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UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of

HEFT, KAHN & INFANTE, INC.
43 N. Village Ave.,
Rockville Center, New York

File No. 8-7475

RECOMMENDED DECISION

Irving Schiller
Hearing Examiner

Washington, D. C.
May 18, 1961

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HEFT, KAHN & INFANTE, INC. 43 N. Village Ave., Rockville Center, New York	:	RECOMMENDED DECISION
File No. 8-7475	:	

BEFORE: Irving Schiller, Hearing Examiner

APPEARANCES: William J. Crowe, Jr., New York Regional Office of the Commission, for the Division of Trading and Exchanges

Robert Schwartz of Gilman & Schwartz for Heft, Kahn & Infante, Inc., Donald Heft, Morton H. Kahn and Michael Infante

Arthur W. Baily of Glasser, Baily & Litwack for Max Axman

Atwood C. Wolf, Jr. of Candee & Wolf for Ronald Binday

These proceedings were instituted pursuant to Sections 15(b) and 15A(1)(2) of the Securities Act of 1934 ("Exchange Act") to determine whether to revoke, or, pending final determination, to suspend the registration as a broker and dealer of Heft, Kahn & Infante, Inc. ("registrant"), whether to suspend or expel registrant from membership in the National Association of Securities, Inc. ("NASD"), a registered securities association, and whether, under section 15A(b)(4) of the Exchange Act Donald S. Heft (Heft), Morton H. Kahn (Kahn), Michael Infante (Infante), Max Axman (Axman), Ronald Binday (Binday) or any of them should be found to be a cause of any order of revocation, suspension or expulsion which may be issued. 1/

1/ Section 15(b) of the Exchange Act, as here applicable, provides that the Commission shall revoke the registration of a broker or dealer if it finds that it is in the public interest and that such broker or dealer or any officer, director or controlling or controlled person of such broker or dealer, has willfully violated any provision of that Act or of the Securities Act of 1933 or of any rule thereunder. It further provides that pending final determination of the question of revocation, the Commission shall suspend such registration if it finds that it is necessary or appropriate in the public interest or for the protection of investors.

Section 15A(1)(2) of the Exchange Act provides for the suspension for a maximum of twelve months or the expulsion from a registered securities association of any member thereof who has violated any provision of that Act or any rule thereunder or has willfully violated any provision of the Securities Act of 1933 or any rule thereunder, if the Commission finds such action to be necessary or appropriate in the public interest or for the protection of investors.

Under Section 15A(b)(4) of the Exchange Act, in the absence of our approval or direction, no broker or dealer may be admitted to or continued in membership in a national securities association if the broker or dealer or any partner, officer, director or controlling or controlled person of such broker or dealer was a cause of any order or revocation, suspension or expulsion which is in effect.

The order for proceedings alleges that during the period from approximately January 15, 1960 to approximately March 10, 1960 registrant, together with, or aided and abetted by, Heft, Kahn, Infante and Axman effected securities transactions in willful violation of the net capital rule requirements of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 (17 CFR 240.15c3-1) thereunder; [2/] that registrant, Heft, Kahn, Infante and Axman are permanently enjoined by a United States District Court from further violating Section 15(c)(3) of the Exchange Act; that registrant and these same individuals are permanently enjoined by the Supreme Court of the State of New York, County of New York from engaging in and continuing certain conduct and practices in connection with the purchase and sale of securities; that registrant, aided and abetted by Heft, Kahn, Infante, Axman and Binday improperly made false and misleading statements of material fact in connection with the offer and sale of securities in willful violation of the anti-fraud provisions of the Securities Act of 1933 ("Securities Act") and of the Exchange Act; [3/]

2/ Section 15(c) of the Exchange Act prohibits the use of the mails or the facilities of interstate commerce by a broker or dealer in securities transactions otherwise than on a national securities exchange, in contravention of the Commission's rules prescribed thereunder providing safeguards with respect to the financial responsibility of brokers and dealers. Rule 15c3-1 provides that no broker or dealer, with exceptions not applicable here, shall permit his aggregate indebtedness to exceed 2,000 per cent of his net capital computed as specified in the rule.

