

ADMINISTRATIVE PROCEEDING
FILE NO. 3-6208

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
ALAN BENNETT HARP

:
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INITIAL DECISION

Washington, D.C.
May 23, 1984

Ralph Hunter Tracy
Administrative Law Judge

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APPEARANCES: Marc E. Chafetz and Irving Einhorn
for the Division of Enforcement

Marvin Gersten, Gary P. Naftalis,
Michael H. Barr for Alan Bennett Harp

BEFORE: Ralph Hunter Tracy, Administrative Law Judge

On January 5, 1983 the Securities and Exchange Commission issued an Order (Order) pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 (Exchange Act) instituting a public proceeding to determine whether the respondent Alan Bennett Harp (Harp) committed violations of the Exchange Act, and regulations thereunder, as alleged by the Division of Enforcement (Division), and the remedial action, if any, that might be appropriate in the public interest.

The Order alleges, in substance, that Harp willfully violated Sections 9(a)(2) and 10(b) of the Exchange Act and Rule 10b-5 thereunder.

The evidentiary hearing was held in Houston, Texas, on May 17 and 18, 1983, and in New York, New York, on May 24, 25, and 26, 1983. Harp was represented by counsel; proposed findings of fact, conclusions of law, and supporting briefs were filed by Harp and by the Division. Harp's employer during the period herein, Mabon, Nugent & Co. (Mabon), also filed a brief on his behalf.

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

Respondent

Harp, a native of Texas, was born on February 6, 1943. He attended the University of Texas from September 1962 to October 1965 but did not obtain a degree. He then attended law school for one year. Initially he spent a short period employed in the steel business, and since then he has had a long and successful career in the securities industry, particularly as an analyst of oil and gas companies. From 1968 until 1976, Harp was employed by Rotan Mosle, the oldest brokerage firm in Texas. At Rotan Mosle Harp was primarily responsible for the formation of the firm's institutional department and its energy sector. He gained a reputation as a competent analyst of oil and gas companies, and soon became one of Rotan Mosle's most substantial business producers.

From 1976 until 1978, Harp worked in the Houston office of Lehman Brothers as an institutional salesman and oil analyst. Here too he was a successful producer of business for the firm.

From 1978 through July 1981, Harp worked in the Houston office of John Muir & Co. (Muir) doing corporate, finance, retail, and institutional sales. In his last year at Muir, Harp personally earned approximately one million dollars in commissions. For reasons not germane to the current matter Muir was dissolved in July 1981.

From July 1981, when he left Muir, until November 1981 when he joined Mabon, Harb engaged in business as an oil and gas consultant for himself and Texas General Resources, an oil and gas exploring firm, as will be described later in this decision.

In November 1981 Harp joined Mabon, a brokerage firm headquartered in New York City. Mabon is registered with the Commission and is a member of the National Association of Securities Dealers (NASD), the New York Stock Exchange (NYSE), and various other national exchanges. Mabon's principal business since its founding in 1892 has been with other broker-dealers and institutional customers.

In November 1981 Mabon took over the former Houston office of Muir, including the physical plant, of which Harp was a partial owner, and its employees. The acquisition was prompted by Mabon's expectation

that it would be a profitable economic venture with Harp producing much of the income. Harp was employed by Mabon from November 1981 to September 1982 as a registered representative, doing retail and institutional sales. However, following the events described herein, Mabon closed its Houston office in September 1982.

Background

Texas General Resources, Inc., (Texas General), a Texas corporation headquartered in Houston, is a holding company with subsidiaries engaged in on-shore and off-shore oil and gas exploration and production, primarily in the southwestern United States. Its common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and its stock is listed for trading on the American Stock Exchange (ASE). Dr. W. Edwin Bosarge, Jr. (Bosarge) was a founder, chairman of the board of directors, and chief executive officer of Texas General at all times relevant herein. He was also the largest stockholder, owning about 25 percent of the common stock outstanding.

Early in 1981 Harp became interested in Texas General and while visiting the firm met Bosarge. Harp and Bosarge subsequently became close friends. On March 16, 1981 Harp and two other Muir salesmen entered into an agreement with Texas General to raise

funds for a Texas General exploration joint venture. On June 5, 1981 Harp entered into a consulting services agreement with Texas General whereby he was retained as an agent of the company (Texas General) in marketing limited partnerships and/or joint ventures offered for sale by the company, either through private placements or through placements registered for sale under the provisions of the Securities Act of 1933.

In addition to the foregoing activities, Harp was instrumental in publishing three research reports on Texas General. In 1981, while he was still at Muir, he helped prepare a research report, and after he joined Mabon he published two reports: on January 9, 1982 and May 14, 1982.

Although Harp testified that he was not reimbursed for the research reports, he did receive approximately \$112,000.00 and 6,298 shares of Texas General stock as commissions and fees for his activities on behalf of Texas General as a consultant and salesman of limited partnerships. He also received \$150,000.00 in personal, uncollateralized loans from Bosarge during 1982. In addition, he earned a \$150,000.00 finders fee in connection with Texas General's acquisition of an interest in a gas well (p. 10 infra).

In December 1981 Texas General's senior management decided to acquire a substantial position in Wainoco Oil Corporation (Wainoco), a Wyoming corporation with headquarters in Houston. Wainoco explores for and produces oil and gas in Canada and the United States. Wainoco's common stock is registered with the Commission and traded on the New York Stock Exchange.

