

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
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:
BRUCE B. BOWEN, and :
:
THOMAS Q. CANNON, JR., :
:
Respondents. :
:
:

INITIAL DECISION

Washington, D.C.
December 8, 1993

Edward J. Kuhlmann
Administrative Law Judge

Thomas Q. Canon was a registered representative in the Salt Lake City home office of Wilson-Davis Inc. The Division of Enforcement has alleged that from September 1988 through August 1989, Canon willfully aided and abetted Richard L. Warner's trading of Automated Language Processing Systems, Inc. (ALPS or ALPNET)1/ stock in violation of the antifraud provisions of the Securities Exchange Act. Warner's stock transactions took place over a two and one-half year period from June 19, 1987 through December 11, 1989 (hereinafter the Trading Period). Canon served as account executive for four accounts that Warner controlled at Wilson-Davis. During the Trading Period, Warner, or his nominee, purchased through the four accounts at Wilson-Davis in excess of 14,000 shares of ALPS or ALPNET in more than 90 transactions at a total cost of more than \$50,000.

A hearing was held on June 2, 3, 15, and 16, 1993 to determine whether the allegations with regard to Canon in the order instituting public proceedings were true and to afford him an opportunity to establish any defense. 2/ In light of the

1/ In August 1989, the company changed its name to ALPNET, Inc. Jt. Exh. 1, Stip. at ¶6.

2/ Bruce B. Bowen, the other respondent in this proceeding, submitted an offer of settlement which the Commission accepted. Securities Exchange Act of 1934, Release No. 32476/ June 16, 1993, 54 S.E.C. Docket 907 (1993). The Commission found that Bowen willfully aided and abetted Warner's violation of Section 10(b) of the Exchange Act and Rule 10b-5. Bowen was ordered to permanently cease and desist from committing or causing any violation of, and from committing or causing any future violation of, Section 10(b) of the Exchange Act and Rule 10b-5. In addition, Bowen was suspended from association with any broker, dealer, investment adviser, investment company, municipal securities dealer, or government securities dealer for a period of 120 days, beginning on June (continued...)

findings, a determination will also be made about whether remedial action is appropriate in the public interest pursuant to Sections 15(b), 19(h), and 21C of the Securities Exchange Act.

The Division of Enforcement filed proposed findings and conclusions on July 9, 1993, a brief on July 20, 1993, and reply on September 15, 1993. Canon filed proposed findings and conclusions on August 6, 1993 and a brief on August 25, 1993.

FINDINGS OF FACT

Warner's Alleged Primary Violation in Trading ALPS Stock

Richard Warner is co-founder and Chairman of the Board of ALPS.^{3/} ALPS, which is located in Salt Lake City, was organized in January 1980, primarily, for the purpose of developing and marketing a proprietary computer-assisted interactive language translation system. During the 1987-1989 Trading Period, ALPS

^{2/}(...continued)
17, 1993.

^{3/} On December 23, 1992, the Commission instituted proceedings pursuant to Section 21C of the Securities Exchange Act of 1934 in which Richard L. Warner and Richard A. Christenson were respondents. Warner and Christenson in anticipation of the institution of the proceedings submitted offers of settlement. Warner was ordered to permanently cease and desist from committing or causing any violation, and any future violation of Sections 10(b), 13(a), 13(g), 14(a), and 16(a) of the Securities Exchange Act and Rules 10b-5, 12b-20, 13a-1, 13d-1, 13d-2, 14a-3, and 16a-1. Christenson was ordered to permanently cease and desist from committing or causing any violation, and any future violation, of Section 10(b) and Rule 10b-5. These orders resulted from their trading in ALPS stock. The subject of this hearing is Canon's role as the broker for some of Warner and Christenson's ALPS' trades. Securities Exchange Act of 1934, Release No. 31656, December 23, 1992; 53 S.E.C. Docket 0377 (1993).

became involved in a series of transactions that related to the price of its stock.

In 1988, ALPS acquired four companies with ALPS stock and by borrowing money. The amount of stock that had to be provided by ALPS in the purchase agreements depended on the "average share price" or the "average closing bid price" in the NASDAQ market over the 90 days immediately preceding the completion date of acquisition. Jt. Exh. 1, Stip. ¶¶ 41, 42, 43, 44, 45-47. Warner testified that the stock was an important part of the consideration paid for the companies. A drop in the share price of ALPS did occur before the acquisition of two of the companies, Interlingua and Ingenierurburo, and, as a result, nearly one and one-half million additional shares were issued. Id.

From 1986 through 1989, ALPS borrowed money and restructured its debt. Tr. 441-43; Div. Exh. 29. The restructuring was required because ALPS was experiencing a shortage in operating cash. Tr. 436. Warner testified that the price of ALPS stock was very important to the debt restructuring because ALPS stock was collateral for the debt. The stock price on which the collateral was based was determined by averaging the last sale price over a 90-day period; it was valued at \$2.49 per share in the restructuring agreement. Tr. 441-44; Div. Exh. 29 at 2.

Warner would frequently consult the Wall Street Journal to determine the last sale price of ALPS stock and its effect on the loans and agreements. Tr. 445-46. From June 17, 1987, and for the

next two and one-half years, ALPS declined from \$17 per share to \$2.25. Div. Exh. 2; Tr. 435-37.

ALPS stock is registered with the Commission pursuant to §12(g) of the Securities Exchange Act of 1934. Jt. Exh. 1, Stip ¶7. Beginning on June 26, 1986, it was listed on NASDAQ. Jt. Exh. 1, Stip. ¶8. It was thinly traded, with very few buyers and sellers. On May 5, 1987, ALPS began trading as a National Market System (NMS) stock which resulted in the NASD providing an information stream or montage for ALPS that included the inside quote, last sale, time of last sale, + or - from the previous day's closing price, high and low trades of the day. Jt. Exh. 1, Stip. ¶12. This information, under the NASD rules, was updated on a real time basis, within 90 seconds of each transaction. Id. at ¶10; Div. Exh 5; Tr. 36-7, 41, 44-47. At the end of the trading day, the NASD provides high, low and last sale and volume information on all NASDAQ stocks to press services which in turn distribute the information to news organizations.

