UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

FILE COPY

In the Matter of

M. J. MERRITT & CO., INC.
54 Wall Street
New York, New York

File No. 8-7416

RECOMMENDED DECISION

SIDNEY L. FEILER
Hearing Examiner

Washington, D. C.

July 30, 1964.

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RECOMMENDED DECISION

APPEARANCES:

Messrs. Jack Becker, Haig M. Casparian and John T. Sullivan, for the Division of Trading and Markets.

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pro se.

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for Charles Nardi.

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BEFORE: SIDNELY L. FEILER, HEARING EXAMINER

I. THE PROCEEDINGS

These are proceedings pursuant to Section 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether it is in the public interest to revoke the registration as a broker and dealer of M. J. Merritt & Co., Inc. ("the registrant"); whether, pending final determination of the question of revocation, it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration of the registrant; whether it is necessary or appropriate in the public interest or for the protection of investors to suspend for a period not exceeding twelve (12) months or to expel registrant from membership in the National Association of Securities Dealers, Inc.; whether, within the meaning of Section 15A(b)(4) of the Exchange Act the Commission should find that Matthew J. Merritt, Jr., James S. Vickers, Henry G. Vickers, Charles Nardi, alleged principals of the registrant, and Edward Abramson, William Perles, Lloyd Fetner, Robert Sharon, Burton W. Teague, Jules Winters, John Costiera, William Downey, Robert Hines, Earle Sperer, Paul Walker and Richard Treistman, salesmen of the registrant, are causes of any order of revocation, suspension or expulsion which may be entered herein; [1/] and whether a notice of withdrawal from registration filed by the registrant, but which has not become effective, should be permitted to become effective, and if so, whether it is necessary in the public interest or for the protection of investors to impose terms and

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1/ Merritt, James S. Vickers, and Charles Nardi were principals in the registrant. The status of Henry G. Vickers is in dispute. The others named, at all times material, were salesmen of the registrant.

conditions upon which the said notice of withdrawal may be permitted to become effective.

The matters put in issue by the order for these proceedings are:

A. Whether, during the period from June 18, 1959 to the date of the order (November 20, 1962) Henry G. Vickers participated in and directed the business operations of registrant and was a person directly and indirectly controlling it and that registrant willfully violated Section 15(b) of the Exchange Act and Rule 17 CFR 240.15b-1 thereunder and Merritt, James S. Vickers, Henry G. Vickers and Charles Nardi aided and abetted such willful violation in that they singly and in concert made statements in registrant's application for registration and in documents supplemental thereto which were at the time and in the light of the circumstances under which they were made, false and misleading with respect to statements that no person not named in said application and amendments directly and indirectly controlled the business of registrant when, in fact, Henry G. Vickers directly and indirectly controlled the business of registrant. It is further alleged that statements were made in registrant's application for registration and numerous amendments thereto that no person controlling or controlled by registrant had been found by the Commission to have violated any provision of the Exchange Act or the Securities Act of 1933 when, in fact, Henry G. Vickers had

been found by the Commission to have violated a provision of the Exchange Act and a rule thereunder.[2/]

B. Whether, during the period above mentioned registrant willfully violated Section 15(b) of the Exchange Act and Rule 17 CFR 240.15b-2 thereunder and Merritt, James S. Vickers, Henry G. Vickers and Charles Nardi aided and abetted such violation, in that registrant failed to promptly file an amendment correcting the alleged inaccuracy of the information supplied in registrant's application for registration and amendments thereto.[3/]

C. Whether, during the period from about May 31, 1960 to about August 31, 1961, the registrant willfully violated Section 15(c)(3) of the Exchange Act and Rule 17 CFR 240.15c3-1 thereunder, the net capital rule, and Merritt, James S. Vickers and Henry G. Vickers aided and abetted such violations.[4/]

2/ By order dated April 30, 1959 the Commission revoked the broker-dealer registration of Vickers Brothers and expelled it from membership in the National Association of Securities Dealers, Inc. upon a finding that Vickers Brothers willfully violated the net capital provisions of the Exchange Act and applicable rules promulgated by the Commission thereunder and that Henry G. Vickers, one of its general partners, was a cause of the order of revocation and expulsion (39 S.E.C. 83, 1959).

3/ Every registered broker-dealer, pursuant to these provisions, is required to promptly file an amendment to its broker-dealer registration if the information contained in the original application or any amendment supplemental thereto is or becomes inaccurate for any reason.

4/ A registered broker-dealer, pursuant to the above provisions is prohibited from making use of the means and instrumentalities of interstate commerce to effect transactions in and to induce the sale of securities, otherwise than on a national securities exchange, when the aggregate indebtedness of the registrant exceeds two thousand per centum of its net capital.

D. Whether, during the period from about April, 1959 to the date of the order, the registrant, Merritt, James S. Vickers, Henry G. Vickers, Charles Nardi and registrant's salesmen above named willfully violated the anti-fraud provisions of the Securities Acts 5/ in the offer and sale of the common stock of Minerals Corporation of America, Inc. (Minerals) and in connection therewith they made false and misleading statements of material facts and omitted to state material facts to purchasers and prospective purchasers of Minerals stock and engaged in other conduct and activities which constituted a fraud and deceit upon certain persons.

Pursuant to notice, a hearing was held in New York, N. Y. before the undersigned Hearing Examiner. No appearances were made on behalf of Burton W. Teague and Jules Winters. The records of the Commission show that the original order for these proceedings was served upon both of these respondents (File No. 8-7416-1-1, Postoffice receipts Nos. 812566 and 812570). Earle Sperer has signed a stipulation consenting to the entry of an order finding that he had violated the Securities Acts as charged in the order for the proceeding and finding him a cause of any order of revocation issued against the registrant, as charged. Edward Abramson, in the course of an investigation, entered into a stipulation

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5/ 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 (17 CFR 240.10b-5 and 15c1-2) thereunder are sometimes referred to as the anti-fraud provisions of the Securities Acts. The composite effect of these provisions, as applicable here, is to make unlawful the use of the mails or interstate facilities in connection with the offer or sale of any security by means of a device or scheme to defraud or untrue or misleading statements of a material fact, or any act, practice, or course of conduct which operates or would operate as a fraud or deceit upon a customer or by means of any other manipulative or fraudulent device.

similar in content to that outlined above.

All parties named in the order for the proceedings, except those specifically mentioned above, appeared either by counsel or in person. All parties were afforded full opportunity to be heard and to examine and cross-examine witnesses. At the conclusion of the presentation of evidence, opportunity was afforded the parties to state their positions orally on the record. Oral argument was waived. Opportunity was then afforded the parties for filing proposed findings of fact and conclusions of law, or both, together with briefs in support thereof. Proposed findings and briefs were submitted by the Division and on behalf of most of the respondents.

Upon the entire record and from his observation of the witnesses, the undersigned makes the following:

II. FINDINGS OF FACT

A. The registrant

1. The registrant has been registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Act since June 18, 1959 and its registration is still in effect. On October 23, 1962, registrant filed a notice of withdrawal of its registration, which withdrawal has not become effective.

2. Matthew J. Merritt, Jr. is president, a director and owner of 10% or more of the common and preferred stock of the registrant.

3. James S. Vickers was originally reported to be an officer, director and owner of 10% or more of the common stock of the registrant until reported to be no longer such in an amendment filed on April 12,

1961.

4. Charles Nardi is a vice-president and director of the registrant.

5. The registrant is a member of the National Association of Securities Dealers, Inc., a national securities association registered pursuant to Section 15A of the Exchange Act.

6. The registrant is permanently enjoined by an order of the United States District Court for the Southern District of New York, entered on or about April 25, 1961, by consent, from further violating the net capital provisions of the Exchange Act and rules promulgated thereunder.

Connection of Henry G. Vickers with the registrant

7. It is alleged that in the period here relevant, Henry G. Vickers participated in and directed the business operations of the registrant and was a person directly and indirectly controlling it.

8. Henry G. Vickers owned a 90% interest in Vickers Brothers, a registered broker-dealer. As previously noted, on April 30, 1959 the Commission, on a stipulation and consent joined in by Vickers, found that Vickers Brothers had willfully violated the net capital rule. It ordered the revocation of the registration of Vickers Brothers and its expulsion from membership in the N.A.S.D. and named Henry G. Vickers and Norman L. Martin, another partner of the firm, as causes of the order of revocation and expulsion.

9. This registrant filed its application for registration on April 27, 1959. Its then three principals had previously been associated with Vickers Brothers. The new firm listed the Vickers Brothers

address, 37 Wall Street, New York, N. Y. as its own and when its registration became effective, it took over the premises occupied by Vickers Brothers and the remaining portion of the lease which, by its terms, expired in July, 1960. Henry G. Vickers transferred the furniture and fixtures and the customer card files of Vickers Brothers, as well as some of its stationery supplies, to James S. Vickers. According to both James and Henry Vickers, this transfer was in discharge of an indebtedness. James S. Vickers in turn transferred this property to the registrant as his capital contribution to the firm.

10. Henry G. Vickers was permitted to maintain the records of Vickers Brothers on the premises of the registrant until about June, 1960. When he was on the registrant's premises, on the average several days a week, Henry G. Vickers used the desk of James F. Vickers and had his nameplate on the desk or used the conference room. No rent was charged. At or about the time the lease on the premises at 37 Wall Street expired, his books and records were moved by Henry G.Vickers to Connecticut.

11. It is contended, on behalf of Henry G. Vickers, that he was on the premises at 37 Wall Street intermittently from approximately June, 1959 to June, 1960 for the sole purpose of winding up the affairs of Vickers Brothers and that the books and records of Vickers Brothers were kept on the registrant's premises as a matter of convenience and to permit Norman L. Martin, the registrant's cashier, who also had previously been associated with Vickers Brothers, to assist in working on the latter's books and records. The Division contends that in addition to any work he may have been doing on the books and records of Vickers Brothers, Henry

G. Vickers also directed the business operations of the registrant. It is undisputed that after the registrant moved from 37 Wall Street in July, 1960, Henry G. Vickers did not visit the offices of the registrant except three or four times and that he conducted no business from there.

12. As part of its liquidation activities, Vickers Brothers maintained a customer's account with the registrant which was under the control of Henry G. Vickers. This account was closed out prior to the removal of the registrant from the Wall Street premises. A good deal of the evidence on the issue of control relates to the activities of Vickers Brothers and Henry G. Vickers in the shares of Minerals. Vickers Brothers had been the underwriter of an issue of 300,000 shares of Minerals at an offering price of $1 per share. The Offering Circular is dated May 4, 1955. As of April, 1959, Vickers Brothers owned 47,000 shares of Minerals stock and these shares were liquidated through the registrant during the period July, 1959 through April, 1960.

13. In addition, Vickers Brothers had loaned Minerals $24,000 in 1956 or 1957 and $19,000 was advanced by certain individuals to Minerals through Vickers Brothers in 1957. These debts were outstanding while Henry Vickers made use of the registrant's premises. The debts were not satisfied until September, 1960 when 500,000 shares of Minerals were received by Vickers Brothers in discharge of both debts. Of this amount Vickers Brothers retained 300,000 shares. These shares, which were investment stock, were turned over to Merritt by Henry Vickers in October, 1960. Vickers maintained the transaction was a loan of stock; Merritt testified that they were received in satisfaction of a debt.