Wainoco's stock was around 13 dollars a share, its lowest price in several years, when Texas General made its first purchase of 20,000 shares in early December 1981 through a Houston broker who had first recommended Wainoco to Texas General. The following day the price of Wainoco rose sharply, and Texas General received several calls inquiring about its intentions. Texas General suspected the broker of spreading rumors in the investment community to the effect that Texas General intended to acquire Wainoco, and that such rumors would raise the cost of additional shares. Consequently, on the advice of counsel, Texas General decided to sell the 20,000 shares, terminate its relation with the broker, and temporarily withdraw from the market.

Shortly thereafter, again on the advice of counsel, Texas General decided to purchase up to 4.9 percent of the shares of Wainoco. Harp was selected as Texas General's broker because of his known ability to buy blocks of stock

in a professional and discreet manner. Also, it was believed that Mabon's reputation as primarily a bond firm would minimize the visibility of the purchases. In mid-December Bosarge and other Texas General executives met in Mabon's New York office with Steven Ehrlich, Mabon's managing director, and other Mabon officers. On counsel's recommendation a nominee account was used, the "RIC Account," to insure confidentiality.

John Wharton, chief financial officer of Texas General, was responsible for funding the acquisition of the Wainoco shares. Again, for confidentiality, the purchases were all transacted by Harp through Mabon in New York and delivery versus payment (DVP) was made through an RIC group account at the Central Bank of Denver. During December 1981 and the early part of 1982, Mabon acquired approximately 345,200 shares of Wainoco for Texas General. However, by March 1982 Wainoco had declined, and Texas General decided to change its strategy and trade the Wainoco stock for income producing properties. Bosarge did not think it worthwhile to sell the shares Texas General had acquired and he first tried to exchange them for oil and gas properties held by Wainoco, but that never materialized. He then asked Harp for suggestions and Harp recommended the Kirk Gas Unit (Kirk Unit).

The Kirk Unit is one of the outstanding gas fields on the Gulf Coast. It produced in significant amounts until early 1981 when a major blowout occurred^{1/}. After a relief well was drilled, the Kirk Unit again produced on a substantial basis. Before the blowout, Harp had been negotiating a sale of some leasehold interests for several of the leaseholders when the blowout aborted the transaction.

Harp introduced Bosarge to John Hada (Hada), one of the leaseholders, and Bosarge conducted preliminary negotiations in March 1982 with Hada and Don Hartmann (Hartmann), another substantial Kirk leaseholder. By the end of March the basic terms of the deal were agreed upon. On April 6, 1982 a written agreement was drawn up at a meeting attended by Bosarge, Harp, Hartmann, and Kenneth White (White), also a leaseholder. White served as lead negotiator for the leaseholders and Bosarge was the negotiator for Texas General. At this meeting an agreement, dated March 31, 1982, was executed by Bosarge and the two repre-

^{1/} A blowout is a catastrophic event in which the pressure in the producing formation causes the well to blow and, in this case, to catch fire.

sentatives of the leaseholders, White and Hartmann. The closing took place on April 26, 1982.

As a result of the agreement 12 leaseholders made a collective assignment representing a 21.1875 percent working interest in the Kirk Unit. In exchange for the interest Texas General was to deliver 352,965 shares of Wainoco stock. In addition, the agreement provided that the sellers could not sell their Wainoco shares prior to June 30, 1982, and thereafter until September 30, 1982, the purchaser, Texas General, had the right of first refusal.

The April 6 agreement contained two so-called "disaster" provisions designed to protect each party in the event the assets they received substantially declined in value. The first disaster clause provided that if the Kirk production declined by 50 percent before September 30, 1982, 25 percent of the Wainoco shares would be returned by the sellers to Texas General. The second disaster clause provided that if the price of Wainoco stock declined by 50 percent of the exchange price (14-1/2) before September 30, 1982, Texas General would have to deliver to the sellers an additional 25 percent of Wainoco shares.

The closing was almost delayed because Texas General was short some five or six thousand shares of the amount needed. However, one of the sellers, Hada, agreed to wait for the extra shares to complete his portion of the deal and to bear responsibility for any loss. In return Hada requested permission to sell or transfer some of his shares. Bosarge consented even though such sales could have had a negative effect on the price of Wainoco.

In connection with Texas General's acquisition of the interests in Kirk Gas Unit, Harp received a finder's fee of \$150,000.00; \$75,000.00 was paid by Texas General and \$75,000.00 was paid by the leaseholders. At Harp's suggestion he signed the leaseholders' checks over to Texas General who then wired the entire \$150,000.00 to an account in the name of Anticipant Investor, N.V. (Anticipant), a Netherlands Antilles corporation, at the New York City branch of the Royal Bank of Canada.

The U.S. portfolio manager for Anticipant is John T. Ragland (Ragland), an investor and investment advisor who operated through Ragland Co., Inc., a family business, and Old Mill Trust,

a family trust. Ragland testified that he and his family and Anticipant owned a substantial amount of Texas General stock during the period herein. Ragland has been a securities salesman and at one time had his own brokerage business. He became acquainted with Harp as an oil and gas analyst when Harp was with Lehman Brothers. He testified that he has been buying and selling securities for Anticipant since 1980, although he does not know who the owners are.

Harp called Ragland saying he had some monies which he wished to deposit with Anticipant. By letter of April 28, 1982, Ragland acknowledged that Harp's deposit of \$150,000.00 had been received as a loan to bear interest at 12 percent per annum. However, Ragland testified that he commingled Harp's funds with other Anticipant funds in the Royal Bank account. Anticipant also maintained a brokerage account with Harp at Mabon.

