to his letters to the Commission and to the agreement.

In accepting the presidency of registrant, Lalich also accepted the responsibilities imposed on him by that office which he cannot escape by pleading ignorance of the actual operations of registrant. Even assuming that despite his regular day-to-day presence at registrant's offices as salesman and sales manager he was completely unaware of the registrant's violations of the securities laws during the period of his employment he nevertheless, as President, shares the responsibility therefore.[40/] He knowingly assumed the office of chief executive of registrant and whatever private arrangement he may have made cannot diminish the sphere of his public responsibility. Unlike other cases in which the Commission has exonerated officers or partners of registered brokers or dealers on the ground that they did not have responsibility in the area in which the violations occurred, Lalich was not an absentee official,[41/] but rather, the chief executive of registrant and held himself out as such.[42/]

Additionally, an analysis of the account of Florence Monaghan ("Monaghan") discloses that between March 8, 1962 and June 20, 1962 registrant effected a substantial number of purchases of securities on her behalf, all through Bond & Share and all involving double mark-ups resulting from the interposition of Bond & Share discussed in detail above. Monaghan was Lalich's customer. He had been a

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40/ John T. Pollard & Co., Inc., 38 S.E.C. 594 (1958); Aldrich Scott & Co., Inc., 40 S.E.C. 775 (1961).

41/ H.C. Keister & Company, supra.

42/ Cf. Schmidt, Sharp, McCabe & Company, Incorporated, Securities Exchange Act Release No. 7690 (August 30, 1965); Midwest Planned Investment, Inc., Securities Exchange Act Release No. 7564 (March 26, 1965).

registered representative since 1956. Certainly, in his position as sales manager and as an experienced salesman, Lalich knew or should have known of the interposition of Bond & Share in his customers' transactions. The analysis of Monaghan's account discloses purchases of utilities and bank stocks, among others, many of which were listed on the New York Stock Exchange. Lalich knew or should have known the market prices of these securities and knew or should have known that these transactions were subject to double mark-ups.

Monaghan's letter of May 25, 1962, submitted to the Commission by Lalich with his letter of July 28, 1966, authorizes Lalich to sell "certain" of her securities to establish tax losses. The letter is not relevant, first, because the transactions in which Bond & Share was interposed were purchases rather than sales and second, because, in any event, a substantial majority of these transactions had already occurred prior to the date of her letter.

Accordingly, on the basis of the record and the foregoing the Hearing Examiner concludes that Lalich aided and abetted in registrant's willful violations of the securities laws alleged in the order for proceedings which occurred prior to his resignation on June 28, 1962.

Gillespie

The pertinent aspects of Gillespie's role in registrant's activities have been set forth above. She did nothing without instruction from Wilkins, Logan or Rose. The Division urges

that by reason of her position as Secretary of registrant she be held to have willfully violated and aided and abetted in registrant's willful violations of the securities laws. Division's brief admits, however, that her functions were entirely clerical and administrative having no relationship with the public; she was totally inexperienced in the securities field prior to her employment with registrant "who capitalized on her inexperience and gullibility" and resigned from registrant when she became aware of irregularities; she was completely cooperative with the Commission during the investigation and in the course of these proceedings.

Since it is evident that Gillespie had no responsibility in the areas in which registrant's violations occurred[43/] and in the light of the other factors present here it is concluded that no violations should be found against her.

Public Interest

Mier has been a member of the bar since 1925. He is now 71 years of age. This was his first relationship with any aspect of the securities business. He testified, and reiterated in his brief, that he has no intention of engaging in the securities business in the future. Although Mier's asserted unfamiliarity "with the intracacies of regulatory statutes" cannot negate the violation resulting from

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43/ Cf. Schmidt, Sharp, McCabe & Company, supra.

his refusal to allow the Commission access to the registrant's books and records, it came at a time when the registrant had closed its doors and shortly thereafter commenced its liquidation. There is no evidence that any investor suffered harm as a result of his denial.

The irresponsibility of Mier's testimony has not been overlooked. But in view of Mier's advanced age, his expressed intention not to engage in the securities business and the nature and effect of the violation found against him, the Hearing Examiner believes that the publicity attendant both these proceedings and the finding of the violations herein are enough. No further sanction need be imposed.

Lalich has been in the securities business since 1956. In a decision dated February 27, 1963, the NASD revoked Lalich's registration as a registered representative for excessive trading activity in his customers' accounts.[44/] His letter of September 12, 1966 states that he does not intend to go back into the securities business.

The background of Lalich's acceptance of the position of registrant's President remains obscure. His employment agreement contains no mention of the Presidency. The fact that registrant filed a Form BD amendment, signed by Lalich, as President, on January 2, 1962, belies his assertionsthat (1) he did not commence his employment until late January or early February and (2) that he was told they needed a president after he commenced his employment. Thus, his frankness and cooperation in a Commission proceeding leaves much to be desired.

44/ District Business Committee No. 2 v. Marache & Co. and John E. Lalich, Complaint No. A-182.

Moreover, assuming nothing more than Lalich's unfamiliarity with the responsibilities of his office,[45/] it is readily apparent that he should not be associated with a broker or dealer in an executive supervisory capacity. When added to (1) the fact that his own client was subjected to fraud resulting from the interposition of Bond & Share in her transactions of which he was or should have been aware both as her representative and as sales manager, and (2) the revocation by the NASD of his registration as a registered representative for excessive trading in customers' accounts prior to his association with registrant, it becomes evident that, in the public interest, his intention to stay out of the securities business should not be subject to unilateral reversal without the Commission's consent. Lalich therefore, should be barred from association with a broker or dealer. Accordingly,

IT IS ORDERED that John E. Lalich be, and he hereby is, barred from being associated with a broker or dealer.[46/]

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(b) of the Commission's Rules of Practice a party may file a petition for Commission review of this initial decision within 15 days after service thereof on him. Pursuant to Rule 17(f) this initial decision shall become the final decision of the Commission as to

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45/ Lalich's letter of July 28, 1966 to the Commission states: "I fully realize now how foolish and uninformed I was to have accepted the title of president without realizing the responsibilities which were attached.

46/ 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.

each party unless he files a petition for review pursuant to Rule 17(b) or the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition to review or the Commission takes action to review as to a party, this initial decision shall not become final as to that party.

Sidney Gross
Hearing Examiner

Washington, D. C.
December 27, 1966