14. Henry Vickers followed closely merger negotiations in the spring of 1960 involving Minerals. He attended negotiation meetings and went with Merritt and others to Florida to inspect properties involved in the pending Merger.

15. Michael S. Snyder was employed as a trader for the registrant from July, 1959 until the early part of 1960. He testified that he took his orders from Merritt, Nardi, and James Vickers. One time when they were not available, he obtained a quotation on Minerals from Henry Vickers. Vickers also gave him about three or four trading orders, he declared, which Snyder executed. One of these was a sale of Minerals stock which Snyder executed after obtaining Merritt's approval.

16. Snyder also recalled that Henry Vickers attended a sales meeting together with the president of Minerals and answered questions. Snyder also obtained additional information on Minerals from Henry Vickers from time to time.

17. Joel K. Plattner was employed by the registrant as assistant trader to Snyder from December, 1959 until the latter left. Then he became the trader. He testified that the registrant maintained a market in Minerals, although there was not trading every day. While Snyder was employed, he obtained quotations from him. Afterwards, according to Plattner, he received daily quotations from Merritt, James Vickers, or Henry Vickers, whoever was available at the time (Tr. 747). He could not estimate how many times he received quotations from Henry Vickers, asserted that it was more than once or twice but that he could not say whether it was as much as twenty or thirty-five. He recalled asking

Henry Vickers for a quotation on Minerals on one occasion and being referred to another brokerage house. He further testified at another point he obtained quotations about once a week (Tr. 1019).

18. There is additional evidence that Henry Vickers attended sales meetings of the registrant and gave the salesman information on Minerals. Robert Hines recalled being present at one meeting addressed by Henry Vickers. John Costa estimated that Henry Vickers spoke to three or four such meetings. Merritt testified that he asked Henry Vickers to speak on one occasion.

19. The Division also relies upon an alleged sale of Minerals stock by Henry G. Vickers on behalf of the registrant to one of its customers, Miss M.E.B. Miss B. had bought Minerals stock in 1955 from Vickers Brothers, through Henry G. Vickers, when he was a member in that firm. Miss B. testified that in July, 1960 she received a telephone call from a person who identified himself as Henry A. Vickers, associated with the registrant. The caller made certain statements to her about Minerals and its future, and stated that a purchase at that time would average down the cost of the total stock she had purchased. Miss B. did not want to make the investment, according to her testimony.

20. A few days after this conversation Miss B. received a confirmation from the registrant, dated July 15, 1960, for 500 shares of Minerals at a price of $225 (Div. Ex. 22). She did not make any remittance even though she received two notices from the registrant to remit the amount.

21. She received a follow-up telephone call severaldays after the second notice requesting payment, Miss B. testified, from a man who identified himself as Mr. Vickers. He demanded payment and became angry when Miss B. stated that she had not ordered the stock and did not intend to pay for it.

22. Henry G. Vickers denied having any transactions with Miss B. after he sold her stock in 1955. It is pointed out that the purported sale to Miss B. took place in mid-July, 1960, which was after the period that Henry G. Vickers testified he had taken his possessions from the offices of the registrant. Furthermore, the confirmation of the transaction bears the initials "EA", the initials of a salesman of the registrant. Miss B. also testified that the person who called her gave her the name Henry A. Vickers rather than the middle initial "G", the correct middle initial of Henry G. Vickers.

23. There is no evidence that Henry G. Vickers made or attempted to make any sales of stock on behalf of the registrant except this one transaction. In view of this fact and the other factors involved here, particularly the initials appearing on the confirmation and the evidence that this transaction took place at a time when Henry G. Vickers had either moved out of the registrant's offices or was in the process of doing so, the undersigned credits the testimony of Henry G. Vickers that he never dealt with Miss B. in 1960. It is clear, however, that Miss B. did receive telephone calls from a person who acted on behalf of the registrant. Details of those conversations are admissible against the registrant, therefore, and will be dealt with in another section of this

decision. The undersigned credits Miss B.'s testimony that the person who telephoned her on behalf of the registrant used the name Henry Vickers, but he credits Henry G. Vicker's denial that he was the one who made the telephone call referred to in Miss B.'s testimony. 6/

24. The Division further contends that Vickers Brothers, through Henry G. Vickers, acted for the registrant in certain transactions involving purchases of Minerals stock by J.C.A. Mr. A. invested a sum of money in registrant's stock in June, 1959. Some time prior thereto, he had been shown an outline of a proposal to set up a new brokerage firm which would include Henry G. Vickers. There is no proof that Henry G. Vickers had anything to do with the drafting of this outline. Actually Mr. A. made his investment in the registrant at the suggestion of Burton W. Teague, also one of the investors in the registrant who acted as a salesman.

25. Mr. A. purchased 10,000 shares of Minerals from Vickers Brothers on or about February 27, 1959 (Div. Ex. 152). He received an acknowledgment of his payment from Vickers Brothers and a receipt for the shares which were being held in safekeeping for his account (Div. Ex. 149).

26. According to Mr. A., he purchased an additional 20,000 shares of Minerals from the registrant through Teague on or about October 15, 1959. He first received a confirmation bearing the legend "FOR INVESTMENT PURPOSES ONLY" (Div. Ex. 153). Mr. A. testified that he protested to Teague about the use of this legend and received a second confirmation labelled "DUPLICATE CONFIRMATION" bearing the same information as the

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6/ See N. Sims Organ & Co., Inc., 40 S.E.C. 573, 576 (1961); aff'd 293 F. 2d 78 (1961); cert. denied 368 U.S. 968 (1962); U.S. v. Benjamin, 328 F. 2d 854, 861 (1964).

previous confirmation except that the legend was omitted (Div. Ex. 150).

27. Prior to his purchase from the registrant, Mr. W. received letters from Vickers Brothers notifying him that the firm of Vickers Brothers was being liquidated and to advise whether he wished to have his stock left in safekeeping with the registrant or wished to make some other arrangements (Div. Ex. 156, 157 and 158). Mr. A. requested that the stock be forwarded to him but, according to his testimony, this was not done (Div. Exs. 159 and 160). By letter dated June 27, 1960, on the stationery of Vickers Brothers, Henry G. Vickers advised Mr. A. that Vickers Brothers were holding 30,000 shares of Minerals for his account and that this stock would be transferred as soon as certain matters were cleared up (Div. Ex. 154).

28. Mr. A. further testified that after receipt of the aforementioned letter, he received three certificates for 10,000 shares each with the endorsement on the back reading "Vickers Brothers". Mr. A. wrote to Teague on November 21, 1960 objecting to the endorsement and asked Teague to obtain for him "proper instruments of ownership in my own name" (Div. Ex. 155). A. never did receive any certificates.

29. Henry G. Vickers recalled that Vickers Brothers had some transactions with Mr. A. in Minerals stock. He was vague as to the details of the transaction but thought that A. had bought some stock from Vickers Brothers and was given some investment stock in lieu of it (Tr. 1817-1821). He denied that any stock that A. received from Vickers Brothers had anything to do with any dealings that A. had had with the registrant in Minerals stock.

30. Merritt testified that the confirmation sent Mr. A. for 20,000 shares on the stationery of registrant was never sent by it and that no payment was received for the amount indicated on the confirmation, and that the registrant's ledgers did not reflect the transaction (Tr. 2543-2553).

31. However, there is documentary proof that A. mailed a check to the registrant within twelve days of the alleged sale to him in the exact amount required by the confirmation (Div. Ex. 161) and that the check was deposited to the credit of the registrant (Div. Exs. 162 and 163). Under all the circumstances, the undersigned concludes that the registrant was obligated in October, 1959 to make delivery of 20,000 shares of Minerals and in the transaction had acted as broker for Mr. A. There is no proof that any such delivery was made other than the transactions Mr. A. had with Vickers Brothers. Henry G. Vickers was very uncertain as to why his firm would have delivered 30,000 shares of Minerals to Mr. A. when it was obligated to deliver just 10,000. While he speculated as to what the reason might be, no evidence was submitted to fortify his surmise. Under the circumstances, the undersigned concludes that the evidence establishes that some arrangement was entered into by and between the registrant and Vickers Brothers, through Henry G. Vickers, whereby the obligation of the registrant to deliver 20,000 shares of Minerals to Mr. A. was assumed by Vickers Brothers which then had substantial holdings of that stock.

32. It is clear that Henry G. Vickers was given special treatment on the premises of the registrant. This was due to his friendship with the principals, the association of his brother with the registrant, and his part in mutually satisfactory arrangements whereby the registrant took over the lease of the premises from Vickers Brothers. However, there is no proof that Henry G. Vickers made any monetary investment in the registrant or owned any stock. There is no proof that he acted for the registrant in transactions with customers in the purchase or sale of stock. In the one instance where such evidence was presented, that in the case of Miss M.E.B., it has been concluded that it was not established that Henry G. Vickers took part in the transactions involved.

33. It has been found that both the oral and written evidence presented establishes that Henry G. Vickers, acting for Vickers Brothers, assumed the obligation of the registrant to deliver a block of 20,000 shares of Minerals purchased by J.C.A. from the registrant, acting as broker for J.C.A. There is no proof that this arrangement was made with the knowledge or consent of J.C.A.

34. There is no proof that Henry G. Vickers gave any instructions or directions to the registrant's salesman or to its principals. The only tangible evidence relating in any way to any control function by Henry G. Vickers was that presented by the traders of the registrant. In the case of Michael S. Snyder, who was a trader from July, 1959 until the early part of 1960, it appears that on one occasion he obtained a quotation on Minerals from Henry G. Vickers and that Vickers gave him three or four trading orders, which he executed. This was in a period

of approximately eight or nine months. This evidence, in the opinion of the undersigned, falls short of establishing that Henry G. Vickers exercised control over Snyder's activities.

35. Joel K. Plattner, who succeeded Snyder, testified that he received quotations on Minerals frequently from Henry G. Vickers. Plattner was the trader for the last three or four months of Henry G. Vickers' stay on the premises of the registrant. Henry G. Vickers' visits to the offices tapered off toward the end of the period and he was not there regularly. Plattner was uncertain as to how often he actually obtained quotations on Minerals from Henry G. Vickers. His testimony in that regard is confusing and contradictory, particularly in the light of his own testimony that as much as he could, he tried to act on his own authority and tried to avoid specific directions from others in his trading activities. The undersigned concludes that there is no substantial evidence that Henry G. Vickers controlled the activities of the traders. While there is evidence of some accommodation arrangement in the case of the stock transaction with J.C.A., referred to above, the undersigned concludes that the evidence does not establish that Henry G. Vickers was a person who directly and indirectly controlled the registrant and should have been listed in registrant's application for registration and amendments thereto.

B. Violations of the net capital rule

36. An issue raised in the order for the proceeding is whether, during the period from about May 31, 1960 to about August 31, 1961, the

registrant willfully violated Section 15(c)(3) of the Exchange Act and Rule 17 CFR 240.15c3-1, both collectively referred to as the net capital rule. It is also alleged that Merritt, James F. Vickers and Henry G. Vickers aided and abetted such violations.