The NASD delisted ALPNET from the NASDAQ National Market System on December 12, 1989 because, among other things, ALPNET had sustained losses from continuing operations and/or net losses in three of its four prior fiscal years, and ALPNET's Form 10-Q for the quarter ended September 30, 1989 indicated that ALPNET had net tangible assets of a negative dollar amount of \$4,780,688. Jt. Exh.1, Stip. ¶ 15. ALPNET stock is currently listed on NASDAQ as a non-NMS stock. Id. at ¶16.

Warner's Trading in ALPS Stock

Warner traded ALPS stock through his own accounts and at least 14 accounts of six nominees, James Warner, Emma Lou Thayne, Rowena Kenyon, Wayne Pearce, Leon Peterson, and Richard Christenson. Jt. Exh. 1, Stip. ¶¶23,53. For the nominee accounts, Warner agreed to absorb all losses, although the nominees would share in the profits. The nominees were not free to sell the stock without first asking Warner. Tr. 447. He initiated the arrangements, paid for all purchases, and had a financial interest in each account. Tr. 447, 477-80, 490.

Warner did not disclose his interest in his nominee accounts to the Commission. Tr. 463-65. Warner purchased 228,350 shares of ALPS stock for nearly \$1.6 million through 588 transactions in these accounts and his own. Jt. Exh. 1, Stip. ¶20. The most frequent purchases in the nominee accounts were in round lots of 100, 200, and 300 shares. Id. at ¶18.

While the stock continued to decline throughout the period that Warner purchased ALPS stock, Warner testified he believed that his trading helped support the price with regard to short selling and margin calls. Tr. 555-56. These trades had the effect of creating the false impression that there existed persistent demand for ALPS stock. Tr. 796, 807, 813, 836, 562, 758.

From June 17, 1987 through September 23, 1987, Warner purchased ALPS stock for his own account and for the account of his son, James Warner, and his sister, Emma Lou Thayne. Most of the trades resulted in upticks to the ask side of the inside quote.

Div. Exh. 2 at 1,2. The trades were frequently made at or near the close of the market. Jt. Exh. 1, Stip. ¶54.

During the period September 25, 1987 through October 28, 1987, Warner saw ALPS stock drop and he sought to counteract the effects of the Market Break of October 1987 by purchasing more stock mainly in the accounts of Leon Peterson and Wayne Pearce. Jt. Exh. 1, Stip. ¶55; Div. Exh. 2 at 2-5. Warner testified that he regularly consulted the Wall Street Journal to find out the last sale price because he was "vitaly interested" in the price of ALPS. Tr. 446-47. The drop in ALPS' price was, he stated, very difficult to take.

From November 2, 1987 through December 11, 1989, Warner purchased ALPS shares in round lots for the accounts of Rowena Kenyon, his secretary, Thayne and Christenson. Jt. Exh. 1, ¶56; Div. Exh. 2 at 5-19. During this period, ALPS traded on 483 days. Warner would place or direct the placement of an order for, usually, 100 shares when the last transaction price was below the ask price to move the price to the ask side of the market. Tr. 174, 226, 747-48. However, when the last transaction price was at the ask price, Warner did not place or direct a trade in the stock. Tr. 171. Warner and his nominees engaged in 483 transactions during this period and 372 of them, 81.9 percent, resulted in an uptick from the previous trade. Jt. Exh. 1, Stip. ¶57; Tr. 175, 208-09. Warner was responsible for the last trade of the day 197 times, which resulted in an uptick in the stock close on 167 days. Tr. 177, 209.

Warner's Nominee Accounts at Wilson-Davis Canon served as Account Executive for Warner directed accounts that were not registered in his name. These accounts were in the name of Emma Lou Thayne and Christenson. The Christenson accounts included Delaware Funding & Guarantee, Cape Trust and Capitol Co. During the 1987-89 Trading Period, purchases of ALPS in those accounts totalled approximately 14,600 shares in 92 transactions at a total cost of \$56,312. Jt. Exh. 1, Stip. ¶ 109; Div. Exh. 4.

When the customer is an officer of the issuer, an account executive at Wilson-Davis is required to obtain a written authorization for each transaction in the issuer's securities. Canon did not obtain any authorization before completing any of the Warner's transactions in ALPS stock. Jt. Exh. 1, Stip. ¶ 107; Tr. 591.

When a transaction is placed by a person who lacks written authorization to trade in an account, Wilson-Davis account executives are required to obtain oral authorization from the account holder before completing the transaction. Canon did not obtain authorization with regard to individual transactions placed by Warner for nominee accounts, even though Warner did not have written authorization to enter orders or execute transactions. Jt. Exh. 1, Stip. ¶ 108; Tr. 557-58, 591-92.

Thane Account During the Trading Period, brokerage accounts in the name of Thayne existed at Paine Webber, Wilson-Davis, and Evans & Co., Inc. Jt. Exh. 1, Stip. ¶ 62. Bowen was the account executive for an account at Paine Webber in the name of Thayne, and

Canon was the account executive for the Thayne account at Wilson-Davis. Jt. Exh. 1, Stip. ¶ 63.

Warner opened the Thayne account at Wilson-Davis on October 11, 1988. Div. Exh. 18 at 119-20; Tr. 557-58. Canon executed the first trade in the Thayne account even before he had contacted Thayne to discuss opening the account or making a trade. Tr. 557-58. Moreover, Canon executed the next three trades in the Thayne account without first discussing these trades with her. Tr. 558. Thayne did not even sign the new account card until November 28, 1988. Jt. Exh. 1, Stip. ¶ 111.

Warner decided how many shares would be purchased in the Thayne accounts. He directly placed trades in the Thayne account at Wilson-Davis. Tr. 476. In addition, Warner reimbursed Thayne for purchases of ALPS stock in the Thayne accounts at Paine Webber, and Warner paid or reimbursed Thayne for purchases at Wilson-Davis and Evans & Co. Warner controlled or directed the ALPS trading through his sister's accounts at Paine Webber, Wilson-Davis and Evans & Co. Jt. Exh. 1, Stip. ¶ 63.

Canon did not contact Thayne prior to execution of any of the transactions in her account at Wilson-Davis. Div. Exh. 18 at 65-66; Tr. 558, 707. From September 7, 1988 through October 12, 1989, there were 86 purchase transactions of ALPS in the Thayne accounts, 81 of which occurred through the Paine Webber account and 5 of which occurred in the Wilson-Davis account. Jt. Exh. 1, Stip. ¶ 65.