Subsequent to Texas General's acquisition of the Kirk Unit, the market price of Wainoco gradually declined. On March 31, 1982 it was 14-1/2, the price used in the agreement; on April 1 it was 15; on April 30 it was 14; on

May 31 it was approximately 12; on June 21 it was 8-1/2 and on July 1 it was 8. The trigger price was 7-1/4. In other words, when Wainoco fell to 7-1/4 Texas General would be obliged to deliver an additional number of shares to the sellers. The agreement did not contain the total number of shares but simply stated:

If, prior to September 30, 1982, the price of the shares of Wainoco common stock shall decline by 50% or more from the market price on the date hereof (\$14.50 per share, subject to any anti-dilution adjustments for stock splits, stock dividends and the like), then Purchaser shall deliver to each of the Sellers an additional 4,230.19 shares of Wainoco common stock or, at Purchaser's option, \$61,337.72 in cash, for each 1% of current Working Interest sold hereunder.

A computation based on the figures in the above disaster clause shows that in the event the trigger price was reached before September 30, 1982, Texas General would have to deliver 89,627.15 shares of Wainoco stock to the sellers, or, in lieu thereof, approximately \$1,299,592.00 in cash. For convenience these figures have been rounded off for future reference as 90,000 and \$1,300,000.00, respectively.

Bosarge testified that sometime in June 1982, he told Harp that he was concerned that he might have to produce a substantial number of shares of Wainoco stock,

perhaps 150,000 shares, under the disaster clause in the agreement and that Texas General did not have sufficient funds to make such a purchase. Bosarge was leaving the country on a business and vacation trip and asked Harp to watch the situation very closely. Harp testified that on June 21, 1982 he called Don Lambert, general counsel of Texas General, to tell him of Bosarge's request; that Wainoco stock was approaching the 8 dollar level; and that he (Harp) wished to know the trigger price and to obtain permission to begin buying the stock. Lambert told Harp that the trigger price was 7-1/4, but that Dr. Leslie (Robert J. Leslie, president of Texas General) would be the one to give permission to start acquiring the stock.

Lambert's testimony, on the other hand, is that Harp called him around July 6 or 7, 1982 to inform him that they were getting close to the trigger price and thought it was in the best interest of the company to start acquiring the stock. Lambert asked the terms of the agreement, but Harp stated he did not have his copy available so Lambert referred to his copy and by a quick calculation came up with a cash figure of about \$1,300,000.00 or 89,000 odd shares, which they rounded off to 90,000 for discussion purposes.

As Bosarge was out of the country Lambert had to obtain authorization from Dr. Leslie (whom he interrupted in a meeting). Lambert and Leslie ran through the mathematical computation. Dr. Leslie agreed that they would be dollars ahead in this transaction by acquiring the stock, even all 90,000 at 8 dollars a share: and so he authorized the use of corporate funds for the transaction. Lambert then called Harp and told him the transaction had been authorized and to start acquiring the shares at the best price available. Lambert testified that the number of shares involved was not discussed with Harp in the second conversation because they had just gone through the calculation of the numbers in the first conversation.

Lambert then briefed his associate general counsel on what was happening. He also called Wharton, who was in New York on business, to advise him, as chief financial officer, that they were going to need three quarters of a million dollars and needed two days to draw down on their line of credit with Marine Midland Bank. Lambert wanted to get Wharton's consent as well as to inform him. He also went through the calculation of shares versus cash with Wharton.

Wharton was executive financial officer and a director of Texas General during the period herein. He is a certified public accountant and was employed by Arthur Andersen & Company for seven years. He was comptroller and treasurer of Wainoco for five years just prior to joining Texas General. He testified that he was in New York when he received the call from Lambert. It was right after July 4, around the 6 or 7 of July. Wharton and Lambert went through the terms of the Kirk agreement and discussed the formula used in determining the number of shares. Wharton said that it was obviously in Texas General's best interest to deliver the stock as opposed to cash; it would save about half the price. He recalled that the cash requirement was around a million four and that he and Lambert calculated the stock price required would be around \$700,000.00.

Wharton testified further that he and Lambert computed that the number of shares that would have to be delivered in the event Wainoco reached 7-1/4 was approximately 90,000. Lambert wanted to get Wharton involved as he (Wharton) had to make sure that the funds were available to make the purchase. They used the same process that they had earlier in the December purchase of Wainoco, at which time they used DVP under the RIC account and issued funds through the Central Bank of Denver. Texas General did not have cash available and borrowed the money, using a line of credit.

Upon his return to Houston, Wharton met with Lambert in his office, again went through the calculations, and confirmed the number of shares, that is, approximately 90,000. Wharton had also figured the number of shares for himself. Shortly afterwards he met with Harp on a personal transaction, and during the course of the conversation they talked about the number of shares that had to be acquired. Wharton told Harp that both he and Lambert had calculated the number at approximately 90,000 shares. Wharton testified that during this period in July Lambert told him he had also told Harp that 90,000 shares was the number that Texas General would be obligated to deliver to the leaseholders.

The record shows that on June 21, 1982, Mabon placed buy orders with the Wainoco specialist of the NYSE. These were limited orders at 7-3/8. James Jacobson (Jacobson), the specialist, testified that the placement of limited orders at 7-3/8 would prevent the market price of the stock from going below that figure. It would also prevent the specialist from quoting it below 7-3/8.