37. Investigators employed by the Commission testified in detail concerning the financial condition of the registrant at various times as revealed by trial balances submitted by it. The financial condition of the registrant, according to one of these witnesses, as of May 31, 1960, as computed pursuant to requirements of the net capital rule may be summarized as follows:

Aggregate Indebtedness		$110,311.73
Required Adjusted Net Capital		5,515.59
Net Current Capital Deficit	$5,799.21	
Add: market value proprietary securities	16,637.56	
Adjusted Net Capital Deficit		22,436.77
Net Capital Deficiency		$ 27,952.36

(Div. Exs. 109 & 110; R. 1052, 1054 and 1055).

38. The registrant had a net capital deficiency of $27,952.36 and needed that amount to bring it up to compliance with the net capital rule (Div. Ex. 110; Tr. 1054).

39. A similar analysis of a trial balance as at September 15, 1960, as submitted by the registrant, reveals the following net capital deficiency:

Aggregate Indebtedness		$85,747.43
Required Adjusted Net Capital		4,287.38
Net Current Capital Deficit	$39,613.25	
Add: market value proprietary securities	20,495.13	
Adjusted Net Capital Deficit		$60,108.38
Net Capital Deficiency		$64,395.76

(Div. Exs. 111 & 112; R. 1056, 1057 and 1060).

40. An analysis of the trial balance submitted by the registrant as at December 30, 1960 revealed a continued net capital deficiency as follows:

Aggregate Indebtedness		$59,855.98
Required Adjusted Net Capital		2,992.80
Net Current Capital	$23,960.00	
Less: market value proprietary securities	31,413.08	
Adjusted Net Capital Deficit		7,453.08
Net Capital Deficiency		$ 10,445.88

(Div. Exs. 113, 114; R. 1062 and 1064).

41. Further analyses of registrant's trial balance were presented by the Division indicating a net capital deficiency on March 15, 1961 of $9,912.38; (Div. Ex. 115, 117, Tr. 1068-1070); on July 31, 1961 of $5,366.80 and $9,237.11 as of August 31, 1961 (Div. Ex. 130, Tr. 1269). (Div. Ex. 127-128, Tr. 1263-67).

42. The registrant took issue with the above calculations maintaining that it should have received certain credits which were not allowed. On November 2, 1960, the registrant entered into an agreement with a D. M. Berdine in which Berdine agreed to lend, and did lend, the registrant

$4,000. This agreement was signed by Merritt on behalf of the registrant and by Burton W. Teague, acting as attorney-in-fact for Berdine (H. Vickers Ex. 8). The registrant contends that this loan was an indebtedness subordinated to the claims of general creditors pursuant to a satisfactory subordination agreement as defined in Rule 15c3-1 and that the amount of the loan should have been excluded in the computation of aggregate indebtedness which Division analysts admittedly did not do. The Division urges that the contention of the registrant should be rejected for the reason that a copy of Teague's power of attorney, although requested by it, was never filed.

43. Merritt testified that the question of the proof of Teague's authority was not raised until after the March 15, 1961 trial balance had been submitted and that according to his understanding, Teague took this matter up with a Commission attorney and satisfied him on that point. Unfortunately both Teague and the attorney with whom he presumably dealt did not testify in this proceeding. There is no written evidence of communications on this subject other than agreement that on March 20, 1961, Merritt sent the Commission at its New York office a copy of the subordination agreement. The Division also produced a file copy of a letter to the registrant dated October 15, 1961 informing it that it was in violation of the net capital rule and that no consideration had been given to the subordination agreement because it did not meet requirements (Tr. 2275-2279).

44. Even if the registrant were given full credit for the $4,000 loan as a satisfactory subordinated loan, the ultimate findings of violations of the net capital rule by registrant still must be found, although

the extent of the respective deficiencies would be less. Since the loan agreement is dated November 2, 1960, it would not affect the net capital deficiencies found for prior periods; that of May 31, 1960 of $27,952.36, and that of $64,395.76 as of September 15, 1960. The deficiency found as of July 31, 1961 of $5,366.80 would have been reduced to $1,116.81 if full credit had been given to the $4,000 loan as a satisfactory subordinated loan, but there would still have been a deficiency. A similar recalculation of the net capital deficiency of $9,237.11 as of August 31, 1961 would have reduced the deficiency to $5,037.11 (Tr. 2285).

45. It is further argued on behalf of the registrant that no credit was given it in the net capital calculations for certain shareholdings which should have been credited. The registrant listed in its portfolio, as of August 31, 1961, 21,400 shares of Tresdor Larder stock at a market price of 6¢ a share for a total value of $1,284. No value was allowed for this stock in the net capital calculations, the comment being made "no value allowed as no Bid or asked prices appear in the 'pink sheets' or in the case of Canadian stocks the Financial Chronicle, 10 days before or 10 days after Trial Balance date" (Div. Ex. 130). The registrant produced a letter from a Canadian securities firm stating that this stock was currently being quoted as 4½-5½¢ (Canadian funds). However, this letter is dated October 18, almost two months after the date of the trial balance. The net capital rule provides that in computing the net capital of a broker, pursuant to the net capital rule, there shall be deducted assets which cannot be readily converted into cash. The Commission has stressed that the type of asset for which a broker may receive full credit is one which is subject

to "prompt liquidation to meet customer's demands made in the course of a securities business. . ."[7/]

46. The undersigned finds that the standard followed by those who calculated the net capital deficiency of the registrant, as set forth above, was a reasonable one in the light of the provisions of the net capital rule and the stress placed by the Commission on the requirement that it must be apparent that any assets in a portfolio can readily be converted into cash. The registrant has not produced any evidence that as of the date of the trial balance there was a ready market at any price for the Tresdor Larder stock.

47. It is also claimed that on its August 31, 1961 trial balance registrant itself made a mistake in listing itself as short some Cutter Laboratory stock when actually it was not. However, even when Merritt attempted to recalculate the net capital position of the registrant as of August 31, taking into account all the contentions he advanced on behalf of the registrant, it was found on examination that the result would still be a net capital deficiency of $2,347.63 (Regist. Exs. 8-B and D). Only as of July 31 would there have been a surplus using Merritt's calculations (Regist. Ex. 8-A and 8-C).

48. The registrant further contended that the net capital deficiency of March 15, 1961 was specifically affected by certain mistakes on the trial balance itself and by registrant's failure to list certain securities among its assets. It was conceded that this still would have resulted

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7/ Carter Harrison Corbrey, 29 S.E.C. 283, 287 (1949). See to the same effect, Guy D. Marianette, 11 S.E.C. 967, 970 (1942).

in a small deficiency (Tr. 1944). However, there is no proof that a corrected trial balance was ever submitted to the Commission in substitution of the statements submitted. Calculations can only be made on trial balances submitted by a registrant as supplemented by any investigation made.

49. It is also argued that the registrant was not aware of any violation of the net capital rule until the injunction proceeding was brought on March 24, 1961 and that it corrected the deficiencies revealed in the March 15, 1961 statement promptly and was not in violation of the net capital rule thereafter. The net capital rule was designed for the protection of investors in the public interest. It places upon a broker the duty of keeping in compliance with that rule at all times. A broker cannot wait until notice by the staff to exert efforts to achieve compliance. It has also been noted that the registrant did not keep in compliance with the net capital rule after March 15, 1961.

50. The evidence reveals that the registrant was in violation of the net capital rule at various times during the period May 31, 1960 to August 31, 1961. In view of the long period of time over which these violations occurred, and the substantial amounts of the deficiencies found, it is concluded that the violations were willful.[8/]

51. Merritt was a person in control of the registrant all during the period involved. James S. Vickers also was a person in control of the operations of the registrant until he severed his connection with that firm at the end of 1960. It is concluded that Merritt and James S.

8/ Churchill Securities Corp., 38 S.E.C. 856, 859 (1959); Sebastian & Company, 38 S.E.C. 865, 868 (1959).

Vickers aided and abetted in registrant's violation of the net capital rule. 9/

C. Activities of the Registrant in the Sale of Minerals Stock

1. Operational history and financial condition of Minerals

52. Minerals was incorporated under the name of Uranium Ventures, Inc. on February 11, 1955. Its name was changed to its present name on April 6, 1955. Minerals was organized for the purpose of acquiring certain mineral property and to engage generally in the exploration, development and mining of uranium and other ores. James S. Vickers had an early association with Minerals as secretary-treasurer and director for the first year and a half of that company's existence. He became a director again in 1958 for a six months period. As previously noted, Vickers Brothers had been underwriter of an issue of 300,000 shares of Minerals stock offered to the public on May 4, 1955 at $1 per share.

53. Testimony presented at the proceeding establishes that Minerals did not have an economically successful program. Conrad Norman, who was president and chairman of the board of directors of Minerals from approximately the end of 1957 until approximately June, 1960 testified that during his entire period of office the only moneys accruing to Minerals as the result of the operation of certain mineral and oil claims was approximately $6,000 or $7,000 (Tr. 975, 995, 996). Federal income tax returns filed by Minerals reflect the results of unprofitable

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9/ All during the period involved here, and particularly on the specific dates when violations of the net capital rule occurred, registrant was transacting business in securities and using the mails in the regular course of its business.

operations. For the years 1955 through 1959 its deficit steadily increased from $82,604.20 to $338,543.89 (Div. Exs. 101-106). Accumulated tax loss for the period also increased from $140,014.82 to $338,543.89 (Div. Exs. 101, 102, 104-106). The balance sheet submitted with the returns reflected net losses for each of the years 1956 through 1959 in substantial amounts (Div. Ex. 103-106). Its balance sheet as of May 31, 1960 reflected a retained income deficit of $420,866. Its principal assets as at the times material herein consisted primarily of various properties which were exploration claims of doubtful value and a substantial tax loss.

54. While Norman was president of Minerals, no financial statement was made available to the public and actually its books and records were not kept in good order and up-to-date from about December 31, 1956 through December 31, 1960 (Tr. 866, 873). The evidence establishes that Norman relayed information about the condition of Minerals to Merritt, James S. Vickers and Henry G. Vickers, all of whom had a keen interest in the condition of that company.

55. By agreement dated March 15, 1960, approved by the stockholders of Minerals on June 1, 1960, Minerals acquired all of the capital stock of Macksey Corporation and the Greene-Macksey Corporation, real estate development firms, in exchange for 80% of all the shares of capital stock of Minerals (Div. Ex. 107; Div. Ex. 88, note A). Among other things the agreement of March 15, 1960 noted that it was entered into " . . . with a full realization of the speculative nature of the value of the assets of Minerals; and Minerals makes no representation or warranties whatsoever

with respect to the value thereof, whether present or prospective" (Div. Ex. 107, p. 15). Attached to the agreement was a list of the assets and liabilities of Minerals noting an estimated loss carried forward of $300,000. Also attached was a list of four agreements to which the Macksey interests were parties. These all dealt with parcels of real estate which were to be developed.