Of the 5 transactions in the Thayne account at Wilson-Davis, three were executed within the last 10 minutes of trading, three

caused an uptick, and two constituted the last sale. Jt. Exh. 1, Stip. ¶ 67.

Christenson Accounts Richard A. Christenson^{4/} is Chairman of Cape Trust, Delaware Funding & Guarantee, and Capitol Co. (formerly Capitol Thrift & Loan). Jt. Exh. 1, Stip. ¶ 83. ^{5/} In the fall of 1987, Warner and Christenson entered into an arrangement pursuant to which Christenson would purchase ALPS shares. Warner said he would pay for the purchases, and Christenson agreed to allow the shares to be purchased through accounts under his control. Under their agreement, Warner would decide how many shares of ALPS would be purchased and provide the money to make the purchases. They would split the profits and Warner would be responsible for all losses. Jt. Exh. 1, Stip. ¶ 84; Tr. 231-32; 185-86.

Between November 1987 and December 1989, Christenson maintained seven accounts at four different brokerage firms, each under his own name or under the names of entities that he controlled. Each of these accounts purchased only ALPS stock, and

^{4/} As pointed out in note three of this decision, Christenson was ordered to permanently cease and desist from committing or causing any violation, and any future violation, of section 10(b) and Rule 10b-5. The Commission's order resulted from an offer of settlement and involved the facts being considered in this case as they apply to Canon.

^{5/} Christenson also has an interest in Capitol Leasing, but does not run it. Tr. 229. He has been a resident of Salt Lake City, Utah for over 40 years and a personal friend and business associate of Warner. Tr. 230; 148-50. Christenson sat on the board of directors of some of Warner's automobile dealerships. Jt. Exh. 1, Stip. ¶ 83.

most of the trades were executed in 100 share lots at or near the close of the market. Jt. Exh. 1, Stip. ¶ 85.

Christenson knew that Warner considered it important that trades be placed during the latter part of the day, specifically at or about the market's close. Tr. 244. As a result, Christenson sometimes told the registered representative that he wanted to perform the stock's closing trade because he wanted ALPS to close on the ask side of the market at a price higher than the prior sales price. Id.

The reason that Warner wanted the transactions to be executed through the Christenson accounts was because "he didn't want to do anything that would be questioned by anyone." Tr. 191; 462-63. Warner controlled or directed the ALPS trading in the accounts either by placing the orders with the registered representatives himself, or by directing Christenson to place the orders. Jt. Exh. 1, Stip. ¶ 84; Tr. 234. Warner instructed Christenson both as to when to purchase stock and how many shares to purchase. Tr. 232, 480-81. Warner would call Christenson toward the middle of the day, or into the afternoon, so that the stock was purchased late in the day, often between 3 and 4 p.m. Eastern time. Tr. 233. Warner and Christenson discussed the timing of the orders at Wilson-Davis, and "we could have said buy the stock toward the end of the day or given an order just before the end of the day." Tr 484-85.

Based on conversations with Warner, Christenson understood that the purpose of the transactions was to maintain the price of

ALPS stock as high as possible at the end of the day. Tr. 234. He knew that Warner was attempting to support the stock's price. Tr. 244. Christenson considered the stock purchased in his accounts to be for Warner. Tr. 232 .

Warner did not have written authorization to trade in the Christenson accounts at Wilson-Davis (Jt. Exh. 1, Stip. 107; Tr. 150-51, 253-54, 467-68), nor, according to Christenson, did Canon have oral authorization from him to allow Warner to make trades in his accounts. Tr. 253-54. Nevertheless, Warner placed or directed all of the orders in all three of the Christenson accounts at Wilson-Davis. Tr. 231-33; Div. Exh. 18 at 91. Such trading violated the firm's internal policies when, as Canon admits, he failed to check on each trade with the registered owner of the account. Tr. 591-92. Canon never suggested to Warner that he needed authorization to trade in the Christenson accounts. Tr. 469-70.

The account in the name of Delaware Funding was opened on or about February 23, 1989. Div. Exh. 18 at 96. Warner placed all of the orders in the Delaware Funding account at Wilson-Davis. Jt. Exh. 1, Stip. ¶ 112; Div. Exh. 18 at 97-98; Tr. 134, 560. For the period February 17, 1989 through August 3, 1989, there were 3,700 shares purchased in the Delaware Funding account in 37 transactions for \$12,750. Jt. Exh. 1, Stip. ¶ 112.

Warner also either placed the orders or directed the purchases of ALPS stock at Wilson-Davis through Christenson's accounts for Cape Trust and Capital Co. Div. Exh. 18 at 92-94; Tr. 560.

Christenson placed the first trade in the Cape Trust account on November 30, 1987, but, thereafter, Warner placed all of the trades in the Cape Trust account. Tr. 559-60. From September 1, 1988 through July 17, 1989, there were 6,200 shares purchased for the Cape Trust account in 46 transactions for \$29,587. On November 16 and 17, 1989, there were 3,700 shares purchased in the Capitol Co. account in three transactions, totalling \$8,325. Jt. Exh. 1, Stip. ¶ 112.

Canon never asked Warner, or Christenson, why Warner was making trades in the Christenson accounts. Tr. 560. Canon stated that his only concern was that the stock would be paid for and he knew one of them would pay. Tr. 698-99. But Canon indicated that he thought the Christenson accounts were actually Warner's. Tr. 699. There is no evidence that Canon questioned Warner about why he was not buying the stock in his own name. Id. Christenson said that he may have told Canon to hold orders and not to execute them until later in the day. Tr. 254.

The NASD Contacted Wilson-Davis About Warner's Trades T h e NASD concluded from a review of trading in ALPS at Paine Webber that Wilson-Davis (before it was a market maker) was on the buy side of each of Paine Webber's trades. After May 1989 (when Wilson-Davis became a market maker), "suspicious trading" continued at Wilson-Davis. Div. Exh. 10 at 1. Canon supplied trading information to Warner, during this time, and caused purchase orders to be executed for him. Div. Exhs. 2, 4.