The specialist's book shows that Mabon first placed a buy order for 5,000 shares of Wainoco on June 21 at 7-3/8. This was a GTC (good 'til cancelled) order. The high for Wainoco on June 21 was 9 and it closed at 8-1/2. Mabon's GTC buy order for 5,000 shares at 7-3/8 remained on the specialist's book for June 22 and 23 and was raised to 7-1/2 on June 24.

The order for 5,000 shares at 7-1/2 remained on the book until July 1, when a 15,000 share order at 7-1/2 and a 10,000 share order at 7-3/8 was made. On July 6 an order for 30,000 shares at 7-3/8 was placed in addition to the July 1 orders. During this period, from June 21 to July 6, Wainoco stock had slowly dropped to a closing price of 7-3/4 on July 6.

On July 7 Mabon made its first buy of Wainoco for Texas General. This was for 11,900 shares at 7-1/2. During the period from July 7, 1982 to July 23, 1982, the pertinent period herein, Texas General purchased 93,000 shares of Wainoco and sold 8,600 shares for a net acquisition of 84,400 shares. In addition, during the period from July 7 to July 27, Ragland, on behalf of Anticipant, purchased 29,300 shares and sold 29,000 shares. The activity on the part of Harp on behalf of Texas General and Anticipant in Wainoco stock is shown in the table on the following page, 17-A.

TABLE SHOWING ACTIVITY IN WAINOCO STOCK

Date	Texas General Bought	Price	Sold	Price	Anticipant Bought	Price	Sold	Price
1982 July 7	11,900	7-1/2						
8	7,900	7-3/8			7,900	7-3/8	3,000	7-3/8
9			2,000	8			2,000	8
9			2,600	8-1/2			2,900	8
12	900	7-3/8			3,000	7-3/8		
12	1,000	7-1/2						
13	38,400	7-3/8			4,000	7-3/8		
14					4,400	7-3/8	600	7-3/8
14							3,000	7-5/8
14							2,000	7-3/4
14							2,000	7-5/8
14							3,800	7-3/4
15								
16			2,000	7-3/4				
16			800	7-7/8				
19			1,200	7-7/8				
21	16,400	7-3/8			10,000	7-3/8		
22	10,000	7-3/8						
23	6,500	7-3/8						
26							8,200	7
27							1,500	7
Totals	93,000		8,600		29,300		29,000*	

*The remaining 300 shares were sold on October 14, 1982 at 7.

Ragland testified that he had been following Wainoco for a long time. He produced a record of purchases and sales, usually on the same or succeeding days, showing some 34 transactions during the period from October 1980 to April 1982, totalling 19,800 shares. These purchases and sales, in the 500 to 3,000 share range, were all for his own account. All transactions, except two, were through his regular broker, Russo Securities.

Ragland testified that in 1982 when Wainoco went below 10, he began watching it closely. When it appeared to hold and rally a little around 8 and 7-1/2, he surmised that it was bottoming out at 7-1/2 or thereabouts just from the trading activity. He assumed that someone was buying it, so he asked his broker, Russo, to find out who was buying. Russo reported back that the buyer was Mabon. Thereupon, he called Harp and learned that he was handling the order at Mabon. He told Harp he was interested in buying Wainoco and rather than compete with him through his broker asked Harp if he would mind handling an order for him. Harp said, "No, not at all, I'll handle it on a go-along basis." Ragland then told Harp that he was going away on vacation,

that he would be out of reach, and that he would call Harp from time to time to see what was happening.

Ragland testified that "go-along" refers to a participating order in which one broker will buy several thousand shares of stock and then apportion it among all accounts that want it. Ragland also testified that he made sales of Wainoco through Russo at the same time he was purchasing through Harp, with the intention of taking short-term profits. He did not tell Harp what he was doing.

The record shows that Texas General made its first buy of Wainoco, 11,900 shares, on July 7, and Anticipant's first buy was at 9:54 a.m. the next day, July 8. Mabon bought 15,800 shares at 7-3/8 and allotted 7,900 to Texas General and 7,900 to Anticipant. This purchase by Ragland on the second day of Harp's trading in Wainoco would appear to be in conflict with his testimony that he was influenced by observing the market activity and had ascertained who was causing the activity before giving a go-along order to Harp. There is nothing in the record to indicate precisely how the simultaneous sales were being made through Russo.

Thomas Turley (Turley), the compliance partner at Mabon, testified that he called Harp about July 13 because he had become concerned about the financing of Texas General's order to purchase Wainoco. Turley knew that there was a limit order at 7-3/8. Harp informed Turley as to Texas General's obligation pursuant to the Kirk agreement, the trigger price, and other information relevant to the order. Turley testified that he was satisfied with the explanation and allowed the purchasing to continue. Later he wrote a memorandum, dated July 15, of the conversation with Harp in which he noted:

Reviewed order to buy WOC at 7-3/8 for possible problems of customer financing purchases. Found we had orders to sell at 8. Customer swapped former WOC position for oil production rights. Terms provided additional payment if WOC dropped below 7-3/8. Permitted WOC to support at 7-3/8 and sell at 8.

In his testimony Turley explained the handwritten memo, saying that "WOC" meant Wainoco, and that it reflected his impression of the situation as outlined by Harp.

On July 22, 1982, the specialist in Wainoco stock, James Jacobson, reported to a floor governor of the NYSE, pursuant to NYSE rules, a possible unusual situation con-

cerning Wainoco stock. Jacobson testified that during the preceding few weeks Mabon had been a buyer of Wainoco, and that on July 22 he heard a rumor that if the price dropped below $7-3/8$, an investor would have to give additional shares of Wainoco because of an agreement in an exchange offering. Jacobson passed on the rumor to Mabon and told them he intended to notify the NYSE.