56. One of the real estate developments mentioned in the agreement of March 15, 1960 was the so-called Emerald Harbors Development. Its value, as reflected on the balance sheets of Macksey Corporation and Macksey Construction Company, was such that the actual equity in it was zero as of August 31, 1958; $3,312.50 as of August 31, 1959; and minus $5,375 as of August 31, 1960 (Div. Ex. 86).[10/] As of December 31, 1960, the balance sheets of Minerals showed an equity of minus $6,706 (Div. Ex. 88, note H). It appears there that it was successful in selling 23 lots in the Emerald Harbors development by December 31, 1960 out of 80 lots available, with 6 lots being sold later. It did not

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10/ Div. Ex. 86 is a financial statement prepared by Alfred Coleman, an accountant and tax consultant. He prepared this statement at the request of Macksey Corporation in 1960 after re-creation of the books and records of Macksey Corporation from available records and consultation with the president of the company. Objection was made to the use of this statement because it was based on financial data obtained from the books and records of Minerals and Macksey interests, which books were assertedly not before the Commission. Basic records prepared by Coleman for the Macksey interests and identified by him were in the hearing room and available for cross-examination. The financial statement was prepared by Coleman as one of the items of regular business for the Macksey Corporation and was the best evidence available, some records having been lost in a flood. The statement, therefore, may be used as the basis for the finding of the financial condition of Macksey Corporation.

proceed with other contemplated developments. As at December 31, 1960, the stock of Green-Macksey Corporation was worthless (Div. Ex. 93; Div. Ex. 88, Note A). The Consolidating and consolidated balance sheet of Minerals and its subsidiary, Macksey Corporation, shows that as of December 31, 1960, there was a deficit of $485,943. There was a net loss from operations for the seven months ending December 31, 1960 of $43,724.[11/]

2. Purchase and Sales Transactions by Registrant in the Stock of Minerals and the activities of its individual salesmen therein

57. During the period here relevant the registrant took an active and continued interest in Minerals stock during the period June 19, 1959 to December, 1960, a period of its greatest activity in trading in the stock. The registrant purchased 589,275 shares of Minerals and sold 405,173, leaving a balance of 184,102. Purchases were made at a price range from .05¢ per share to a high of 5/8. Sales were made from a low of 15¢ to a high of 9/16. Lower prices prevailed toward the end of the period involved (Div. Ex. 123). The evidence indicates that while the registrant also dealt in other stocks, its activity in Minerals constituted a substantial part of its total business.

11/ The auditor's report referred to above was prepared from the books and records of Minerals which included records obtained from the Macksey interests. Detailed testimony was given as to the preparation and the undersigned overruled objections to its use in this proceeding.

58. The registrant's business was initially carried on at 37 Wall Street. Salesmen sat in one room, which was open space. Later, during the time when the registrant was there, a smaller room also became available and two or three salesmen occupied it at times. Merritt testified that at no time did the registrant have more than six salesmen on its payroll. The registrant moved to 125 Maiden Lane in July, 1960 and there the salesmen occupied one room. There was some partitioning at each location but they were not floor to ceiling partitions and according to Merritt and others who testified the occupants of the salesrooms could hear each other. Anyone having supervisory authority could also hear their conversations by stationing himself at a central point. The registrant had customer card files maintained by Vickers Brothers, turned over to it by James S. Vickers, as part of his investment. It developed additional leads of its own as a result of various mailings it made, a list of stockholders of Minerals, and leads that its own salesmen had developed for themselves. Staff meetings were held from time to time. Estimates as to the number of these varied widely, but it appears that Minerals was discussed at about ten of those meetings.

59. The activities of each of the principals of the registrant and their salesmen will now be considered separately:

Matthew J. Merritt, Jr.

60. Merritt, at all times here relevant was president of the registrant, a director and beneficial owner of 10% or more of its stock.

During most of this period, Merritt was in daily attendance at the offices of the registrant and among other things supervised and directed the office and sales personnel. Merritt testified that he became especially interested in Minerals commencing approximately in the fall of 1959 when a large broker evidenced interest in the stock and merger negotiations for the Macksey interests began. Merritt followed those developments closely, in part, he stated, because he was interested in the registrant participating in a future stock issue by Minerals if there was a decision to make such an offer. He attended some of the negotiating meetings among the parties in New York City. He also went to Florida for about ten days in the spring of 1960 and was shown the properties which the Macksey interests were developing or hoped to develop. He maintained that he was told by the head of the Macksey group that they owned all the properties which he was shown (Tr. 2209-2213).

61. Continuing his testimony, Merritt stated that when he returned to his offices, he kept in touch with Mr. Tom Macksey, head of the Macksey group, and on the basis of information obtained from him, prepared material on Minerals which he put in registrant's publication "Market Views", a publication regularly distributed to a mailing list of approximately 3,000 persons. The second page of the March issue of Market Views was devoted to a discussion of the land equities and of Minerals in particular. The discussion of Minerals is as follows:

> "A new entry into this field is MINERALS CORPORATION OF AMERICA, a low priced speculative stock, which has been dormant for quite some time. They recently concluded a merger agreement to be approved by the stockholders in April with the Macksey interests of Sarasota, Florida. These interests are composed of the following four subdivisions:

EMERALD HARBORS, an exclusive development for the high income bracket, has lots starting at $12,000 and going as high as $30,000, and homes beginning at approximately $35,000 and going as high as one may desire. We have seen the plans for the properties development and they are quite beautiful and outstanding, with all homesites having water-frontage. The RIVERDALE subdivision is very large, with, as we understand, 1500 homesites already having been sold. These too are all water-front properties, with land and homes to be built thereon starting at $12,000. This will certainly attract the retiring individual and those wishing to just invest in real estate. The BRENTWOOD division is also large, although not a water-front property, and will consist of low-cost housing, which should do very well. The fourth piece of property is referred to presently as ROUTE 301. A goodly amount of this subdivision is commercial property along Route 301, which will prove highly profitable, since the corporation is considering building a shopping center and renting the sites thereon. The remaining acreage will be devoted to low-cost housing.

The Macksey interests have projected that the net profits, before taxes, from the sale of these properties should be better than $7 million. Likewise, when the building on these properties is completed, the profit, which would not include the Route 301 acreage, would be better than $4 million. Consider also that in the Riverdale development MINERALS CORP. OF AMERICA are the owners of the utilities (water and sewerage), which would bring to the corporation better than $100,000 a month net. Over and above this, it is important to know that they are also the owners of the construction companies and all of the subcontractors with whom they deal, except for the electricians. They own the real estate company through whom the purchases and sales of the parcels are made.

The Macksey Brothers have been in the development business for over thirty years. They have eight subdivisions in Detroit at the present time, which have done extremely well. These assets, it has been said, will eventually find themselves in MINERALS CORP. OF AMERICA, as will their other assets. MINERALS CORP. will continue to expand so that it will be in direct competition with Arvida, General Developers, etc. We feel convinced of the new management's ability and integrity to accomplish this feat, and consider that of all the Florida land speculations, this is the most outstanding! " 12/
(Div. Ex. 46)

12/ Previous notice of Minerals in registrant's market letters were: On July 3, 1959, it was listed at the end of the letter with a group
(continued on next page)

62. Merritt further testified that when he was in Florida the accountant for the Macksey Company, Coleman, explained that he was setting up a balance sheet for the firm in which properties would be put down at their estimated resale value rather than at their original cost. He stated that while he did not see a completed balance sheet at that time, a balance sheet was submitted at the meeting of stockholders of Minerals in June, 1960 called to ratify the merger and that this balance sheet, just as the work sheets he saw, included as an asset of over $6,000,000 "developed lots offered for resale" (Resp. Ex. 4; Tr. 2228-2230; 2235-2237).[13/]

63. Merritt also received a copy of the proxy notice, dated May 12, 1960, sent out by Minerals to its stockholders dealing with the proposed merger (Div. Ex. 23). It described in glowing terms the plans and

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12/ (Continued from preceding page)

of other companies under the heading "We also recommend the following:" A similar mention was made in an issue of July 30, 1959. In an issue of September 25, 1959 it was listed under the heading "Promising low-priced stocks" as follows:

> "We continue to recommend MINERALS CORPORATION OF AMERICA and GIBRALTAR MORTGAGE, two very promising low-price speculations. Both companies are presently negotiating separately with other companies for possible mergers. If suitable agreements are reached, we feel that these stocks could appreciate substantially. Although we shy away from penny stocks in general, we feel that these two stocks are worthy for investors willing to take considerable risk." (Div. Ex. 62)

13/ No evidence was submitted as to who prepared this exhibit. Coleman testified in the proceeding and stated that in his work he used actual cost as a basis for valuation. He was not questioned about this exhibit.

prospects of the Macksey group and sought approval for the merger. No financial information on the companies was included. Merritt received about 200 of these statements which were distributed to interested customers or prospects. Registrant's market letters, in addition to being sent to a mailing list of 3,000, were also available at the offices of the registrant and the salesmen were instructed to rely on the material contained in them and to use it in discussions with customers.

64. The Division asserts that the information contained in the Market Views letters, dated September 25, 1959 and March 21, 1960 and the proxy statement dated May 21, 1960 are false and misleading in that they did not reveal the heavy mortgages outstanding against the properties which the Macksey group was trying to develop so that the group had little, if any, equity in the properties. Registrant contends that Merritt sought to carefully check on the assets of the Macksey group, inspected the properties himself and believed and was assured that the Macksey group owned substantial assets and would be able to complete its plans as projected.

65. It is evident from Merritt's testimony that he took all assurances or inferences that there were no encumbrances on the properties being developed by the Macksey group without doing any checking. He testified that he saw work sheets which resulted in a balance sheet as of April 30, 1960 for the Macksey group which was presented at the general meeting of Minerals stockholders. If he had checked these work sheets, he would have found out that there was an item listing mortgages in a substantial amount. He never sought or obtained a profit and loss statement to indicate the result of current operations of the Macksey group.

66. The Market Views letter of March 21, 1960 was designed and was used as selling literature for Minerals stock. Most of that issue was devoted to Minerals stock. Mention was made of all the profits to be expected from the Macksey real estate developments - a profit of better than $7,000,000 and an income of $100,000 a month from utilities operations. Nowhere was there any discussion of the equity interests of the Macksey group in the real estate involved, their current operations, or the balance sheet figures. While it was correctly stated that Minerals itself had been dormant for quite some time, no details were given as to the extent of the losses they had incurred.[14/] It is argued that Merritt sincerely believed in the future of the Macksey properties from a personal visit of inspection to them and from information furnished him orally. However, this does not excuse his failure to safeguard the interest of investors to whom the stock was recommended. Inquiry could easily have been made for written financial data on the value of the contracts and properties involved in the merger and the truth could quickly have become evident or the unavailability of such information would have been disclosed. Faith in the ultimate success of the business did not excuse this elementary duty of inquiry.[15/] Optimistic and self-serving declarations from the Macksey group, the ones who stood to benefit from any

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14/ The Commission has held that in general, information on operating losses is material and should be disclosed to investors as part of any sales presentation. N. Pinsker & Co., Inc., 40 S.E.C. 285 (1960).

15/ D. F. Bernheimer & Co., Inc., Sec. Exch. Act Rel. No. 7000 (Jan. 23, 1963). "An over-the-counter firm which actively solicits customers and then sells them securities . . . holds itself out as competent to advise in the premises . . ." Charles Hughes & Co., Inc. v. S.E.C., 139 F. 2d 434, 436-7 (1943).

merger also furnished no basis for reliance by Merritt and should have put him on guard when sufficient written evidence was not produced to support the asertions made.[16/]

67. Characterizing Minerals as a low-priced speculative stock did not negate the duty of the registrant to bring known or easily ascertainable unfavorable factors to the attention of investors to whom it was recommending the stock as the most outstanding of all Florida land speculations.[17/]

68. Under all the circumstances, the undersigned concludes that the statements on Minerals contained in the March 21, 1960 issue of Market Views were incomplete, false and misleading and that the use of this market letter as a piece of selling literature was willfully violative of the anti-fraud provisions of the Securities Act.