In early August 1989, Samuel Wilson, Chairman and President of Wilson-Davis, received an NASD inquiry about trades in ALPS stock. Because of the inquiry he reviewed the accounts and trading records in ALPS stock at Wilson-Davis. He immediately concluded that "there was something unusual." Tr. 265. "They were not the normal kind of trade," he said, because of the number of them and they were made "near the close of the day." Tr. 265-66. Wilson discussed the trading with Canon and David King, the firm's outside counsel, who is Canon's counsel in these proceedings. King was concerned about the ALPS transactions because they were manipulative and the subject of inquiry and he advised Wilson that they should be stopped. Tr. 268-69, 273-74.

Around August 3, 1989, Wilson told Canon to stop accepting small orders at the end of the day from any source for the purchase of ALPS stock. Jt. Exh. 1, Stip. ¶ 117; Tr. 592, 265-66. And he instructed Canon that he could not take any more orders from Warner to trade in ALPS stock. Tr. 265-66; see Tr. 592-95.

Wilson-Davis counsel, David King, wrote to the firm, on August 9, 1989, and explained that the Commission had brought a number of enforcement actions for stock manipulation where trades had taken place "at the end of the day at prices above the transactions effected during the course of the day" when it was believed that the purpose was to give the appearance that the stock was trading at the higher price. King told Wilson-Davis that such trades were referred to as "pegging" the market price or "painting the tape." He explained that such manipulative trades were illegal. Jt. Exh.

1, Stip. ¶ 118. King had told Wilson the same thing about the ALPS trades when he met with him on August 3, 1989. Tr. 270, 595. Canon sent a copy of King's letter to Warner. Tr. 595-96.

Canon testified that, if Wilson had not told him to stop taking Warner's ALPS' trades, he would not have stopped. Tr. 596-97. Canon, even after being told to stop taking Warner trades, executed one from Warner in the Thayne account in October 1989 and three in Christenson's Capital Co. account in November 1989. Div. Exh. 4 at 3; Tr. 594.

In late 1990 and early 1991, all of the certificates for ALPS stock in the hands of nominees, except Thayne, were given to Warner because they were his. Tr 448, 237.

Warner's Manipulative Practices and Canon's Assistance In Effectuating Them

During the Trading Period, on almost a daily basis, Warner monitored the decline in the price of ALPS by contacting the brokerage firms that serviced accounts through which ALPS stock was purchased, including Wilson-Davis, to determine volume, bid, ask, last sale price and whether trades had been done that day. Jt. Exh. 1, Stip. ¶19; Tr. 506-08, 561. Warner would also ask whether the price of the last trade was up or down. Div. Exh. 18 at 203.

Warner contacted Canon at Wilson-Davis as much as five times a day during the Trading Period. Ordinarily, he would call in the morning, again around noon, and near the end of the trading day. Tr. 560-61. Canon would provide Warner with bid, ask, and last trade information. Jt. Exh. 1, Stip. ¶ 106; Tr 711.

Warner testified that he would also ask Canon whether the price of the previous trade was up or down to "see the trend" because, "if the trend is down, ... with the number of shares of stock I have and as the chairman of the company, I'm vitally interested in what's happening." Tr. 493-95.

Warner asked for last sale price and the inside quote to determine what the stock had been trading for and what he would have to pay for the stock to buy it. Tr. 495-96, 747-48, 534-35. With this information, Warner could determine whether a purchase was required to uptick the price of ALPS. Tr. 747-48. Often at the end of the day, Warner would place an order for ALPS stock, usually upticking the price of the stock. Jt. Exh. 1, Stip. ¶ 106; Tr. 496, 500, 508, 561-62, 747-48.

Intra-Day Upticks Warner placed or directed purchases through his nominee accounts when the stock's price was quoted at less than the ask price. Div. Exhs. 2, 3, and 4; Tr. 174, 747-48. Warner and his nominees usually did not purchase stock when the last transaction price was the same as the quoted ask price. Tr. 171.

Warner frequently entered or directed trades through his nominee accounts to raise the price of ALPS stock to the ask price following a trade that had caused the price to drop to the bid price or drop to a price in between the inside quote. Tr. 174, 226.

Warner placed small trades and bought ALPS stock, frequently on the uptick, throughout the day and at the market's close in a manner calculated to affect the price of the stock. Tr. 498-99, 508. According to David Capurro, a portfolio manager at Franklin

Advisors of the mutual fund company, Franklin Resources, reoccurring trades at the ask price are evidence of "somebody lifting the offering on the stock and paying the full price" and "on the surface" as someone accumulating stock. Tr. 814-15.

The market impact or effect from this trading pattern was to increase price, stabilize the market, or retard the decline of the stock's price. Tr. 217, 551-52, 754.

During the entire Trading Period, June 19, 1987 through December 11, 1989, out of the 337 days in which Warner and his nominees traded ALPS, purchases on 219 days resulted in upticks on 182 days, 83.1 percent of the time. Jt. Exh. 1, Stip. ¶21.

From November 2, 1987 through December 31, 1989, ALPS stock traded on 483 days. Warner and his nominees made 454 purchase transactions during this period, 372 (81.9 percent) resulted in an uptick from the previous trade. Jt. Exh. 1, Stip. ¶ 57; Tr. 175, 208-09. In 72 of the 92 transactions (78.3 percent) executed through Warner nominee accounts at Wilson-Davis, the stock price of ALPS upticked. Jt. Exh. 1, Stip. ¶ 115; Tr. 182, 563. In none of the 92 transactions at Wilson-Davis did a stock trade by Warner result in a downtick. Tr. 563. In some months, 100 percent of the Warner trades at Wilson-Davis resulted in an uptick. Tr. 569-70, 573-74; Div. Exh. 4.

Marking the Close Moving the last sale transaction to the ask side of the market to set the closing price is referred to as marking the close. This trading pattern increased the likelihood of control over the last reported price. Warner and Christenson

discussed buying stock at the ask price towards the end of the day. Warner testified, "I'm sure we talked about that because that's what we did. That was our plan." Tr. 490.

Christenson sometimes told registered representatives that he wanted to do the closing trade and he sometimes told them that he wanted to close the stock up. Tr. 192, 244. Warner and Canon testified that they believed Warner's frequent end-of-day purchases caused ALPS average daily closing price to be higher than it would have been in the absence of those trades. Tr. 509, 754. Because ALPS was a thinly traded and illiquid stock, transactions early in the day could, and sometimes did, result in the closing trade for the day. Tr. 56; Div. Exh. 4, Record Nos. 475, 484, and 491.