Marshall Sherman (Sherman), a Mabon partner, was asked to formulate Mabon's response to the specialist's concerns. Sherman testified that he consulted with Mabon's attorneys who advised him to ascertain the size of the entire order and to place it with the specialist. Sherman called Harp and informed him of the situation. Harp then checked with the trading desk about the number of shares acquired and the total of shares on the book. Harp was of the opinion that Texas General needed a total of 150,000 shares to satisfy the agreement, and he calculated that they now needed 72,100 additional shares. He communicated this figure to Sherman, and it was put on the specialist's book.

Harp testified that in the morning of July 21 he received a call from Bosarge who was anxious

to find out Texas General's current position in Wainoco. Harp could give him only the figure from the night before, which was 60,000 shares. Bosarge said he was going to see Lambert immediately and asked Harp to call Lambert to find out how much stock was required to deliver. Harp called Lambert, who informed him that they needed 90,000 shares to make delivery. Harp testified that since Bosarge had just visited Lambert in his office he assumed Lambert had been told that Texas General had purchased 60,000 shares so that when Lambert told him 90,000 it seemed that this concurred with the 150,000 shares Bosarge had told him originally.

In his testimony Harp said that he received a frantic call from Sherman on July 22 while he (Harp) was on vacation. Sherman said that the specialist was going to inform the NYSE that there were irregularities; that he (Sherman) had spoken to Wharton at Texas General; and that Harp was to provide them immediately with the number of shares left on the order. Harp called the trading desk of Mabon and then called Sherman. During the conversation with Sherman, Harp made calculations

on a memo pad to ascertain that as of the close of business on July 21 Texas General had a net position of 67,900 shares of Wainoco. There was an additional 10,000 share purchase on July 22, so Harp calculated that a total of 77,900 shares were then owned by Texas General; thus 72,100 were needed to reach the total of 150,000 shares which he thought were required to meet the agreement. Harp called Leslie to get the necessary authority to make the additional purchases, and then communicated with Sherman who had the Mabon trader put the order for 72,100 shares on the specialist's book.

John Lesniewski (Lesniewski), manager of the stock watch division, which is part of the surveillance unit of the NYSE, testified that when he was informed of some unusual trading in Wainoco late in the day of July 22, 1982, he first spoke to the specialist, Jacobson, and then with Sherman at Mabon. Sherman told Lesniewski that he had checked with Mabon's counsel regarding the order and had then given the purchase order for 72,100 shares to the specialist with a limit of 7-3/8 and instructions not to show the full amount. Sherman did not say that Mabon's attorneys had been consulted about the situation

but only about the order. Sherman then asked Lesniewski if it had been all right to give the order to the specialist. Lesniewski replied that he would not object at the time but would have to pursue the matter. Lesniewski did not suggest that the order be cancelled because it was approaching the 4 p.m. closing time and he did not have the full facts nor the authority to cancel it.

The documentary record shows that Lesniewski spoke to Sherman at about 3:35 p.m. on July 22, 1982; that Sherman told him that Texas General was the customer buying Wainoco; that there had been net purchases of about 75,000 shares since July 7, 1982; and that he (Sherman) had told the registered representative (Harp) to ascertain from the customer the full size of their buying and the reason for setting the 7-3/8 price level. Sherman said he had been informed by the registered representative that Texas General would tell him only that it had to do with an exchange offer of 150,000 shares at 7-3/8, which was supposedly the full amount Texas General intended to buy.

Lesniewski asked Sherman about the terms of the exchange offer, and Sherman said he was not sure but that in February, 1982, Texas General had owned about

300,000 or 400,000 shares of Wainoco; that Texas General exchanged the Wainoco shares for certain drilling leases; and that if the price of Wainoco decreased to a certain level, Texas General would have to give an additional 150,000 shares of Wainoco to the sellers.

Lesniewski also questioned Sherman regarding the agency obligation of both his broker and the specialist. Lesniewski asked if a seller entered the market with 50,000 or 75,000 shares to sell at 7, how could they not purchase the stock at 7 but instead tell the seller that they would buy it at 7-3/8. Lesniewski told Sherman that not trying to do better would be considered a practice of pegging or price fixing. Sherman said that he had thought that placing the order with the specialist and showing the bid at 7-3/8 was well within the rules.

On the next day, July 23, 1982, Lesniewski continued his inquiry. He received information from a vice president of Wainoco that his company was not engaged in any business or exchange of stock with Texas General; that he had heard that after Texas General had purchased over 300,000 shares of Wainoco stock it had entered into an agreement to exchange

its Wainoco shares for oil drilling leases; that if the price of Wainoco dropped to 7-1/4 Texas General would have to give the sellers an additional 25 percent of the 300,000 shares exchanged for the leases.

Lesniewski also informed the SEC and reviewed the situation with staff members. Lesniewski told them that he could not understand the reason for the large amount of 75,000 shares already purchased and the order to buy an additional 75,000 shares by Texas General since 25 percent of the 300,000 shares would amount to only 75,000 shares. Lesniewski said perhaps the company was not only trying to peg the price but also considered Wainoco stock to be a good buy at that level. Lesniewski was informed that the SEC had requested Texas General to cancel the order.

The price for Wainoco stock on the NYSE fell to 7-1/4, the trigger price, on July 23, 1982.