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

that registrant, aided and abetted by Heft, Kahn, Infante and Axman, extended credit in willful violation of Regulation T issued by the Board of Governors of the Federal Reserve System pursuant to Section 7 of the Exchange Act[4/] and failed to keep current certain books and records in willful violation of Section 17(a) of the Exchange Act and Rule 17a-3 (17 CFR 240.17a-3) thereunder.[5/]

Following a hearing on the question of suspension registrant stipulated to certain facts and consented to the entry of an order of suspension and the Commission suspended registrant's registration pending final determination of these proceedings.[6/] After appropriate notice hearings were held before the undersigned Hearing Examiner on all of the issues except the question of suspension of the registrant's registration pending final determination of the question of revocation. Proposed findings of fact and conclusion of law and brief in support thereof were

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4/ Section 7(c) of the Exchange Act, as applicable here, prohibits any broker or dealer who transacts a business in securities through the medium of any member of a national securities exchange from extending credit to customers in violation of regulations prescribed by the Board of Governors of the Federal Reserve System under Section 7 of the Exchange Act. Section 4(c)(2) of Regulation T provides that a broker or dealer shall promptly cancel or otherwise liquidate a transaction where a customer purchases a security in a cash account and does not make full cash payment within 7 business days.

5/ Section 17(a) of the Exchange Act requires registered brokers and dealers to keep such records and file such reports as the Commission by rules may prescribe as necessary and appropriate in the public interest or for the protection of investors. Rule 17a-3 specifies the records which must be kept including, inter alia, ledgers reflecting all assets and liabilities, income and expense and capital accounts and a securities record showing the position of each security.

6/ Securities Exchange Act Release No. 6326 (July 26, 1960)

filed with the Hearing Examiner by the Division of Trading and Exchanges and by Axman and Binday. 7/

The following findings and conclusions are based on the record, the documents and exhibits therein and the Hearing Examiner's observations of the various witnesses:

1. Registrant has been registered with this Commission as a broker and dealer since June 12, 1959. From said date until on or about March 29, 1960 Infante was President, Kahn was Vice President and Heft was Secretary of the registrant and each of the named individuals was a director and owner of more than 10% of stock of the registrant. From approximately September 1959 to on or about March 29, 1960 Axman was a director and owner of 10% or more of registrant's stock.

False and Misleading Statements

2. The record discloses that registrant acted as underwriter with respect to an offering of 100,000 shares of common stock of United States Communications, Inc. ("U.S.C."), which offering was made pursuant to a claimed exemption under Regulation A under the Securities Act. Such offering was commenced on or about September 17, 1959 and was concluded on or about October 12, 1959. During the period from September 1959 through January of 1960 Infante was secretary, treasurer and director of U.S.C. and received a salary at the rate of $5,200 per annum.

3. The evidence adduced at the hearing shows that registrant's salesmen in the offer and sale of U.S.C. stock between July and December of 1959 and in February 1960 made false and misleading representations of material facts over the telephone. According to six investors in the

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7/ No proposed findings or briefs were filed by registrant, Heft, Kahn or Infante.

New York area who testified concerning their purchases of U.S.C. at prices ranging between 2-1/4--3, the representations included statements that the stock would "rise to 6 - $10," the "stock had to go up," that U.S.C. was "a very good stock, it had a lot of prospects and that within a very short time it would really go up high," and that if U.S.C. were held long enough "it would reach $10.00," that "the anticipated earnings would be $2.00 a share," that U.S.C. was "successfully selling its equipment," and with respect to one of the investors to whom stock was being offered at $2.25 "the stock was sure to make money because the following Monday it would go on public sales at about $3.00 so that there would be a profit automatically * * * and that the stock 'was due to go up to double figures'."

4. The record further discloses that some time in October or November, 1959 the so-called research department of registrant prepared a market letter concerning U.S.C. which stated, among other things, that American Hospital Supply Corp. ("American") had an exclusive sales contract with U.S.C. for distribution of a wireless inter-communication system to hospitals and institutions, that American "is currently holding an order backlog in excess of $3 million," and that U.S.C. estimated that "on sales of $3 million profits should exceed $2.00 a share." Registrant conceded that approximately 11,000 copies of the market letter were printed and delivered to its offices. The record contains evidence that during November 1959 the said market letter was received through the mails by five prospective investors who subsequently invested in U.S.C. stock. In addition, the record contains evidence that during the same period and in the beginning of 1960 at least 650 of

the market letters were mailed by registrant or at registrant's direction to prospective investors. 8/