For the entire Trading Period, Warner's purchases of ALPS stock through his own and nominee accounts resulted in the last trade of the day on 219 trading days out of the 337 days in which he and his nominees traded ALPS, or 65 percent of the time. Jt. Exh. 1, Stip. ¶21.

On 55 of the 75 (or 73.3 percent) trading days when Warner controlled or directed trades through Wilson-Davis, they were the last trade of the day. Jt. Exh. 1, Stip. ¶ 116. For the month of January 1989, over 70 percent of the trades at Wilson-Davis occurred within the last hour of the day and over 70 percent caused an uptick. Div. Exh. 4 at 1 and 2; Tr. 566. In terms of trading days, on 12 of 14 days (or 85.7 percent) the Warner transaction was the last trade of the day. Tr. 566.

In 72 of 92 transactions (78.3 percent) executed through Warner nominee accounts at Wilson-Davis, the stock price of ALPS upticked, and in 49 instances the uptick occurred within the last hour of trading. Jt. Exh. 1, Stip. ¶ 115. Out of a total of 92 orders to purchase ALPS shares through Wilson-Davis, 63 (68.5 percent) were executed within the last hour of trading. Jt. Exh. 1, Stip. ¶ 113; Tr. 561.

Out of a total of 92 purchase transactions through Wilson-Davis, 59 orders to purchase shares (64.1 percent) were executed within the last half-hour of trading. Jt. Exh. 1, Stip. ¶ 114; Tr. 183. On 44 of the 74 days in which purchases occurred through Warner nominee accounts at Wilson-Davis, the stock's price closed on an uptick. Tr. 183.

The NASD Inquiry The NASD conducted an investigation of the trading in ALPS or ALPNET stock for the period January 2, 1989 through November 30, 1989. NASD'S investigation was begun because the NASD's Market Surveillance Department generated "Marking-the-Close-Alert Reports" (a computer generated report that detects a pattern of end-of-the-day trades which close the market on an uptick or a down-tick from the previous reported trade) that detected a pattern of suspicious trade reporting in ALPNET stock. Div. Exh. 10 at 1; Tr. 128-29. The investigation found over 80 transactions in the NASDAQ/NMS System at or near the close of the market. Each of the reports represented an uptick from the previous trade report of the day (or, in certain instances, from

the previous day) and caused ALPS to close at the offer side of the market. Div. Exh. 10 at 1.

The NASD found a pattern of orders involving transactions for 100 to 300 shares that occurred at the end of the day, which closed the market on an uptick. The NASD also noticed that the trades were placed through the broker-dealer Wilson-Davis, which was also suspicious to the NASD. Tr. 129. The NASD interviewed Canon in November 1989. Tr. 132. He told the NASD that Warner placed all the trades in the Delaware Funding account and he was aware of the end-of-the-day trading. Tr. 134.

Warner's Motives The record reflects that Warner traded the ALPS stock for a number of reasons. Warner wanted ALPS stock to look strong in the market because it would make the company look strong. Tr. 520-22. Warner admitted to the SEC staff at a meeting in August 1990 that the reason he did transactions at the end of the day was to "firm up the market...." Tr. 187. He believed that even if the price was declining, an end of the day trade could stabilize the price or retard the decline. Tr. 551, 754.

During the years 1986 through 1989, Warner personally controlled between 18 and 24 percent of ALPS' publicly traded stock. His trading tried to protect that position. Tr. 521-22, 139-40, 145-46, 431.

Beginning in 1986, and during the next three-year period, Warner pledged his ALPNET shares as collateral for a number of large personal loans:

<u>Year</u>	<u>Shares Owned</u>	<u>Shares Pledged</u>	<u>Shares Not Pledged</u>	<u>Percent of Ownership Pledged</u>
1986	1,547,407	557,000	990,407	35.99
1987	1,899,770	1,203,611	696,159	63.35
1988	1,898,265	1,203,611	694,654	63.40
1989	2,064,265	1,593,106	471,159	77.17

Jt. Exh. 1, Stip. ¶ 24.

By June 17, 1987, Warner had encumbered 557,102 shares of stock against an indebtedness of approximately \$3,550,000. Jt. Exh.1, Stip. ¶25. During the next 30 months, June 1987 through December 1989, Warner increased the number of shares that he pledged as collateral for personal loans. By the end of 1987, Warner had encumbered over 1.2 million shares of ALPS, which approximated two-thirds of his personal holdings in ALPS stock. Jt. Exh. 1, Stip. ¶ 26.

During the Trading Period, Warner had four personal loans that were at least partially collateralized by ALPS stock. Jt. Exh. 1, Stip. ¶¶ 28-37. Warner said that ALPS stock was an important part of the total collateral pledged for these loans. Tr. 531-32. Under the terms of the loan agreements, the stock's value had to retain certain loan-to-value ratios. Jt. Exh. 1, Stip. ¶¶ 29, 32, 34-35.

Because the bank loans referenced the "fair market value" of the stock as reported in the Wall Street Journal or current market value, Warner regularly consulted the Wall Street Journal to find out the last sale price. Jt. Exh. 1, Stip. ¶¶ 32, 33; Tr. 446-47. If the price of ALPS fell, the banks could require Warner to put up additional collateral. Tr. 523-26. In one instance, Warner

asked the bank to waive its right to additional collateral. Jt. Exh. 1, Stip. ¶ 30.

As Chairman of the Board of ALPS, Warner was aware of the overall "numbers" as well as some of the specifics in the acquisition agreements, and he knew the relationship between the value of the ALPS stock being paid and the total consideration for the acquisition. Tr. 529-31. Warner and his nominees had the last trade of the day and/or upticked ALPS stock on the valuation date on July 1, 1987, the first day of the calendar quarter in 1987; in all four instances in 1988 by trading on the day before or on the day of the valuation date; and in all four instances in 1989 by placing the last trade and/or upticking the stock on the business day immediately preceding or on the valuation date. Div. Exh 2.

As Chairman of the Board of ALPS, Warner was aware of the overall "numbers" as well as some of the specifics in the acquisition agreements, and he knew the relationship between the value of the ALPS stock being paid and the total consideration for the acquisitions. Tr. 529-31. If the price of ALPS stock slid, ALPS would be required to put up additional shares under the agreements it had to acquire companies. Tr. 522. Warner knew that his trading would be to provide support to the market price for ALPS stock, so that no additional shares would be required at the time of closing of the acquisitions. Tr. 555-56.