69. The proxy statement of May 12, 1960 (Div. Ex. 23) also was deficient in that while it contained optimistic statements about the Macksey properties, it did not contain any financial data on the Macksey properties or on the financial situation of Minerals itself. Its use as selling literature, which the registrant admitted doing, was also willfully violative of the anti-fraud provisions of the Securities Acts. Merritt, who composed the material in the Market Views letters aforementioned, is specifically chargeable with that violation.

16/ J. A. Winston & Co., Inc., Sec. Exch. Act Rel. No. 7337 (June 8, 1964); N. Pinsker & Co., Inc.,40 S.E.C. 285, 291-292 (1960).

17/ Ross Securities, Inc., Sec. Exch. Act Rel. 7069, p. 7 (April 30, 1963).

James S. Vickers

61. James S. Vickers had an interest in Minerals from its inception as a substantial stockholder. He also served as an officer and director in 1955 and 1956 and as director in 1958. He disposed of his stock to Henry Vickers in 1957. He knew the operating history of Minerals.

62. James Vickers was an officer and director of the registrant, and owner of 10% of its common stock from June, 1959 to December, 1960. While Merritt spent all his time at the offices of the registrant, Vickers spent an estimated 50% of the time away from the office on registrant's business. He urged at least one salesman to send out literature on Minerals to customers (Tr. 1564-5).

63. Vickers could only recall making one transaction in Minerals, a sale of several hundred sales to a friend, H.B. in the spring of 1960. B. was a stockholder in Minerals, according to Vickers, and knew as much as Vickers did. Vickers did tell B. of the proposed merger with the Macksey group. He admitted he did not mention that Minerals was operating at a loss. B. did not testify and there is no complete record on just what Vickers said to B. at the time, especially about the proposed merger. No adverse finding is made in connection with this sale.

64. It is evident from his ownership in the registrant that James S. Vickers was a person in control of its operations.

Charles Nardi

65. Nardi was vice-president, a director, and beneficial owner of 10% or more of registrant's stock.[18/] He had no prior experience in the

18/ Nardi is listed as officer and director and stockholder of the registrant in an amendment to its application for registration, filed May 27, 1959. He continued to be listed as such at least to October 26, 1961 when he was not listed among 10% stockholders.

securities business. Merritt characterized him as an executive trainee who was learning the business.

66. Nardi testified he made an investment in the registrant to try to learn the business. He went there as he could spare time from his regular business from July, 1959 to January, 1960. He maintained he then told James Vickers he did not want to be connected with registrant. However, his investment remained in the firm and no notice was ever filed with the Commission noting a change in his official connection with registrant. Nardi maintained he did not authorize the use of his name when the registrant's name was changed to its present form.

67. However, Nardi did exercise some supervisory authority. He interviewed some applicants and did give orders and oversee the work of the office. He was on the Executive Committee of the registrant (Tr. 2092). Above all, he had the power to exercise control of its affairs and therefore must be considered a person in control of the registrant's affairs regardless of the extent of his knowledge.[19/]

68. Nardi sold 4,000 or 5,000 shares of Minerals stock to five or six customers. He stated he told these investors that the stock was a speculative stock he had bought and that he thought it was "fairly good". The only information he had on the stock was from brochures at the office (Tr. 1478-79).

19/ Aldrich, Scott & Co., Inc., 40 S.E.C. 775, 778 (1961). John T. Pollard & Co., Inc., 38 S.E.C. 594, 598 (1958); Alan Russell Securities, Inc., 38 S.E.C. 599, 601 (1958); Lucyle Hollander Feigin, 40 S.E.C. 594, 596 (1961).

69. It is apparent that Nardi had only a sketchy knowledge of Minerals and made no effort to familiarize himself with current financial information on Minerals but relied on written material which has been found incomplete, false and misleading. His failure to exercise reasonable precautions to protect investors to whom he sold stock was a willful violation of his obligations under the Securities Acts. His asserted inexperience in the business does not excuse this failure. 20/

John Costa

70. Costa was employed by the registrant from August, 1959 to September, 1961. He became sales manager in the early part of 1960 and vice-president in 1961.

71. Costa exercised supervisory duties over the salesmen from the time he became sales manager and was responsible in the operation of the office, including the activities of the salesmen and their statements to customers. It was his duty to see that no misleading information was given to customers. Costa testified in these proceedings, but on a collateral matter. Evidence was introduced in the proceeding as to personal sales by him with the transcript of his testimony taken during an investigative proceeding (Div. Ex. 143A and B). It was offered solely against him as containing admissions.

72. Costa sold approximately 40,000 shares of Minerals. Two witnesses testified as to transactions with him.

20/ Ross Securities, Inc., Sec. Exch. Act Rel. No. 7069 (April 30, 1963).

73. J. G. purchased 1,000 shares of Minerals on October 27, 1959. He was introduced to Costa before the purchase and received four or five telephone calls from him urging him to make a purchase and to do it quickly because it might rise the next day (Tr. 582).

74. In November, 1959, Costa told G. that a merger was pending and urged him to buy more stock, telling him he had to act quickly. G. bought another 500 shares. G. further testified Costa did not tell him anything about the earnings of Minerals.

75. M.G.H. bought some Minerals stock through another salesman of the registrant in October, 1959. H. had been assured by the salesman that Minerals would soon merge with another company. Several weeks after his purchase, he stated, he telephoned registrant and spoke with Costa and asked him about the progress of the merger. Costa assured him the merger was going well, the merger would be certain to take place and the stock would certainly rise (Tr. 1147). He described the company with which Minerals would merge as a large, substantial firm with large amounts of capital - millions of dollars in liquid capital in Detroit alone (Tr. 1148). He also told H. that Minerals had large holdings of mineral land in Texas and Arizona.

76. In March, 1960, at the time of the merger agreement, Costa told H., according to the latter, that there would be action in the next thirty days and he would see a very large rise (Tr. 1162-63).

77. Costa did not testify and the testimony of J. G. and H. is credited. Costa made extravagant promises of quick price increases and attempted to pressure G. into quick decisions. To H. he made similar

promises of price increases and made statements about the merging companies having no basis in fact. All these practices have been condemned as violative of the obligation to deal fairly with customers. On the basis of decisions treated in detail in the next section, the undersigned concludes that Costa willfully violated the anti-fraud provisions of the Securities Acts by his activities.

Edward Abramson

78. Edward Abramson was employed by the registrant as a salesman from its beginning until some time in 1961. He had previously been employed by Vickers Brothers. His earnings were the highest of all the salesmen. He did not appear at the hearing, but stipulated in advance that he might be found a cause of any order that might be entered against the registrant.

79. A group of investors testified as to their transactions with Abramson in Minerals stock. This evidence was presented against the registrants.

80. E. R. testified that he had first dealt with Abramson when the latter was employed by Vickers Brothers. In the early part of 1959, E. R. had purchased 13,500 shares of Minerals from Vickers Brothers with Abramson acting as salesman.

81. In August, 1959, E. R. purchased an additional 5,000 shares of Minerals from the registrant at 50 cents a share.[21/] Abramson urged E. R. to make the purchase stating that the price was going up, the

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21/ The mails were used in this transaction and other transactions by the registrant.

price would rise to a dollar within a few weeks and was going to make him some money. When E. R. stated he thought he had enough Minerals and did not have more money to invest, Abramson urged him to, and succeeded in getting E. R. to send in other stock for sale to raise funds for this purchase. Abramson also stated, according to E. R.'s undenied and credited testimony that the stock would rise to $1.50 or $2 in a very few months (Tr. 325).

82. Abramson bought an addional 5,000 shares for E. R. on August 12, 1959, using the balance of stock E. R. had sent in. In connection with this purchase, Abramson assured E. R. he would make a lot of money. E. R. further testified he tried to get information on company earnings and financial statements from Abramson, but was unsuccessful, and was assured Minerals was doing fine (Tr. 332).[22/]

83. R. received the Market Views issue of the registrant of March 21, 1960 containing a write-up of Minerals and the news of the forthcoming merger.

84. L.R.H. also bought Minerals shares from Abramson in August, 1959 - 1,000 at 1/2.[23/] Prior to his purchase, he received telephone calls in which Abramson told him that Minerals was developing new areas and a new achievement would be announced to the public causing a demand for the stock and an increase in its price from $2 to $4 a share. He also said there was a limited amount of stock available, and that if one

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22/ Abramson's initials appear on E.R.'s confirmations as well as on those of other investors named herein.

23/ He had previously bought some Minerals from Vickers Brothers in 1957.

wanted to buy it, he had better hurry (Tr. 386).

85. In another call, Abramson urged him to sell all his other holdings to buy several thousand shares of Minerals. Abramson told him the new developments would yield a handsome profit to the company and within a short time it would pay a dividend (Tr. 387). After these remarks from Abramson, H. placed his order with him.

86. H. also received the Market Views letters, including the issue of March 21, 1960.

87. A.J.B. purchased 200 shares of Minerals from registrant through Abramson in January, 1960. He had previously bought Minerals from Vickers Brothers through Abramson in 1957 and sold it subsequently.

88. Before his purchase, B. had three telephone conversations with Abramson. On learning he had sold his original holdings, Abramson said B. had made a big mistake, a reorganization of Minerals had taken place, and the stock would be worth a lot of money in the near future. In a second conversation, Abramson said that the stock would be worth a dollar a share within a few weeks and he could only set aside one thousand shares for him but B. had better buy fast (Tr. 405). In a third conversation, B. agreed to buy his shares. B. was not given any information about the financial condition of Minerals by Abramson except optimistic statements as to the future nor did Abramson inquire as to B's financial needs.

89. W.J.W. received several telephone calls from Abramson in which Abramson urged him to buy Minerals stating it was going into the real estate business and should go to $20 a share in a few years. W.J.W. refused to purchase, according to his credited testimony, but received a confirmation

for 500 shares. When he refused to pay, Abramson threatened that he would get into trouble if he did not pay. W.J.W. paid for the stock in August, 1960.[24/]

90. J.T. had bought Minerals stock from Vickers Brothers in 1957 or 1958. He testified that he received a telephone call from Abramson in January, 1960 in which Abramson said Minerals was growing and would earn 1½ to $2 a share. He received another call from Abramson about a week later and after the latter told him Minerals was making good progress, he agreed to buy 200 shares.

91. On March 18, 1960, J.T. purchased an additional 1,000 shares after Abramson telephoned him and stated, according to T., that earnings and the price of the stock would increase substantially and urged him to buy immediately before the price rose. On March 31, 1960, T. bought an additional 500 shares after several calls from Abramson giving optimistic predictions about Minerals.

92. T.'s testimony has been attacked on the basis that he was admittedly angry over the results of his dealings with the registrant. However, his testimony is mutually corroborative with that of other witnesses who dealt with Abramson. It is credited.

93. The same themes as have been previously outlined in the testimony of investors as to their dealings with Abramson run through the testimony of other investor-witnesses:

24/ A similar situation of sending a confirmation to one who had not ordered occurred in the case of M.E.B., who received a confirmation with Abramson's initials on it (Div. Ex. 22).