5. The record in these proceedings shows, and the Hearing Examiner finds, that all the oral and written representations were unwarranted, false or misleading. From its inception and during the period registrant was selling U.S.C. stock to the public, the promoters of U.S.C. made their offices at registrant's place of business. Infante was one of such promoters. It was not until October 1959 that U.S.C. moved into a leased building in Long Island, New York and during that month and November was primarily engaged in construction of its laboratory and installing its equipment. The evidence shows that in July, 1959, U.S.C. entered into a sales contract with American giving the latter corporation exclusive right to distribute an inter-communicating system called Electropage throughout the country and in South America. An official of American testified that under the contract American was to undertake to distribute this system only after U.S.C. had installed its equipment in at least three hospitals and tested it to the satisfaction of American. It is undisputed that no such installations were made nor the equipment tested to the satisfaction of American. In fact, the evidence shows that by the end of 1959 U.S.C. had no orders for its system and that some time in February or March, 1960, U.S.C. had installed its system in one hospital which unit was apparently unsatisfactory and

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8/ One of the investor witnesses who testified identified a copy of the market letter and stated he received it from registrant.

had to be replaced with another unit some time in July, 1960.

6. A former accountant for U.S.C. testified that in June, 1960 his firm was hired to audit the books of U.S.C., and to prepare a balance sheet and profit and loss statement to furnish to customers who wanted some assurance that the company had sufficient capital to perform its contracts. In preparing the audit for the period from July 21, 1959 to May 31, 1960, no particular instructions were given and all information was taken from the books of account and records of U.S.C. and statements of the management without verification of inventory values. The profit and loss statement showed for the period indicated sales income of about $25,700, a gross profit of approximately $21,000 and a net loss of approximately $25,000. The accountant further testified that U.S.C. received its first sales income some time in February or March, 1960.

7. It is evident from the record that the statements made to the prospective investors who testified as to the future increase in the price of the stock were unwarranted and the statements that the company was successfully selling its equipment were false. The unrebutted evidences is that through November 1959, U.S.C. had no production of its inter-communicating system, had no income and in fact was operating at a loss. It is well established by Commission precedent that a prediction by a securities salesman to an investor that a stock is likely to rise 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.[9/] In the instant case, it is evident from the record

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9/ Leonard Burton Corporation, Securities Exchange Act Release No.5978, p. 4 (June 4, 1959); Barnett & Co., Inc., Securities Exchange Act Release No. 6310, p. 4 (July 5, 1960).

that during a great part of the time registrant was selling U.S.C. stock the issuer was merely a paper organization without offices, facilities, equipment or products and nothing more than an idea in the minds of the promoters who had hopes of producing a communicating system which was, as yet, untried and untested. Two of these promoters testified that until October, 1959 they were present daily in registrant's office and spoke with registrant's officers, directors and salesmen. Registrant and its salesmen therefore knew, or certainly should have been aware, that U.S.C. was not yet operating and had no income or earnings, which facts should have been disclosed to prospective investors. At the hearing registrant contended the prediction that the price of the stock would increase was not false because the price of the stock did, in fact, rise and several of the investor witnesses testified that they sold the stock at increased prices. This argument misconceives the concept of fraudulent representation within the meaning of the Acts. Whether a representation that a stock will rise is considered false or misleading depends on the facts and circumstances extant at the time the representation is made. We previously noted that a representation to a prospective purchaser should have a reasonable basis and should be accompanied by the disclosure of known or early ascertainable facts bearing upon the justification for the recommendation.[10/] It would follow almost axiomatically that the true test of whether a prediction, that a stock will rise, is warranted is not and indeed should not be measured

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10/ Supra paragraph 7 and cases cited.

by a subsequent fortuitous rise in the price but rather by a consideration of the facts, if any, purportedly justifying such prediction at the time it is made. In the instant case it is quite apparent that not only were there no facts which would furnish a basis for predicting a future rise in the price of U.S.C. stock but equally important is the fact that no disclosure was made to prospective investors of the true condition of U.S.C. Accordingly, the Hearing Examiner finds that the optimistic statements covering the market price of the stock had no reasonable basis in fact and the statements made to the investor witnesses were therefore false and misleading.