Warner acknowledged that one of his motives for his trading activity was that he felt responsible for losses being incurred by his friends, family members and business associates who had

purchased ALPS stock at his suggestion as well as to slow the losses that his nominee accounts had been experiencing. Tr. 522, 135-136, 143, 580-81, 721-23.

Warner's preference and practice was to buy stock on margin when allowed. Tr. 490-91. Warner knew that his trading practices would have the effect of providing support to the market price for ALPS stock, so that the risk of margin calls was reduced. Tr. 555-56. Canon was aware of Warner's concerns over these margin calls at other brokerage firms. Tr. 135, 268, 276-77, 581-82, 720-21.

Warner attributed the drop in the stock's price to short selling. Tr. 437, 440-41. Based on advice from the investment banker who underwrote ALPS's initial public offering, Warner bought ALPS stock toward the end of the trading day on an uptick to help counteract the effects of short selling. Tr. 485-86, 186-87. He discussed this advice with Canon. Tr. 235, 579. Warner also told the SEC Staff in the 1990 SEC Meeting that he bought stock towards the end of the day to counteract short selling. Tr. 186-87.

Canon's Awareness That His Role Was Part of Overall Trading Activity That Was Improper

Canon would provide Warner with bid, ask, and last trade information. Jt. Exh. 1, Stip. ¶ 106; Div. Exh. 18 at 98-99, 203; Tr. 711. Warner would occasionally purchase ALPS during the day, but more often Warner would place an order at the end of the day for ALPS stock. Jt. Exh. 1, Stip. ¶106.

By January 1989, Canon was aware that Warner traded shares in round lots which would uptick ALPS at the end of the day and in

closing transactions. Div. Exh. 4; Tr. 567, 710. Canon agreed that this pattern had jelled in his mind by then. Tr. 581. Canon stated that, by May 1989, there were greater percentages of small orders, upticks, end of the day trades, and closing transactions. Div. Exh. 4; Tr. 568-69. And Canon knew that in June 1989, nearly one hundred percent of the transactions were trades that fit a pattern. Div. Exh. 4; Tr. 570-71.

When Canon was asked by the NASD in November 1989 why small orders were being placed by Warner and Christenson at the end of the day, he said "I think you know what they are doing." Tr. 134-35. Canon then explained to the NASD representatives the pattern of Warner's trading, involving upticks and last trades, as well as Warner's motivations. Tr. 142-43, 748-49.

Intra-Day Upticks Canon was aware that generally Warner placed trades only on those days when the previous transaction was below the ask price and the trade had the effect of upticking the price to the ask price. Tr. 573-74. Canon was aware that in nearly four out of five trades by Warner at Wilson-Davis the transaction resulted in an uptick to the ask price. Tr. 563.

Marking the Close Canon realized during the time that Warner was trading at Wilson-Davis that Warner was very interested in the price at which ALPS was trading, that Warner was interested in what price the stock closed every day, and that Warner was interested in supporting the price of the stock. Tr. 562-63.

Canon knew when he was accepting Warner trades that almost all of the trades took place at or near the close. Div. Exh. 18

at 100. Moreover, Canon knew that Warner frequently purchased stock at the end of the day when the stock price was down below the ask price, as a result of the prior transaction. Div. Exh. 18 at 202.

During Warner's trading at Wilson-Davis, Canon became aware and was impressed with the fact that Warner was trying to close the market price for ALPS on the high side, at the ask price. Tr. 562. Christenson sometimes told registered representatives that he and Warner wanted to execute the last sale of the day to get the stock's price higher. Tr. 192-94, 220-22. He may have told Canon about this plan. Tr. 228, 245-46. Christenson testified that if Canon asked him, he would have told him. Tr. 244-46.

Based on conversations with Warner and Christenson, "as well as his own analysis," Canon surmised that Warner's intent had been to effect the closing price of ALPS with each of the purchases. Div. Exh. 10 at 4, Tr. 748-49, 142-43. There was no need for Warner to tell Canon what he was trying to do. Canon said, "I could see what he did when he put the trades through." Div. Exh. 18 at 226. "I could see that that's what he was doing after a time."

Because Canon understood what Warner was trying to do, Canon did not ask Warner why he was engaged in these transactions. Canon stated that, "if he wanted to give me his trades every single day at that point in time, I was willing to take them," even though "I was aware that what he was doing might possibly have been considered by somebody else not to be right." Tr. 725.

When Sam Wilson, the Chairman and president of Wilson-Davis, examined the account statements and trading records regarding ALPS transactions, he immediately recognized that this was "not the normal kind of trade" because of the number of trades near the close of the market. He instructed the trading department and Canon not to accept small orders in ALPS near the close of the market. Tr. 265-66.

Canon's Knowledge of Warner's Motives Canon thought that Warner's intent was to close the market on the ask side. Div. Exh. 18 at 107. Based on conversations with Warner at the time of the trading, as well as Canon's own analysis of Warner's end of the day trading at Wilson-Davis, Canon believed he understood the motives behind Warner's trading activities. Tr. 136, 143-44, 151-52, 748-49. Canon knew that Warner was Chairman of the Board of ALPS and that he owned millions of shares of ALPS. Tr. 700.

Canon said that "probably the first time that he started executing those trades" for Warner he believed that Warner was purchasing stock at or near the close of the market because a number of his friends had bought the stock and he wanted the stock to close higher. Div. Exh. 18 at 108; Tr. 580-81.

It was not until August 3, 1989, however, when Wilson brought the matter of the NASD's second inquiry to Canon's attention, that Canon told Wilson about Warner's trading and his belief that Warner was trying to prevent margin calls on his nominee accounts. Tr. 581-2.

Canon also knew that Warner had pledged ALPS stock as collateral on some of Warner's automobile dealerships (Div. Exh. 18 at 221; Tr. 577-79) and Canon knew that, if the price of the pledged stock declined, additional collateral could be required. Div. Exh. 18 at 224; Tr. 579. Canon also had discussed with Warner during the Trading Period Warner's concerns about the short selling of ALPS stock. Tr. 579, see also 720-21.