On July 26, 1982, White, on behalf of the Kirk Unit sellers, addressed a letter to Bosarge requesting that Texas General comply with the disaster clause in the agreement and deliver to the sellers either 89,627.15 shares of Wainoco stock or \$1,299,592.94 in cash. Wainoco continued to decline, gradually going

to 7 on July 26, 6-3/4 on August 2, 6-1/4 on August 10, 6 on August 12, and 5-1/4 on August 13. On August 16 it reached a low of 4-5/8 and gradually recovered until it reached 7 on October 14, 1982, the date Ragland sold his last 300 shares.

Violations

The Order alleges that during the period from on or about July 7, 1982 through on or about July 23, 1982 Harp willfully violated Sections 9(a)(2) and 10(b) of the Exchange Act and Rule 10b-5 thereunder in connection with the purchase and sale of the common stock of Wainoco on the NYSE. ^{2/} The Division states that

2/ Section 9(a)(2) makes it unlawful to effect "a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."

Section 10(b) as here pertinent makes it unlawful for any person to use or employ in connection with the purchase or sale of a security any manipulative device or contrivance in contravention of rules and regulations of the Commission prescribed thereunder. Rule 10b-5 defines manipulative or deceptive devices by making it unlawful for any person in such connection: "(1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statements of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading or (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . ."

Harp committed these alleged violations by directing the purchase and sale of Wainoco stock by Texas General and Anticipant at a limit of not less than 7-3/8 with the intention of preventing Wainoco from reaching the trigger price of 7-1/4, so that Texas General would not be required to deliver the additional shares demanded by the agreement.

The record clearly shows that beginning on June 21, 1982 and continuing until July 23, 1982, Harp placed limit orders for Wainoco on the NYSE which would not permit it to be quoted below 7-3/8. This effectively prevented it from reaching the trigger point of 7-1/4. During this period, specifically from July 7 to July 23, Harp, through Mabon, purchased 122,300 shares of Wainoco at 7-3/8 or above. During the same period Texas General sold 8,600 shares of Wainoco at 7-3/4 to 8-1/2, while Anticipant sold 19,300 shares at 7-3/8 to 8. In addition, on July 23, 1983, Harp placed an order to buy an additional 72,100 shares at 7-3/8.

Harp's contentions that he did not know the trigger price or the number of shares required is not supported by the record. According to his own testimony, Harp took Bosarge's instructions to him to mean that ". . . if you let that stock hit seven and a quarter, you'd better get . . . on the fastest plane out of town, because I'm going to . . ."

Dr. W. Edwin Bosarge, who is 44 years of age, has a number of graduate degrees including a Ph.D in mathematic economics from Brown University. He was also a professor of mathematical sciences at Rice University, Houston. He had his own investment business in real estate, oil, and gas, and formed the forerunner of Texas General in 1976 which became Texas General Resources in 1978.

In his testimony concerning the time period from June 21, when Harp first placed an order with the specialist, until July 23, Bosarge said that he was out of the country on business from mid-June until June 23 or 24 and then left again on June 26 for vacation and returned in early July. Bosarge stated that he had a conversation with Harp around June 24 or 25; that the stock was getting down around 8; and that Texas General needed to cover its position if it went to 7-1/4. Bosarge said he reconstructed the date of this conversation with Harp from checking his calendar.

Bosarge testified that Texas General had a business obligation to deliver on demand stock to meet the disaster provision; he thought they were short 150,000 shares because if the well production dropped 50 percent the sellers would have to give back to Texas General

50 percent of the shares and if the price of the stock dropped 50 percent Texas General would have to give the sellers 50 percent more shares. He testified that as it turned out the 50 percent did not apply to the number of shares, but that is how he was given the impression of an amount over 150,000 shares; thus when he talked to Harp he thought they needed 150,000 shares. Harp indicated to Bosarge on that day, June 24 or 25, that Lambert, in conjunction with Leslie, had given him the authority to go ahead and buy the stock, but they did not know the number of shares at the time.

Bosarge testified that he told Harp to buy the Wainoco stock as cheaply as possible at a price above the trigger price since it would have been impossible to accumulate a position optimally if they had waited. He said that there were a number of events contributing to this decision: Texaco, a joint venture partner with Wainoco, was rumored to be considering a takeover of Wainoco; Wainoco was incredibly cheap and other buyers might possibly be interested; the international situation indicated that something could occur which would cause the stock to run up even after it dropped to 6 or 7 and then they would still be short; brokers in Corpus Christi and Houston were aware that the stock was down in the seven range and that Texas General was short a significant

number of shares and would have to pay a higher price. Bosarge stated he did not know what it would have run to but that it could have run to 10, 11, 12 very quickly on a short recovery; that he wanted to buy the stock optimally and cover the short position; and that he told Harp to buy the stock at 8 or below.

Bosarge stated that when the trigger price was hit he received a demand letter the next day for immediate tender of the shares. Bosarge said that he was responsible for the miscommunication of the 150,000 share number to Harp.

It is readily apparent that there is a conflict in testimony among the principals concerning the time of conversations, the number of shares required, the prices to be paid, and the reasons for participating.

Harp originally placed a limit order on June 21, 1982, presumably after having talked to Bosarge. However, both Bosarge and Harp testified that they had a conversation on June 24 or 25, 1982. There is no testimony pertaining to a conversation between Harp and Bosarge prior to June 21 concerning instructions from Bosarge as to the purchase of Wainoco shares. Moreover, the conversation which Harp and Bosarge say took place around June 24 or 25 contained information concerning events which Lambert and Wharton

testified did not occur until July 5 or 6. In the context of the entire record it is concluded that the testimony of Harp and Bosarge is implausible and that of Lambert and Wharton is to be credited.