8. Moreover, the evidence shows that the statements in the market letter sent by registrant to its customers concerning the purported backlog of orders held by American and prospective earnings by U.S.C. of $2.00 a share were false and misleading. Though American had contracted with U.S.C. to distribute the Electropage system, the record is clear that American, in fact, had no backlog of orders since no system had been developed to American's satisfaction which, under the contract, would have at least triggered American to attempt to secure orders for the product. This fact was known or could easily have been ascertained by registrant and its salesmen. Infante, during the period in question when U.S.C. stock was being sold, in addition to being a promoter, secretary-treasurer and director of U.S.C., in fact had access to U.S.C.'s books and records and knew or could easily have informed himself when

the market letter was published there was in fact no backlog of orders held by American.[11/] The Hearing Examiner therefore finds that the statements disseminated by registrant to prospective investors concerning the backlog of orders held by American were untrue.

9. To predict earnings of $2 a share on such a nebulous basis as the non-existent backlog of orders of a company which had just been organized and had no operating experience or income, was completely speculative and unwarranted. In view of the foregoing, the Hearing Examiner finds that the market letter distributed by registrant to prospective investors contained false and misleading statements. Accordingly, the Hearing Examiner concludes and recommends that the Commission find that registrant willfully violated Section 17(a) of the Securities Act, Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder.

Net Capital

10. The record discloses, and registrant does not controvert, that during the period from about February 9, 1960 to on or about March 10, 1960 registrant effected transactions in securities when its aggregate indebtedness exceeded 2,000 per cent of its net capital, computed as specified in Rule 15c3-1. On February 9, 1960 such deficiency amounted to $119,582 and on March 10, 1960 amounted to $124,834. It is

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11/ At a meeting of stockholders held as late as July, 1960, the president of U.S.C. informed those present that he felt that American had a potential of two or three million dollars worth of business a year but nowhere in the minutes of the meeting did he state flatly that there was a backlog of orders held by American in that amount.

further uncontroverted by the registrant that during this period registrant made use of the mails and instrumentalities of interstate commerce to effect transactions in securities otherwise than on a national securities exchange. Accordingly, the Hearing Examiner finds that during the period from February 9, 1960 to about March 10, 1960 registrant used the mails and instrumentalities of interstate commerce to effect securities transactions, otherwise than on a national securities exchange, when the aggregate indebtedness of registrant to all persons exceeded 2,000 per cent of its net capital in willful violation of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.

11. The record discloses, and registrant does not deny, that during the period mentioned above neither registrant nor any of its agents informed any of the customers with whom it effected securities transactions that its liabilities exceeded its current assets nor were such customers apprised of the financial condition of registrant nor of the fact of registrant's insolvency. The Commission has consistently held that where a broker and dealer purchases and sells securities and accepts monies and securities from its customers it impliedly represents that it is ready and able to discharge its liabilities to its customers in connection therewith and its failure to disclose its insolvency to its customers makes this representation false within the meaning of Sections 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and the Rules thereunder.[12/] The Hearing Examiner

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12/ Batkin & Co., 38 S.E.C. 436 (1958); Earl L. Robbins, Securities Act Release No. 6246 (April 26, 1960).

therefor finds that registrant willfully violated Section 17(a) of the Securities Act and Sections 10(b) and 15(c) of the Exchange Act and Rules 10b-5 and 15c-1-2 (17 CFR 240.10b-5 and 15c1-2) thereunder.

Extension of Credit

12. The record discloses, and registrant does not deny, that as of March 1960 its books and records reflect that out of a total of 260 open accounts there were 113 transactions in 65 of such accounts in which more than seven days had elapsed since sales had been posted and that such sales had neither been cancelled nor applications made for approval of further extension of credit. The Hearing Examiner finds that registrant willfully violated Section 7(c) of the Exchange Act and Section 4(c)(2) of Regulation T, promulgated by the Board of Governors of the Federal Reserve System.

Maintenance of Books and Records

13. The record discloses, and registrant does not deny, that as of March 1960 its general ledger had not been posted beyond February 9, 1960 and its stock record had not been posted beyond January 5, 1960. The Hearing Examiner finds that registrant's books and records were not maintained and kept current in compliance with the requirements of Section 17(a) and Rule 17a-3 of the Exchange Act thereunder.