Canon's Knowledge of Misleading Investing Public Canon explained that the significance of purchasing stock and closing the market on the ask side was that "if somebody's reading the newspaper, it doesn't look like their stock is trading on the down side." Div. Exh. 18 at 104. Instead, he said, the newspaper would give the impression that the stock closed on the offer side. Div. Exh. 18 at 105. Canon explained, "[I]t looks like [the stock is] trading at the top of the market rather than at the bottom of the market." Div. Exh. 18 at 104; Tr. 562.

Canon was aware that the appearance of an end of a day rally could help support the price of ALPS stock. Tr. 562. Canon believes that an increase in the last sale from below the ask price to the ask price gives an appearance of market strength to a stock that may affect trading decisions of other investors. Tr. 758. It might, Canon admits, have had the effect of slowing the stock's decline. Tr. 754.

Even though the pattern of trading had "jelled in Canon's mind" by January 1989, Canon neither stopped accepting purchase orders nor made any inquiry about the trades. Tr. 567-68.

By May 1989, even though there were a greater percentage of small orders, upticks, end of the day trades, and closing transactions, Canon did not inquire of Warner or Christenson, or advise his firm's principals of Warner's trading patterns or his perceived intent to effect the price of ALPS' stock. Tr. 568-70. In June 1989, after the pattern had clearly developed, Canon did not make any inquiry of Warner or Christenson, and did not bring this matter to the attention of his supervisor. Tr. 574-75.

In June 1989, the NASD made its first inquiry of Wilson-Davis concerning the trading in the Christenson accounts. Canon was aware of and discussed the NASD's June 1989 inquiry with Lyle Davis. Div. Exh. 18 at 151; Tr. 583-84. During Canon's 27 years in the securities industry, this was the first inquiry ever by the NASD concerning trading in an account for which Canon served as the registered representative. Nonetheless, Canon made no inquiry of Warner or Christenson as to the purposes of the pattern of trading that had emerged. Tr. 596-97.

Canon thought that Warner's moving the price of the stock at the end of the day was "very unusual," but he did not inquire or discuss this with anyone. Tr 718-19.

Even in the absence of the NASD inquiry, Wilson would have stopped the trading had Canon brought it to his attention. Tr. 266-67, 273-74. Wilson's instincts were that there might be regulatory violations and in any event the "red flag" had waved. Tr. 274.

Transactions by Control Persons When Warner was trading in the Christenson and Thayne accounts at Wilson-Davis, the firm's supervision manual required its registered representatives to obtain prior approval from a supervisor before placing orders submitted by "control" persons. Canon Exh. C-4 at 8, 10, 25; Tr. 267. Canon acknowledged in writing that he had received and read the manual. Div. Exh. 18, at p. 137. Canon also was informed of these restrictions at sales meetings. Tr. 267-68. Canon knew what it meant to be a control person because he had been an officer and director of a public company. Div. Exh. 18 at 29.

Canon knew that Warner was chairman of the board and a control person of ALPS at the time Canon accepted the purchase orders for ALPS stock from Warner for the Christenson accounts. Div. Exh. 18 at 68, 143; Tr. 701. Canon did not seek to obtain prior approval, as required by the Wilson-Davis procedures manual, before executing trades by Warner in ALPS. Tr. 268, 591. Canon Exh. C-4 at 8, 10, 25. Nor did Canon make any inquires of Warner as to why the purchases were being made. Tr. 560, 567, 574, 585.

Transactions Without Third Party Trading Authorizations Canon allowed Warner to place trades with Wilson-Davis in accounts other than his own. Tr. 471-73, 575. This is the only instance in Canon's 27 years as a broker in which anyone opened an account and traded in someone else's name, but Canon asked no questions about why this was being done. Tr. 560, 703.

There were no third party authorizations or powers of attorney for any of the accounts in which ALPS stock was purchased during

the Trading Period. Jt. Exh. 1, Stip. ¶¶ 95, 108; Tr. 161. Canon knew that Warner was placing trades in accounts for which he did not have trading authorizations. Tr. 136, 266, 591. Such trades were not permitted at Wilson-Davis, unless the account representative obtained permission to enter each individual trade from the named account holder before entry of each trade. Jt. Exh. 1, Stip. ¶ 108; Tr. 557-58, 591-92.

Initially, Canon testified that he may have contacted Christenson after Warner placed a purchase order, "but then there were so many orders I didn't after that." Div. Exh. 18 at 94. Canon contacted Thayne to inform her of trades in her account only after the transactions had been completed. Tr. 558, 707. Canon did not obtain the required permission before executing Warner's transactions. Jt. Exh. 1, Stip. ¶ 108; Tr. 557-58, 591-92.

Canon accepted orders from Warner because he was very excited about having a client of Warner's wealth and stature in the Salt Lake City business community. Tr. 739, 423-431. Canon made no inquiries about why the trades were being made. Tr. 560, 567, 574, 585. Instead, he just took the order, collected his commission and went home. Tr. 585.

Canon's Knowledge of Substantially Assisting Warner's Scheme

Canon admits that, based on the last sale and other information he provided to Warner near the end of the trading day, Warner would or would not place an order to purchase ALPS stock. Tr. 747. Generally, Warner would place a trade when the last sale information indicated that a purchase would cause an uptick, so

that the stock would "close at the top of the market." Tr. 748. Canon admits that, without the information he supplied to Warner, Warner could not have consistently caused these upticks. Tr. 748.

Canon's Duty to The Marketplace The supervision procedures manual at Wilson-Davis, when discussing the Wilson-Davis professional approach to investment counseling, recognizes a duty to the marketplace on the part of its account executives:

It is the continuing obligation of each account executive to be responsible to his customers, his firm, and his industry, as well as to the community in which he lives.

Canon Exh. C-4 at 2.

The duty extends to knowing who a customer is and why he is placing the order. Spencer Baggs, who was the Paine Webber branch manager in Salt Lake City during the Trading Period, and Charles Wilmot, who is the assistant director of compliance at Paine Webber, testified that a broker is obligated to inform himself or herself about an investor's trading strategy before any orders are taken. The obligation is even greater if a pattern of questionable trading has occurred. Tr. 299-300, 386-87, 409; Div. Exh. 23 at 10.1. Once an inquiry is made, if the explanation is inadequate, the order should not be accepted, they said.

The Importance of the Last Sale Information to Investors

Wilson-Davis had access to NASDAQ market information throughout the Trading Period. The firm had available Levels I and II information, which included the inside quote, last sale trading volume and all market maker quotations, and last trade information.