Also, as indicated earlier, Ragland's testimony appeared to be inconsistent (p. 19 supra). His further testimony concerning his reasons for purchasing Wainoco indicate that as a sophisticated investor he recognized the indicia of a manipulation:

- Q. Now if you had known then those facts, that Mr. Harp was the principal buyer and had those limit orders in with the specialist, if you'd known those facts at that time would you have bought the shares that you did?
- A. Absolutely not.

* * * * *

Well, I guess what I really meant was if I knew then what I know now I wouldn't have purchased the stock. That's correct, because although the stock was forming a bottom Alan (Harp) was, his account was the only other order out there, and once he was completed with his order, once he had bought all the shares against his order, the stock would in all likelihood go down; and, that's why I became nervous, and that's why I sold the stock so quickly, through Russo Securities.

In his brief Harp contends that he purchased Wainoco on behalf of his customer in order to fulfill its pressing contractual obligation. Therefore, he asserts, although Texas General's market investments necessarily affected the performance and price of Wainoco stock, his actions

as Texas General's broker were not manipulative. Because Texas General feared an immediate demand once the trigger was hit, it retained Harp to accumulate the stock to cover its short position before the stock dipped to the trigger price. He argues that his consistent market strategy had no relation to typical manipulative devices - painting the tape, pink sheet quotes, wash sales, matched orders, end and beginning of day trading, secret sales of publicly purchased stock, or hiring dealers to tout a stock.

The fact that respondent's actions did not include any so-called "typical manipulative devices" is not determinative of whether a manipulation has been committed. As the Commission has said: ^{3/}

A manipulation may be accomplished without wash sales, matched orders, or other fictitious devices. Actually buying with the design to create activity, prevent price falls, or raise prices for the purpose of inducing others to buy is to distort the character of the market as a reflection of the combined judgments of buyers and sellers, and to make of it a stage-managed performance. Whether or not his belief is, in good faith, that the free market had under-valued the securities, the manipulator's design in raising prices is to create the appearance that a free market is supplying

3/ Halsey, Stuart & Co., Inc., et al., 30 S.E.C. 106, 112 (1949). See, also, Barrett & Company, et al., 9 S.E.C. 319, 328 (1941); Masland, Fernon & Anderson, 9 S.E.C. 338, 344 (1941).

demand whereas the demand in fact comes from his planned purpose to stimulate the buyer's interest. It is of utmost materiality to a buyer under such circumstances to know that he may not assume that the prices he pays were reached in a free market; and the manipulator cannot make sales not accompanied by disclosure of his activities without committing fraud.

Harp, as an experienced broker, and Bosarge, as chief executive of Texas General were both, according to their testimony, groping in the dark. They did not know the number of shares required and Harp, at least, asserts he did not know the trigger price until the middle of July 1982. They also knew that Texas General would have to borrow the funds to buy the shares. Apparently the hope was that Wainoco would bottom out at 7-1/2 or thereabouts so that a purchase order at 7-3/8 for up to 150,000 shares would cause the market to rise as it had in January 1982.

It should be noted that Harp made no effort to obtain the required shares from other sources. Both Hada and Hartmann, leaseholders who had received large blocks of Wainoco in the exchange, expressed a wish to sell some of their shares but Harp did not consider it.

Upon consideration of the entire record, the picture that emerges is that Texas General needed 90,000 shares to satisfy the agreement; that Harp was instructed not to let the price of Wainoco go below 7-3/8, or reach 7-1/4; that Harp put in orders as early as June 21 with

a limit of 7-3/8; that orders were placed for 150,000 shares when only 90,000 were needed; that despite a previously declining market the price was pegged at 7-3/8 from July 7 to July 22; and that once the limit of 7-3/8 was removed the price immediately dropped to 7-1/4 and then declined further. Harp, as the broker, knew or should have known the trigger price and the number of shares required. His protestations that he was not aware of either are not credible.

The number of shares is irrelevant as to the finding of a manipulation. Once the price was pegged at 7-3/8 and held there for over two weeks, a manipulation had been effected. Moreover, the placing of an additional order for 72,000 shares at 7-3/8 is indicative of a continuing effort to maintain the price. It is noted, also, that both Lesniewski of the NYSE and Turley of Mabon thought that the market for Wainoco was being supported or pegged.

In this connection the Commission has stated: ^{4/}

The legislative history of Section 9(a)(2) shows that Congress clearly intended its prohibition against manipulation to extend beyond the actual consummation of purchases or sales. . . . what was intended to be prohibited was affecting the market artificially by raising or depressing security prices, or creating actual or apparent

^{4/} Kidder Peabody & Co., et al, 18 S.E.C. 559, 569-70 (1945).

activity, whether or not accomplished by actual purchases or sales. (Underscoring supplied.) And the conference report of the bill which became law shows that both houses intended to make the scope of the prohibition broader than a mere prohibition of purchase and sales. We think it is clear that Section 9(a)(2) prohibits the manipulation of prices on a securities exchange by means of placing bids on the exchange, directly, or indirectly through other persons.