Injunctions

14. The record further discloses that on January 29, 1960, on the basis of a complaint filed by this Commission and with the consent of the defendants, the United States District Court for the Eastern

District of New York permanently enjoined registrant, Infante, Kahn, Heft and Axman from effecting securities transactions otherwise than on a national securities exchange while and at a time the aggregate indebtedness of registrant exceeded 2,000 per cent of its net capital. 13/

15. On August 3, 1960, on a complaint filed by the Attorney General of the State of New York and with the consent of the defendants, the Supreme Court of the State of New York, County of New York, permanently enjoined registrant, Infante, Heft, Kahn and Axman from engaging in securities transactions in the State of New York. 14/

Findings as to Heft, Kahn, Infante and Axman

16. We now turn to consider the allegations in the order for proceedings that Heft, Kahn, Infante and Axman aided and abetted in the willful violation by registrant of the various provisions of the Securities Act and the Exchange Act. As noted earlier, Infante, Heft and Kahn were officers, directors and owners of more than 10% of stock of registrant from June, 1959 through March, 1960. The evidence shows that each of these individuals supervised or concerned himself with particular operating functions of registrant. Registrant's former cashier testified, and his statements are uncontroverted in the record, that Infante had primary responsibilities for registrant's operations, hired employees, sold stock and saw to it that the salesmen and other employees performed their

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13/ Civil Action No. 60, Civ. 87.

14/ Case No. 40998/60.

duties; Heft concerned himself primarily with producing sales of stock on behalf of registrant and gave instructions to employees on occasion and that Kahn's duties related to supervising the "back office" or "cage work" which concerned the mechanical and bookkeeping functions of registrant and on occasion sold U.S.C. stock.

17. The record shows that all of them were present daily at registrant's place of business, consulted with each other regarding registrant's operations, assumed joint responsibility for registrant's operation, had access to the books and records of registrant and in fact did on occasion look at registrant's books, exercised a proprietary interest in the firm and certainly during the period registrant was engaged in selling U.S.C. stock all of them took an active interest in such activity and had knowledge of the scope of such operations. From the daily presence of two of the promoters of U.S.C. (in addition to Infante) in registrant's office during the time it sold the bulk of U.S.C. stock, all of these persons knew or could have easily ascertained that U.S.C. had not yet established its plant, had not yet produced any products and had no income or earnings. Counsel for these individuals argued on the record that there was no proof adduced that any one of his clients were directly involved in any of registrant's specific violations or that they were causes of any such violations. The Hearing Examiner cannot accept such contention. The fact that there was division of responsibilities among Heft, Kahn and Infante concerning registrant's operations does not, and cannot, serve to exculpate any of them from violations on a vague theory that the finger of no specific violation

can be pointed in the direction of any one of the three persons. There is not the slightest intimation in the record that any one of these individuals had no information or knowledge of registrant's operations. On the contrary, and peering through the corporate veil the three individuals in question were partners in a common enterprise and knew exactly what was occurring.

18. With respect to Axman, the record shows he became an owner of 10% or more of registrant's stock and a director of registrant in September, 1959. The record reflects that since 1956 he was a securities salesman and according to the testimony of registrant's former cashier, Axman's functions when he came with registrant were those of sales manager and trader for the firm. During the period registrant was selling U.S.C. stock, Axman was present daily at registrant's place of business and in the latter part of October participated in a conference with Infante and Binday in which Binday was requested to prepare the above-mentioned market letter relating to U.S.C. for distribution to registrant's customers. The record shows, and Axman does not deny, that in October or November, 1959 Axman furnished one of registrant's typists with a list of approximately 500 names which the typist used to address envelopes in which she inserted the U.S.C. market letter, which envelopes were subsequently sealed and mailed.