Prediction of price rise and growth of company, repeated telephone calls - need to act fast, no inquiry into financial needs, no specific information given on Minerals, (A.G.B. - purchase of 200 shares in June, 1960) - had previously purchased Minerals from Abramson while he was at Vickers Brothers;

Minerals would show price appreciation because it was going into land development, no financial data furnished on Minerals, suggestion to sell other holdings when inability to purchase Minerals was stated (J.C.H. - purchase of 200 shares in July, 1960).

Minerals would appreciate, no inquiry as to financial needs of customer (E.H. - purchase of 300 shares in March, 1960).

Because of the merger, Minerals stock would rise to about $10 a share (Dr. S.S. - purchase of 1,000 shares on July 8, 1960).

Minerals would probably double in price in about six to eight months, many telephone calls to customer urging purchase, urging customer to sell other stock to buy more Minerals, no financial information on Minerals furnished, (E.S. - purchase of 500 shares in July, 1959 and additional 500 in August, 1959).

Conclusions

94. Abramson's activities furnish a classic case of willful violations of the Securities Acts. A broker and his salesmen must deal fairly with customers in accordance with the standards of the profession.[25/] Outright false statements are of course expressly prohibited by securities laws and are inconsistent with the duty of fair dealing. In addition, as the Commission pointed out, the making of representations to prospective purchasers without a reasonable basis, couched in terms of opinion or fact and designed to induce purchasers, is contrary to the obligation of fair dealing borne by those who engage in the sale of the securities to the public.[26/]

95. Another aspect of the standards of fair dealing applicable to the securities business is the refusal to permit concealment by a person engaged in the securities business of material facts of an adverse nature, the disclosure of which is necessary to render statements made not misleading. As was observed in the case of Leonard Burton[27/] "a prediction by a securities salesman or dealer to an investor that a stock is likely to go up implies that there is an adequate foundation for such prediction and that there are no known facts which make such a prediction dangerous and unreliable". Unfounded predictions of a price rise in a stock are a "hallmark of fraud".[28/]

25/ Duker v. Duker, 6 S.E.C. 386, 388-89 (1939); A.J.Caradean & Co., Sec. Exch. Act Rel. 6903, p. 2 (Oct. 1, 1962).

26/ Mac Robbins & Co., Inc., Sec. Exch. Rel. No. 6846 (July 11, 1962), aff'd 316 F. 2d 137 (1963); Ross Securities, Inc., Sec.Exch. Act Rel. 7069 (April 30, 1963).

27 39 S.E.C. 211, 214 (1959).

28/ Alexander Reid & Co., Inc., Sec. Exch. Act Rel. No. 6727 (Feb. 8, 1962; Best Securities, Inc., Sec. Exch. Act Rel. No. 6282 (June 3, 1960).

96. Abramson violated all the requirements of fair dealing set forth above, plus others. He predicted price rises, sometimes being very specific, when there was no basis for such prediction and certainly without informing his customers as to the true financial state of Minerals.[29/] He apparently never made any effort to ascertain its condition. He dangled before the prospects the assurance that they would make a lot of money quickly. He made no inquiry as to the financial needs of his customers and in fact in some cases when it was apparent that his customers did not have any funds available, he urged them to sell their holdings in order to buy Minerals stock.

97. While he was making the aforementioned misrepresentations and furnishing his customers with misleading or no information on the true financial state of Minerals, he also was engaged in the practices which have been condemned by the Commission as inconsistent with fair practices; failing to give potential investors an opportunity to make a reasoned decision before investing; repeated telephone calls urging customers to act quickly, indicating that there was a very limited supply of stock available;[30/] and the recording of sales to customers who, in fact, had not placed orders and threatening them when they protested.[31/]

29/ J. A. Winston & Co., Inc., Sec. Exch. Act Rel. No. 7337 (June 8, 1964).

30/ Mac Robbins & Co., Inc., Sec. Exch. Act Rel. No. 6846 (1962).

31/ J. A. Winston & Co., Inc., supra, p. 11.

William Perles

96. William Perles was employed by the registrant as a salesman from March to July, 1960. Prior to this employment he had had seven years' experience in the securities business with seven firms.

97. Mrs. E.P.B., a pensioner, first dealt with Earle Sperer in the purchase of Minerals, receiving telephone calls from him beginning in late 1959. After repeated telephone calls in which Sperer stated that the stock would increase in price and that she should buy as much as she could, selling other stock to make a purchase,[32/] Mrs. B. visited the offices of the registrant later and was told Sperer had left and was introduced to Perles.

98. Mrs. B. received several telephone calls from Perles, she testified, in which he told her Minerals would increase to 3½ dollars and she should buy as much as she could. He urged her to buy 1,000 shares (Tr. 678). Mrs. B. sold other stock and on March 28, 1960 purchased 480 shares of Minerals.

99. Mrs. B. later met Perles at a Minerals stockholders meeting in June. She stated that Perles again urged her to buy more Minerals since the price was going up and she was going to make a lot of money. When Mrs. B. said she had no more money, Perles suggested that she sell other

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32/ These statements were willfully violative of the anti-fraud provisions of the Securities Acts in view of the financial condition of Minerals at the time and the fragmentary nature of the information supplied. As previously noted, Sperer did not contest the issues and has consented to be named a cause of any order of revocation that may be entered here.

stock. Mrs. B. did this and bought another 100 shares through Perles. She further testified that she was not given any information on the financial condition of Minerals.

100. Perles did not testify. Mrs. B's testimony is credited. It establishes that Perles made extravagant claims of price increases for Minerals and repeatedly urged her to buy Minerals stock. When he was told she had no available funds he succeeded in getting her to sell other stock. At the same time he gave her no detailed information on the financial condition of Minerals. For reasons previously stated in the case of Abramson, the undersigned concludes that Perles willfully violated the Securities Acts in his dealings with Mrs. B.

101. Similar misrepresentations and omissions were made by Perles in his dealings with other investors. He told J.H.B. in May, 1960 that the stock should go up to a dollar or more a share. J.H.B. purchased 500 shares.

102. T.K. received telephone calls from Perles in the spring of 1960 in which Perles predicted that the earnings of Minerals would jump to at least a dollar a share by December and the stock should then be selling at $8 to $10 a share. K., at Perles' urging, sold other stock to make a purchase of 500 shares in May, 1960. Perles then urged K. to purchase an additional 10,000 shares, repeating his optimistic predictions. K. bought an additional 500 shares. He also received from the registrant its March 21, 1960 Market Views issue and the proxy statement. No inquiry was made as to his financial needs.

103. In February or March, 1960, R.S., who had previously bought stock through another salesman, received several telephone calls from Perles in the evening hours, urging him to attend a cocktail party to introduce the Mackseys. Perles urged S. to purchase additional Minerals stock, stating it would go up to at least $3 a share after the party. S. refused to buy any more stock.

104. Perles made several telephone calls to C.J.K. He told of the merger and stated the prospects were immense and the stock should treble in a year, but A. must act quickly for there would not be any stock available in a day or two (Tr. 661). A. bought 100 shares.

105. Perles continued to urge A. to make a further purchase and when A. said he could not afford it, because he was supporting his aged mother, told him he would be better able to do this with a purchase since the stock would go up quickly (Tr. 665).

106. Perles, in his conduct with the customers above-named willfully violated the anti-fraud provisions of the Securities Acts. He urged purchases on customers for whom he knew Minerals was not suited. He made extravagant promises of price rises, having no basis in fact and gave no true financial information on Minerals. 33/

33/ An investigative transcript of Perles' testimony was introduced as against Perles (Div. Ex. 137). It corroborates the evidence formally presented in the hearing concerning Perles' lack of knowledge of the financial affairs of Minerals, his promises of price rises, and his failure to inquire into the financial needs of his customers.

He made efforts to have his customers buy more and more stock even when they told him they could not afford purchases.

Burton Teague

107. Teague was an investor in registrant and was employed by it as a salesman from June, 1959 to October, 1960.

108. Teague acted as a part-time salesman and had a regular full-time job all during this period. He was W.O.'s superior in 1960. Teague had discussions about Minerals with W.O. and urged him to buy. After the merger he predicted that Minerals should rise to $3 or $4 a share or even $7 or $8. W.O. purchased 1,000 shares at 25 cents a share after the merger and another 1,000 at 5/8 in September, 1960. Teague did not appear in these proceedings.

109. This prediction of a sharp rise in Minerals had no reasonable basis in fact and the information given W. O. was incomplete, false, and misleading and willfully violative of the Securities Acts.[34/]

Robert Sharon

110. Robert Sharon was employed by the registrant from June to September, 1959 as a salesman. He had three months' prior experience in the securities business selling mutual funds.

111. A.D. had bought some Minerals from Vickers Brothers. In September, 1959, Sharon told him that there was going to be a merger

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34/ In an investigative transcript introduced as against Teague, the latter admitted that he sold approximately 25,700 shares of Minerals to seven customers, never saw any financial statement regarding Minerals, and did no soliciting on registrant's premises (Div. Ex. 134). These admissions support the findings of violations by Teague.

with a company in Florida, that a price rise was expected, and asked him if he would like to buy some more stock. On a second call, D. agreed to and did buy 100 shares. He further testified that Sharon did not tell him anything about the earnings or operations of Minerals (Tr. 1088). No inquiry was made as to his financial condition.

112. On cross-examination, he acknowledged that he knew the stock was a speculation (Tr. 1102).

113. Sharon testified in these proceedings. He stated that he took a sales position with the registrant as a summer job. He was given some literature on stocks the registrant was dealing in and some lead cards. He denied making any knowingly incomplete or false statements to customers. He returned to law school in September, 1959, earning five to seven hundred dollars during the period.

114. On cross-examination, he testified that he sat in a room with three or four salesmen. He could not recall ever seeing a financial statement of Minerals (Tr. 1626) and stated that he believed Minerals was not making money. He attended sales meetings of the registrant at which Minerals was discussed, but did not know what properties or assets Minerals had (Tr. 1631).

115. He did tell his customers that there might be a possibility of a merger in the future, but knew no details of the merger or with whom it would be or when it would take place, or anything about the company with which the merger would take place (Tr. 1632-33).

116. He identified six confirmations of sales of Minerals to customers and further testified he only inquired into the financial

condition of one customer. He sold the stock, he affirmed, as a low-priced speculation. He received no training at the registrant.

117. It is urged on behalf of Sharon that no finding can be made against him unless it is shown that he engaged in some act with the knowledge that it was in furtherance of an overall unlawful purpose.[35/] This is not the standard applicable to this administrative proceeding. For an adverse finding to be made, it must be found that a respondent willfully violated the Securities Acts. The Commission has consistently held that proof of willfulness under Section 15(b) of the Exchange Act resides in proof that those charged with violation of said Act were aware of what they were doing, and that it is not necessary for them to have been aware of the legal consequences of their acts. Harry Marks, 25 S.E.C. 208, 220 (1947); George W. Chilian, 37 S.E.C. 384 (1956); E. W. Hughes & Company, 27 S.E.C. 629 (1948); Hughes v. S.E.C., 174 F. 2d 969 (C.A.D.C. 1949); Shuck & Co., 38 S.E.C. 69 (1957); Carl M. Loeb, Rhoades & Co., 38 S.E.C. 843 (1959); Ira Haupt & Company, 23 S.E.C. 589, 606 (1946); Van Alstyne, Noel & Co., 22 S.E.C. 176 (1946); Thompson Ross Securities Co., 6 S.E.C. 1111, 1122 (1940); Churchill Securities Corp.,[36/] 38 S.E.C. 856 (1959).