The activity in Wainoco stock created by Harp was deceptive. As the Commission has held: ^{5/}

When investors and prospective investors see activity, they are entitled to assume that it is real activity. They are also entitled to assume that the prices that they pay and receive are determined by the unimpeded interaction of real supply and real demand so that those prices are the collective market place judgments that they purport to be. Manipulations frustrate these expectations. They substitute fiction for fact. Once in a great while the fiction turns out to have been benign when viewed in the light of hindsight. Even then, it is still a fiction. The vice is that the market has been distorted and made into "a stage managed performance."

A finding of a violation must be inferred from the circumstances of the case. In this regard the Commission has said: ^{6/}

Determination of the purpose of an act or series of transactions is at best a difficult task, involving the drawing of inferences from the transactions themselves and from the sur-

^{5/} Edward J. Mawod & Co., et al., 46 S.E.C. 865, 871, 872 (1977), aff'd 591 F.2d 588 (10th Cir. 1979).

^{6/} Leroy A. Strasburger & Co., 14 S.E.C. 397, 403 (1943).

rounding circumstances. Seldom if ever is there clear and convincing proof available as to the state of mind of the person involved.

It is found therefore that Harp willfully violated Section 9(a)(2) of the Exchange Act as charged in the Order. ^{7/}

The Order also charges that Harp willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The same facts and circumstances previously described as supporting a violation of Section 9(a)(2) are equally applicable to Section 10(b) and Rule 10b-5. Section 9(a)(2) prohibits manipulation "for the purpose of inducing the purchase or sale of such security by others," and Rule 10b-5 similarly prohibits deception upon "any person in connection with the purchase and sale of any security."

Thus, it is found that Harp willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and that the record fully supports a finding of awareness on his part, ^{8/} or at the very least, that he was recklessly indifferent to the consequences of his actions. Accordingly,

^{7/} In this context it is well established that a finding of willfulness does not require an intent to violate the law; it is sufficient that the person charged with the duty knows what he is doing. Billings Associates, Inc., 43 S.E.C. 641, 649 (1967); Tager v. S.E.C., 344 F.2d 5, 8 (1965); Hughes v. S.E.C. 174 F.2d 969, 1977 (1949).

^{8/} Aaron v. SEC, 446 U.S. 680, 690 (1980).

it is found that he acted with the requisite scienter. ^{9/}

Public Interest

The remaining issue concerns the remedial action which is appropriate in the public interest for the violations found to have been committed by Harp. The Division urges that Harp be barred from association with any broker-dealer. Respondent Harp asserts that even if a violation were found the public interest would not be served by the imposition of a sanction.

On October 5, 1981 the Texas State Securities Board revoked Harp's registration as a securities salesman for having sold a security which was not registered under the Texas Securities Act. Harp consented to this revocation. The Securities Board stated that it would not oppose the license application of Harp to become re-registered as a securities salesman on or after October 19, 1981 provided that: he be closely supervised by the broker-dealer under whom he is licensed and that he not become manager of a branch office for

^{9/} Recklessness has been held sufficient to satisfy the scienter requirement. See, e.g. Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1023-25 (6th Cir. 1979); Edward J. Mawod & Co. v. SEC 591 F.2d 588, 595-597 (10th Cir. 1979); First Virginia Bankshares v. Benson 559 F.2d 1307, 1314 (5th Cir. 1977) cert. denied, 435 U.S. 952 (1978).

one year after his registration as a salesman becomes effective.

The public has a vital interest in high standards of conduct in the securities business. However, when the most drastic sanction is imposed, the Commission has a greater burden to show with particularity the facts and policies that support those sanctions and why a less severe sanction would not serve to protect investors. ^{10/}

In view of the visibly contrived performance in the attempt to hold the Wainoco price above the contractual trigger point, as hereinbefore chronicled, and the sophistries and convolutions employed to rationalize such actions; and since an earlier sanction by the Texas State Securities Board involving restrictions and employer supervision seems not to have had any rehabilitative effect; and because the violations found herein are serious and the sanction must be of sufficient severity to impress upon respondent and others that the type of violative conduct engaged in by him cannot be tolerated; and in the absence of any truly mitigating factors, the comprehensive

^{10/} Steadman v. SEC, 603 F.2d 1126, 1137, 1139 (5th Cir. 1979), aff'd 450 U.S. 91 (1981).

assessment of Harp's conduct in the light of all of the circumstances leads to the conclusion that the sanction recommended by the Division be concurred in. Accordingly, it is determined that respondent should be barred from association with any broker or dealer as it is believed that any lesser sanction would be ineffectual.

ORDER

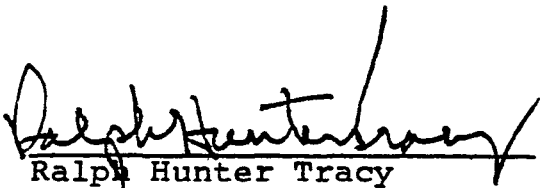
IT IS ORDERED that respondent Alan Bennett Harp be barred from association with any broker or dealer. ^{11/}

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

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

^{11/} It should be noted that a bar order does not preclude making such application to the Commission in the future as may be warranted by the then existing facts. Fink v. SEC, 417 F.2d 1058, 1060 (2d Cir. 1969); Vanasco v. SEC, 395 F.2d 349, 353 (2d Cir. 1968).

review, or the Commission takes action to review as to the party, the initial decision shall not become final with respect to that party. ^{12/}


Ralph Hunter Tracy
Administrative Law Judge

Washington, D.C.
May 23, 1984

12/ All proposed findings, conclusions, and contentions have been considered. They are accepted to the extent that they are consistent with this decision.