19. Axman argues that there is no proof in the record that he willfully acted with respect to the violations since there is no testimony that he acted intentionally in the sense that he was aware of what he was doing. The Hearing Examiner rejects these contentions. An

analysis of Axman's activities supports the view that when he acquired more than 10% of registrant's stock he intended to and did participate in registrant's daily operations in addition to exercising responsibilities of a director. The record is persuasive that Axman's activities as sales manager and firm trader, coupled with his presence every day during the period U.S.C. stock was being distributed by registrant, his participation in the conference leading to the preparation of the U.S.C. market letter and his subsequent dissemination of such letter is further indication of Axman's direct involvement in registrant's operations. These activities can only lead to the conclusion that Axman was aware of what he was doing and was as an important cog in registrant's various activities as were Infante, Heft and Kahn. In this connection the Hearing Examiner believes it is a factor of substantial significance that neither Infante, Heft, Kahn or Axman took the stand to deny the charges or evidence against them. It is well settled that, in a non-criminal case, the failure of a party to testify in explanation of suspicious facts and circumstances peculiarly within his knowledge fairly warrants the inference that his testimony, if produced, would have been adverse.[15/]

20. Finally, the record shows that registrant, Heft, Kahn, Infante and Axman were permanently enjoined by a United States District

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15/ 2 Wigmore, Evidence (1940), Sec 289; Daniel v. U. S., 234 F 2d 102, 106 (C.A. 5, 1956); Meier v. Commissioner, 199 F 2d 392, 396 (C.A. 8, 1952); Mammoth Oil Company v. U. S. 275 U.S. 13, 52-3 (1927). Cf. N. Sims Organ & Co., Inc., Security Exchange Act Release No. 6495 p.5 (March 14, 1961).

Court from further violation of the net capital requirements and are permanently enjoined by the Supreme Court of the State of New York from engaging in and continuing certain conduct and practices in connection with the purchase and sale of securities within the State of New York.

21. On the basis of the foregoing, the Hearing Examiner finds that Heft, Kahn, Infante and Axman willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 17 CFR 240.10b-5 thereunder that each of the named individuals willfully participated in or aided and abetted violations by registrant of Section 15(c)(1) of the Exchange Act and Rule 17 CFR 240.15c1-2 thereunder, Section 15(c)(3) of the Exchange Act and Rule 17 CFR 240.15c3-1 thereunder, Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-3 thereunder, Section 7(c) of the Exchange Act and Section 220.4(c)(2) of Regulation T, promulgated by the Board of Governors of the Federal Reserve System and, accordingly, within the meaning of Section 15A(b)(4) of the Exchange Act, Heft, Kahn, Infante and Axman are each a cause of any order of revocation which may be entered by the Commission.

Findings as to Binday

22. Binday is charged with willfully violating Sections 10(b) and 15(c)(1) of the Exchange Act and the rules promulgated thereunder and Section 17(a) of the Securities Act and in aiding and abetting registrant, Heft, Kahn, Infante and Axman in violating Section 17(a) of the Securities Act. These charges spring from the preparation by Binday of the market letter concerning U.S.C. The record shows, and Binday admits, that he was employed by registrant as a research analyst and salesman

from August to December, 1959 for which he was paid $600, that on or about October 29, 1959, at Infante's request, he prepared a draft of a market letter relating to U.S.C. which was subsequently published (except for the deletion of an immaterial paragraph) and that he knew at the time he prepared the market letter it would be disseminated to registrant's customers. Binday further admits that at the time he prepared the market letter he was aware that the U.S.C. plant was in a state of construction, and that U.S.C. was not in production.

23. Binday contends he is innocent of any wrongdoing and testified that prior to his preparation of the market letter he heard talk in registrant's office from the two promoters of U.S.C. and registrant's directors that American had a $3,000,000 backlog of orders, which he believed was a fact, that nevertheless he wanted to verify this fact with American but was requested by Infante and Allen B. Morrell, vice-president of U.S.C., not to contact American and that in essence he was merely following instructions given to him by Infante as to what should be included in the market letter. These contentions are hardly sufficient to relieve Binday from responsibility for the role he played in assisting registrant in its efforts to encourage customers to purchase U.S.C. stock on the basis of false statements. The record shows that prior to Binday's employment by registrant he had previous brief experience as a junior research analyst with a large brokerage concern where he bacame familiar with research techniques and preparation of reports on various companies. Binday knew when he was requested to prepare the market letter on U.S.C. that it was to be used to interest registrant's