118. The evidence establishes that Sharon sold Minerals stock with only a fragmentary knowledge of its affairs. He knew nothing about Minerals' financial condition in detail, but knew they were losing money.

35/ Citing, U.S. v. Palladino, 203 F. Supp. 35 (1962).

36/ Mac Robbins & Co., Inc., Sec. Exch. Act Rel. 6462, p. 8 (1961).

He had no details on any proposed merger, but held out the hope of a price increase to investors. Labelling the stock a low-priced speculation did not excuse Sharon from making reasonable inquiry into the stock he was selling and giving prospects a clearer picture of the stock he was selling. The information he gave investors was incomplete, false and misleading and in the disregard of basic standards of care and fair dealing with customers and was willfully violative of the Securities Acts.

Richard Treistman

119. Richard Treistman was employed by the registrant from September, 1959 to January, 1960 and, according to Merritt, was new to the business.

120. M.G.H. purchased 4,000 shares of Minerals from registrant on October 30, 1959. Before he made the purchase he had three or four telephone calls from Treistman. According to H., Treistman told him Minerals was an attractive security which would move very fast and there was an opportunity for a large profit in it; it was to merge with a large and substantial company and the stock would go up two or three to one (Tr. 1140-41). When H. asked how soon the stock might move, Treistman replied that he would have to act fast because the increase might come in two or three weeks.

121. After his purchase, H. telephoned Treistman and, according to his testimony, asked Treistman why he had not received material on Minerals which the latter had promised to send him. Treistman told him he could not give him more information on the merger, since there were private negotiations going on, but that registrant was very close

to the situation and H. should have confidence in registrant (Tr. 1196).

122. Treistman never gave H. information on Minerals' earnings or capital but told him, "Don't worry about it, they are in great shape, and they are going to be much better." (Tr. 1148). He predicted a sharp capital gains rise for H. He assured H. that he would not lose on his investment.

123. H. further testified that later he received a telephone call from Treistman in which Treistman told him he was with a new firm, sought to sell some of his Minerals stock for him, and admitted that Minerals was a promotion in which the registrant had artificially inflated the price of the stock (Tr. 1158-59).

124. On cross-examination, H. testified he first heard from Treistman a week or two prior to his purchase and in the evening. He denied knowing Minerals was a speculation. H. did institute a civil proceeding over his purchase, but it was withdrawn on the day he testified in this proceeding. He maintained he dropped the suit because of time lost over it. He admitted feeling badly about his loss over this investment.

125. It is urged that H.'s testimony is replete with contradictory and inconsistent statements rendering his testimony "unusable as evidence in these proceedings."

126. It is pointed out that while H. testified on direct examination, he spoke only with Treistman and Costa, on cross-examination he admitted that he also spoke with employees Plattner and Martin (neither of these was salesmen). It is also pointed out that H. could

not be certain of the exact language used by Treistman in a conversation in the spring of 1960. Reliance is also placed on H.'s dropping of his civil suit and on his denial that he was looking at papers dealing with this matter during a recess when, in fact, the papers he looked at had a bearing on the issues here (Tr. 1213-17).

127. While these are matters of some importance, even more significant is the failure of Treistman to testify concerning his dealings with H. and H's detailed testimony of conversations with Treistman. The failure of a party to testify in a non-criminal case, in explanation of suspicious facts and circumstances peculiarly within his knowledge warrants the inference that his testimony, if produced, would have been adverse.[37/]

128. The undersigned from his evaluation of the evidence credits the testimony of H. It is concluded that Treistman made extravagant claims of a sharp and quick price increase for Minerals having no basis in fact. In October, 1959, from all the evidence, Minerals was not having any substantial income. Merger talks, if they had begun, were only in initial stages. No financial data was furnished to H. as he had requested. No balanced presentation was made to him. The undersigned concludes that Treistman's conduct was willfully violative of the Securities Acts, as alleged.

37/ N. Sims Organ & Co., Inc., 40 S.E.C. 573, 577, aff'd 293 F. 2d 78, 81 (1961), cert. den. 368 U.S. 968 (1962).

Lloyd Fetner

129. Lloyd Fetner was employed by the registrant as a salesman from September, 1959 to January, 1960. He sold 6,900 shares of Minerals to nine customers.

130. One of his customers was R.S. According to R.S., he told Fetner's father-in-law that Fetner could telephone him on investment opportunities. Fetner telephoned R.S. and, according to the latter, told him that Minerals was a wonderful opportunity where money could be made quite rapidly in a short period and because of a proposed merger it would probably go up to one or two dollars a share (Tr. 607). Fetner also stated that the minimum order was 1,000 shares. S. bought 3,000 shares at 50 cents a share on October 30, 1959, 1,000 for himself and 1,000 each for two relatives to whom he had passed on the information he had received from Fetner. He asserted he was told nothing about the earnings of Minerals or its operations by Fetner nor did Fetner inquire into his financial needs .

131. Fetner testified that he told his customers that Minerals was a speculative stock and that the proposed merger might cause a price rise (Tr. 1584). He got his information at sales meetings. He might have said there might be a substantial rise, but, he maintained, he never predicted a specific amount of rise.

132. On cross-examination he stated that he did not see any financial statement on Minerals nor was any written material available at registrant's office on Minerals (Tr. 1589). He could not recall having

any specific information on the company with which Minerals was supposed to merge. He admitted that he did not inquire into the financial condition of his customers or tell them the financial condition of Minerals; but he might have told them Minerals was losing money.

133. Fetner's testimony differed from that of R.S. only on the question of whether he predicted a specific price rise for Minerals rather than an unspecified price increase. The testimony of R.S. is credited. It is evident that Fetner recommended Minerals on meager information which did not include any financial information on Minerals and the company with which it was going to merge. In effect, and at best, he merely passed on some information he had heard at a meeting without obtaining more information or determining the suitability of the investment for the customers. He abdicated the function a salesman is supposed to perform and his conduct was violative of the Securities Acts. 38/

134. It is urged that for any finding to be made against Fetner it must be established that he engaged in some activities with the knowledge that they were in furtherance of an overall unlawful purpose and awareness of a fraud practiced by his employer. A similar contention has previously been considered and rejected. The undersigned concludes that Fetner's violations were willful within the meaning of the Securities Acts.

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

Jules Winters

135. Jules Winters was employed by the registrant as salesman from July to November, 1959, again in April, 1960, and from November, 1961 to February, 1962. He sold approximately 8,500 shares of Minerals to six customers.

136. M. B., according to her credited and undenied testimony, was told by Winters that there was going to be a merger of Minerals and that the stock was expected to go to a dollar and a half a share (Tr. 624-5). He urged her to buy a large amount of stock. She bought 1,000 shares in August, 1959 at 7/16. Winters did not tell Miss B. anything of the earnings and operations of Minerals.

137. Winters did not appear in the proceedings. For reasons stated in considering similar conduct on the part of other salesmen, the undersigned concludes that Winters' conduct was willfully violative of the Securities Acts, as charged.

137. Transcripts of investigative transcript of Winters were introduced as against him individually (Div. Ex. 132, 132-B). In these Winters admitted making optimistic recommendations of Minerals without supplying financial information on Minerals. He stated that he heard salesmen make unscrupulous remarks, which he characterized as "larcenous" about Minerals and specifically protested to Merritt about Abramson's conduct. Yet he stayed on. As an experienced securities salesman, which he was, he should have quickly realized what was going on. 39/

39/ See, U.S. v. Ross and Gordon, 321 F. 2d 61 (C.A. 2, 1963), cert. den. 375 U.S. 894 (1963).

Robert W. Hines

138. Robert W. Hines was employed by the registrant from January to April, 1960.

139. A.D.H. testified that in the spring of 1960 he received a telephone call from Hines, with whom he had dealt before, telling him that he had a good speculative offering, Minerals, that within three to six months the stock would be selling from three dollars to as high as ten dollars (Tr. 634). Hines further stated that the company was in the mining business, dealing with either uranium or some atomic materials, that there were processes that had to be completed in order for them to obtain a particular federal contract, that they had completed them and were just in the process of having the matter approved, and that as soon as the contract did go through, he was sure that the stock would really "take off". A.D.H. bought 200 shares of Minerals at 9/16, jointly with a friend, through Hines. He also quoted Hines as saying that Minerals was having earnings, but would pay no cash or stock dividends because it was investing its money for growth (Tr. 637).

140. Hines testified that he sold primarily two stocks while at the registrant, neither of which was Minerals. His recollection was that H. and his partner were interested in speculative issues and that he told H. that Minerals was a corporate shell about to be taken over in a merger and was a complete speculation. However, he had only a vague memory of the entire transaction (Tr. 1646).

141. A.D.H. testified in convincing detail while Hines could not remember any details of the transaction. The undersigned credits the

testimony of A.D.H. The statements made to him had no reasonable basis in fact on the evidence developed in the record of this proceeding and under all the circumstances were willfully violative of the Securities Acts.

142. There is no proof that Hines made any other sales of Minerals other than the above and he professed that he was not interested in selling it and was surprised that there was evidence of even one sale. However, responsibility under the Securities Acts attaches to any violation and does not depend on proof of a number of infractions.[40/]

William Downey

143. William Downey was employed by the registrant as a salesman from January to September, 1960. He testified that he could not recall actually selling any Minerals stock but testified he recalled taking a call in the early morning for Merritt, who was not in, in which a customer ordered three lots of a stock totalling 250 shares. He was not sure whether it was for Minerals stock, but conceded it might have been.

144. On cross-examination, he testified he used card files in the office for leads. He also stated that in the salesrooms it was impossible not to hear other salesmen talking. He affirmed statements given in an investigative transcript (Div. Ex. 142) that he had heard salesmen tell customers that the stock would double in price in a few weeks. He characterized the statements he heard made as "ridiculous". He further testified that Merritt and James Vickers urged the salesmen to send out

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40/ Mac Robbins & Co., Inc., supra; U. S. v. Ross and Gordon, supra.

materials on Minerals.

145. It is alleged that Downey was a participant in a scheme to defraud. If Downey is to be believed, and no contradictory evidence was presented, he may or may not have sold any Minerals and, if he did, it was on an occasion when he acted as an order-taker for another. The evidence is too fragmentary to warrant a finding that Downey personally engaged in fraudulent activities. Nor is there sufficient proof that the registrant concentrated on one or a small number of issues, all sold fraudulently, to warrant an inference that Downey's mere presence at the registrant's premises was part of an illegal scheme.[41/]

Paul Walker

146. Walker was employed by the registrant approximately 10 or 12 weeks from March to May, 1960.

147. C.W. bought 2,000 shares of Minerals from the registrant at 9/16 on April 7, 1960. He testified that before the purchase he received telephone calls from one of the registrant's salesmen telling him that Minerals had real estate developments in Florida and would possibly double or treble in price in a few months. He received at least two telephone calls before his purchase. He was not sure of the identity of the salesman who spoke with him prior to the purchase.

148. After his purchase, W. continued, he received calls from Walker urging him to purchase an an additional 2,000 shares and repeating the information previously given to W. He received more than one such call. W. did not make an additional purchase. He was not told anything

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41/ Compare Mac Robbins & Co., Inc., supra; U.S. v. Ross and Gordon, supra.

about the earnings and operations of Minerals in any call, he affirmed, nor was inquiry made as to his financial condition.