customers to purchase the stock. Binday testified that for his own "protection" he sought and obtained a letter from Morrell supposedly verifying the backlog of orders.[16/] An analysis of this letter amply demonstrates the liberties Binday took in reflecting the information concerning the backlog. Morrell's letter states "we estimate our first year of operation sales will exceed three million dollars gross based on the backlog of orders American Hospital Supply Corporation feels they can turn over to us." (Underscoring ours.) The market letter prepared by Binday states "It is estimated by U.S. Communications that American is currently holding an order backlog in excess of $3 million for Electropage." (Underscoring ours.) It is evident to the Hearing Examiner that Binday was doing more than following instructions. In addition, Binday's failure to verify the 'backlog' information with American, the primary source, because of suggestions by Morrell and Infante not to bother American reflects his willingness to aid and assist registrant in furnishing information to its customers notwithstanding the suspicious circumstances surrounding the entire matter. Moreover, the

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16/ There is a sharp conflict in the testimony concerning the manner in which this letter was prepared. Binday testified he phoned Morrell from registrant's office and requested a letter confirming the backlog of orders and that within a day or two Kahn handed him a letter addressed to registrant and signed by Morrell which Binday retained in his personal files. Morrell and Morrell's secretary both testified that in the latter part of October 1959 Binday came to the U.S.C. plant, which was practically barren of equipment, and that both Morrell and Binday participated in the preparation of the letter. On the basis of observation of the demeanor of the witnesses at the hearing, the Hearing Examiner rejects Binday's version of the origin of the letter. The Hearing Examiner was particularly persuaded by the testimony of Morrell's secretary who identified Binday as the person who "collaborated" with Morrell in dictating the letter which she then typed. Her testimony as to the manner in which the letter was composed was positive and convincing.

inclusion in the market letter of a statement "that on sales of $3 million profits should exceed $2 a share" at a time when Binday knew the company had just started to occupy its premises and had no production demonstrates a complete lack of understanding of, or concern with, the nature of information to be given prospective investors. His conduct at the least was reckless and his plea that he was following instructions can not constitute a defense to the preparation of false and misleading representations which he knew would be circulated to potential investors. The Hearing Examiner can only conclude that Binday was aware of what he was doing, that he participated in the operation of the scheme to defraud, which registrant carried out and under the circumstances must be held accountable with registrant for such misconduct.

24. Accordingly, the Hearing Examiner finds that Binday willfully participated in or aided and abetted in registrant's willful violations of the designated anti-fraud provisions, and that he was a cause of any order that may be entered revoking the registrant's broker-dealer registration.

25. The record contains a plea in mitigation on behalf of Binday to the effect that he was a young man with limited experience in the securities business and that he is presently employed by an old and established brokerage firm, a partner of which testified he would be willing to retain his services. However, the Hearing Examiner's findings as to Binday, if accepted by the Commission, does not mean Binday is barred from employment by a registered broker-dealer in a

supervised capacity upon an appropriate showing, including evidence of good conduct subsequent to the conduct upon which these findings are based. 17/

Public Interest

26. The sole remaining question is whether it is in the public interest to revoke registrant's registration as a broker and dealer. In view of the serious willful violations found and the injunctions entered against registrant by a United States District Court and the Supreme Court of the State of New York 18/ the Hearing Examiner finds that public interest requires revocation of registrant's registration as a broker and dealer and its expulsion from membership in the NASD.

17/ Cf. In the Matter of Mac Robbins & Co., Inc., Securities Exchange Release 6498 (March 14, 1961).

18/ The Commission has held that an injunction against a respondent even though on his consent forms a sufficient basis for a finding that revocation is in the public interest. Kimball Securities Inc. (Securities Exchange Act Release 6274, May 27, 1960).

RECOMMENDATION

In view of the willful violations found it is respectfully recommended that the Commission enter an order finding it is in the public interest to revoke registrant's registration as a broker and dealer, and expel it from membership in the NASD. It is further recommended that the Commission also find that Infante, Heft, Kahn, Axman and Binday willfully participated in or aided and abetted in registrant's willful violation of the designated provision of the Securities Act and the Exchange Act and the respective rules thereunder and that such individuals were each a cause of such order of revocation. 19/

Respectfully submitted,

Irving Schiller
Hearing Examiner

19/ To the extent that the proposed findings and conclusions submitted by the Division of Trading and Exchanges, Axman and Binday are in accord with the views set forth herein they are sustained, and to the extent they are inconsistent therewith they are expressly overruled.

Washington, D. C.
May 18, 1961