149. On cross-examination, he testified that his recollection was that the voice of the person who sold him the Minerals stock was not that of the man who later identified himself as Walker (Tr. 919-920).

150. On later examination, W. testified that he was not sure if Walker had spoken to him before his purchase also, but that he had spoken to at least two men, one of whom had identified himself as Walker (Tr. 1120-21).

151. Walker did not testify and it is argued on his behalf that there has been a failure of proof connecting Walker with the purchase by C.W.

153. Although C.W. was not certain of the identity of the person with whom he dealt, there is supporting evidence linking Walker to the transaction. C.W.'s confirmation has a "W" at the place where the initials of the salesman making the transaction were customarily placed (Div. 121). The only salesman of the registrant whose name also ended in a "W" was Jules Winters (Resp. Ex. 10) and he began work at this period, according to the aforementioned record, on April 13, 1960, after the sale.

154. W. was very clear that Walker spoke with him after his first purchase and sought to have him buy more Minerals stock. Violations of the anti-fraud sections of the Securities Acts may be made in an offer as well as the sale of a security. The undersigned credits W.'s testimony and concludes the statements made to him, which were substantially the same

before and after the purchase, were incomplete and misleading and willfully violative of the anti-fraud provisions of the Securities Acts in view of the paucity of information given on Minerals. The preponderance of the evidence including C.W.'s testimony, the initial "W" on his confirmation and W.'s failure to testify in these proceedings supports the conclusion the while W. was uncertain who his caller was in initial phone calls, he actually was dealing with Walker.[42/]

155. An investigative transcript of testimony by Walker was introduced in evidence as against him (Div. Ex. 131). In it, he stated that he sold Minerals to a couple of customers at Merritt's request and recommendation. He was not sure whether he saw a financial statement on Minerals and said he sold from literature given him. He had poor recollection of what he actually saw and used. He maintained he sold the stock on growth potential. He did not know the source of the literature he used. Walker admitted selling Minerals to two customers and did not check their financial condition.

156. It is clear from Walker's testimony that he blindly accepted whatever literature he received and made no attempt to analyze it. As far as the evidence shows, the only literature available to Walker would be the brief write-up in the March Market Views and perhaps some promotional material prepared for the Macksey interests. None of these gave a clear picture of Minerals and did not even reach the status of the type

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42/ N. Sims Organ, 40 S.E.C. 573, 577 (1961), aff'd 293 F. 2d 78, 81 (1961), cert. den. 368 U.S. 968 (1962).

of brochure the indiscriminate use of which, by salesmen, was condemned in the Mac Robbins case (supra, p. 12). Walker's testimony merely buttresses the conclusions previously reached and demonstrate that he did not live up to the full obligations of a securities salesman to his customers.

III. RESPONSIBILITY OF THE REGISTRANT

156. Merritt testified that the registrant had a careful plan for the supervision and direction of its salesmen. Salesmen were trained according to their needs, newcomers receiving more than experienced men. Salesmen were advised to confine their recommendations to the data appearing in the issues of Market Views. They were admonished not to sell off the registrant's premises. In one instance, that of Abramson, he was allegedly discharged for improper practices.

157. Customer files, according to Merritt, were maintained by the registrant which included questionnaires giving data on portfolios held so that investment needs and objectives of each customer could be determined.

158. With respect to Minerals, it is pointed out that registrant caused an extensive investigation to be made of Minerals and the proposed merger including a trip by Merritt to Florida to look at the Macksey properties. It is also stated that salesmen were carefully instructed not to make any representations about earnings or possible rise in price of Minerals, but to sell the stock purely as a speculation.

159. Merritt also testified in detail of registrant's program to supervise salesmen and to check on their conversations. Merritt would

station himself at a central point frequently so he could overhear conversations. Costa had the specific duty of listening carefully to salesmen's conversations and to supervise their activities.

160. There is a complete lack of evidence that the program outlined by Merritt was ever put into force; certainly, if it existed at all, it was not efficiently administered. There is evidence that inexperienced men were hired as salesmen and given no training (Fetner, Treistman, Sharon). This was a practice which was fraught with danger to investors. Experienced salesmen who testified were ignorant of the existence of any training program.

161. The entire record is full of evidence that many salesmen made fraudulent misrepresentations and omissions of material information about Minerals to customers to such an extent that it completely negates registrant's claim of careful supervision of its salesmen's activities. Registrant had a duty to supervise its sales force to see to it that flagrant misrepresentations did not occur.[43/] It failed in this duty.[44/] What was said by the Commission in the Best case, supra, applies with equal force here:

43/ Best Securities, Inc., 39 S.E.C. 930, 934 (1960).

44/ Merritt testified that Abramson was told by him not to sell any more Minerals stock when he began to be dissatisfied with his tactics and concentration on that stock. However, this conversation took place over a year after Abramson had been selling Minerals with results which have been summarized in a preceding section.

> "Moreover, the fact that identical misrepresentations were employed by the two salesmen named in the order in selling to various members of the public, raises the inference that they were employing an agreed upon sales 'pitch,' which could hardly have occurred without the knowledge of responsible persons in the firm and the firm was clearly chargeable with such knowledge and the responsibility for the misrepresentations."
> (p. 934)

162. The record also is replete with evidence that no inquiry was made into the financial needs of customers or effort made to determine the suitability of Minerals as a stock for investment by the customers solicited. None of the customer witnesses was asked about filling out a financial questionnaire and none testified they did. The record actually establishes that salesmen were furnished with lead cards and proceeded to contact the prospects listed with no further information than name and address.

163. Comment has already been made on the incomplete and misleading nature of the material registrant itself prepared on Minerals. The evidence establishes that registrant was selling Minerals in substantial amounts from its very beginning and long before the merger with the Macksey group was in a firm discussion stage and while Minerals was a corporate shell (Div. 123).

164. It is concluded that the registrant was responsible for the conduct of its salesmen and that it willfully violated the antifraud provisions of the Securities Acts and that Merritt, James S. Vickers, and Nardi, persons in control of the registrant, and Costa,

its sales manager, willfully violated or abetted in the violations, in addition to their own individual violations previously found.

IV. CONCLUSIONS OF LAW, RECOMMENDATIONS

It has been found that the registrant, aided and abetted by Merritt and James S. Vickers who were persons in control of its operations, willfully violated the net capital provisions of the Exchange Act. It has further been found that the registrant, Merritt, James S. Vickers, Charles Nardi and registrant's salesmen named in the order for the proceeding except William Downey, willfully violated the anti-fraud provisions of the Securities Acts and applicable rules in the sale of common stock of Minerals.

The Commission, pursuant to the provisions of Section 15(b) of the Exchange Act, so far as it is material herein, is required to revoke the registration of any broker or dealer if it finds that such revocation is in the public interest, and that such broker or dealer, subsequent to becoming such, or any officer or director or any person controlled by such broker or dealer, has willfully violated any provision of the Securities Acts or any rule or regulation thereunder. Willful violations by principals and controlled persons of the registrant have been found.

It is urged that revocation is not required in the public interest. It is urged on behalf of the registrant, James S. Vickers, and Merritt that the application of registrant to withdraw its registration should be granted. Money was put into the firm, it is asserted, so that all

customers were paid what was owed. The respondents, it is claimed, tried to operate the firm in a business-like manner, observing ethical rules. Minerals was sold as a speculation for those willing to take risks. It is pointed out that an on-the-spot survey was made of the Florida operations. It also asserted that registrant did not deal solely in Minerals, but dealt in other stocks suitable to different investment purposes.

On behalf of Nardi, it is maintained he had no experience in the business, was not there regularly, and acted more as office boy than supervisor.

On behalf of Fetner, it is urged that his youth (23 years old at the time), his inexperience (college student), short period of employment (a few months), and alleged action in good faith, should be considered.

On behalf of Walker, it is asserted that he only worked for registrant about ten weeks, sold to only a few customers, and did not knowingly participate in a scheme to defraud.

His youth and inexperience are urged in Treistman's behalf.

Youth and inexperience are also claimed as extenuating circumstances for Sharon, who took a position with registrant as a summer job.

The evidence establishes that registrant, from its inception, took an active interest in Minerals. The stock was sold with gross misrepresentations and with careless indifference to the true financial condition of Minerals during the period here under consideration. No attempt was ever made to determine and inform investors of the true financial situation of Minerals and the Macksey groups. Registrant not

only tolerated high-pressure and fraudulent tactics by its salesmen, but encouraged them by handing out misleading or incomplete literature or making sales when it had no written information on Minerals. All the respondents, except Downey, joined in the sales campaign. The misrepresentations were all so uniform as to warrant the conclusion that all the respondents were participating in a common scheme to defraud.[45/] In any event individual violations of the Securities Acts by the individual respondents were established.

The Commission has determined that in cases such as this one where extensive violations are involved, the public interest must be fully protected and pleas such as have been advanced here must be rejected.

In Ross Securities, Inc.,[46/] where the Commission found violations similar to those found here, it said:

> "Some of the salesmen have sought to excuse their conduct by asserting that they were young and inexperienced; that they themselves purchased Tamarac stock, thus evidencing their good faith; that customers knew that Tamarac stock was speculative; and that only one or a few customers testified with respect to certain salesmen. They urged that they not be banned from future employment in the securities business or be found causes of any action against registrant. These facts do not detract from the gravity of the violations revealed in the record of these proceedings. On the basis of this record we do not believe that the investing public should be exposed to further risks of such conduct by respondents who have demonstrated their

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45/ Mac Robbins & Co., Inc., supra; U. S. v. Ross and Gordon; supra.

46/ Sec. Exch. Act Rel. 7069 (April 30, 1963).

gross indifference to the basic duty of fair dealing required of those engaged in the securities business. 10/

10/ A determination that future securities activities by the salesmen would be consistent with the public interest should be made on the basis of a showing of the nature of the proposed activity and the conduct of the salesman in question prior to and subsequent to the misconduct here found."

Under all the circumstances, the undersigned concludes that it is in the public interest to revoke the registration of the registrant and recommends that the Commission issue such an order and also should expel registtant from membership in the National Association of Securities Dealers, Inc. It is further recommended that the Commission find that Matthew J. Merritt, James S. Vickers, Charles Nardi, Edward Abramson, William Perles, Lloyd Fetner, Robert Sharon, Burton W. Teague, Jules Winters, John Costiera, also known as John Costa, Robert Hines, Erle Sperer, Paul Walker, and Richard Treistman are each a cause of the order of revocation which the undersigned has recommended be entered here. It is also recommended that the notice of withdrawal from registration filed by the registrant not be permitted to become effective.

Registrant was not in business at the time of the hearing and with no plans to re-open. Under the circumstances, it is not recommended that the registration of the registrant be suspended pending final determination of the question of revocation. If registrant seeks to

re-enter the brokerage business, it is recommended that an order of suspension issue.[47/]

Respectfully submitted,

Sidney L. Feiler

Sidney L. Feiler
Hearing Examiner

Washington, D. C.

July 30, 1964.

47/ All contentions and proposed findings submitted by the parties have been carefully considered. This Recommended Decision incorporates those which have been accepted and found necessary for incorporation therein.