Jt. Exh. 1, Stip. ¶¶ 11 and 105; Div. Exh. 18, at 28. Beginning on May 11, 1989, Wilson-Davis became a market maker in ALPS stock which gave it access to Level II information as well as the ability to change its quote. Jt.Exh. 1, Stip. ¶105.

The quote of the last sale price reflects an actual, real transaction. Tr. 52-53, 84-86, 628-29, 793-94.6/ For ALPS, which was thinly traded and had a wide quote spread, 1/4 point or more between the bid and the asked price during the Trading Period, last sale information was important in assessing where the market really was. Tr. 796-97, 806-808.

Last sale information is the basis for assessing price movement and trends for market analysts and managers that are concerned with technical analyses. Tr. 635-36, 801-803, 724.

Last sale information is also used in assessing supply and demand. When the last sale price occurs at the asked price (or offering price) of a market maker, professional traders and others interpret that to mean that there are buyers in the market for the stock. If the last sale price occurs at the bid, the implication is that people are selling stock. Tr. 796, 807, 813, 836.

Last sale information is a basis for assessing whether a broker has satisfied his duty of best execution by providing the best price for his customer. Tr. 40-41, 633-34, 813. It is helpful in assessing whether a customer has been "overreached" by his firm. Tr. 636-37

6/ The inside quote does not reflect a real transaction and is only an indication or an "advertisement" of the price at which a dealer is willing to enter into a transaction.

Traders, who are acting on behalf of institutional investors and portfolio managers, negotiate the price of block trades at a premium or discount in relation to the last block trade or at a price between the bid and asked prices of the inside quote to narrow the spread. Tr. 795-96, 799-803, 807, 811-12, 637-42.

It is also the basis for computing each customer's long position at the end of each month, whether payments are necessary for margin purposes, and the net asset value ("NAV") for mutual fund shares when new shareholders want to buy into the fund and when exiting shareholders seek to redeem those shares.

Canon had read literature about and knew that the securities industry, including market timers and technical analysts, would watch the last transaction prices, particularly if it either downticked or upticked consistently. Tr 724.

Last sale information is important to the NASDAQ marketplace from a regulatory standpoint because, among other things, it is one of the principal tools for monitoring the NASDAQ market by the NASD, including price movement. Tr. 55-56, 59-60, 65-67.

CONCLUSIONS OF LAW

The preponderance of evidence establishes that Warner's transactions in ALPS stock resulted in illegal market manipulation. The result of his market transactions was "the creation of deceptive value or market activity for [ALPS], accomplished by an intentional interference with the free forces of supply and demand." See, In re Swartwood, Hesse, Inc., Securities Exchange Act Release No. 31212 (September 22, 1992), 52 S.E.C. Docket 2219,

2227. Canon took Warner's orders for ALPS stock and provided him with market information about the stock price throughout the trading day. The record reflects that he was aware that he aided Warner in manipulating the price of ALPS stock. In fact, Canon conceded that Warner could not have carried out his market manipulation without the information he provided to him. The preponderance of evidence reflects that Canon knowingly and substantially assisted Warner in his scheme. In re Dominick & Dominick Inc., Securities Exchange Act Release No. 34-29243 (May 29, 1991), 48 SEC Docket 1740. A public interest assessment of Canon's assistance to Warner requires that he be suspended from association with a broker or dealer for six months and that he be ordered to cease and desist from violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10 b-5 now and in the future.

The Primary Violation

During the Trading Period considered in this case, from June 17, 1987 to December 1989, Richard Warner attempted to counteract the decline in the price of ALPS stock by initially supporting the stock price and ultimately by trading to slow its decline. When the stock price was below the inside asked price, Warner engaged in trades that had the effect of moving the price of ALPS back to the ask side of the market. He also frequently placed the last trade of the day to mark the stock's close at the ask price. Warner's trades created a pattern of repeated upticks, returning the stock

price to the ask side of the market and often marking the close at the highest possible price.

ALPS was traded in the over-the-counter market through the National Association of Securities Dealers Automated Quotation System (NASDAQ). During the Warner Trading Period ALPS was included in listings of the National Market System. For National Market System stocks, the NASD provides brokers, dealers and investors with the inside quote, last sale, time of last sale, + or - from previous day's closing price, high and low trades for the day, and intra-day volume for ALPS. The information is distributed through a computerized inter-dealer network where market makers display their quotations and where a market's "transparency" or montage is reflected. This information was updated within 90 seconds of each transaction. The NASD's last sale and volume information for ALPS was carried in The New York Times, The Wall Street Journal and other newspapers, which made the information widely available to investors. 7/

In 1987, Warner initially traded ALPS stock in his own accounts but because he was Chairman of ALPS and a large shareholder, he did not want anyone to know that he was trading to

7/ Canon argues that the last sale information is not a factor considered by investors and traders in establishing price in the over-the-counter market. The only factors to be relied on, he argues, are the bid and ask price. But as the Division points out in its reply, the Commission and Congress have gone to great effort to insure that last sale information is available to investors in order to correct the unreliability of bid and ask quotations in thinly traded stocks like ALPS. Canon makes this argument by way of urging that buyers and sellers did not rely on the last sale information that Warner manipulated. The expert testimony is to the contrary.

counteract the price fall. He established numerous nominee accounts in the names of family members, an employee, and associates through which he traded. He agreed to share the profits with the nominees and to cover all losses in the accounts. When Warner purchased stock in the nominee accounts, he would purchase small round lots, which frequently caused the stock to uptick to the ask price. The orders were frequently placed at or near the close of the market.

From November 1987 through December 1989, Warner directed trading through the accounts of his business associate, Richard Christenson. Christenson maintained seven accounts at four different brokerage firms, each under his own name or under the name of entities that he controlled. They were Delaware Funding & Guarantee, Capital Leasing Trust, and Capital Thrift and Loan. Only ALPS stock was purchased in the accounts. Warner either placed the orders with the registered representative for the Christenson accounts himself or he told Christenson to do so. Warner would always direct Christenson about when to purchase. Christenson testified that Warner told him the purpose of the transactions was to maintain the price of ALPS stock as high as possible at the end of the day in order to support the stock price.

By December 1989, the end of the Trading Period, Warner and his nominees had made 588 separate purchases of ALPS stock through seventeen accounts located at ten different brokerage firms. His nominees purchased 228,350 shares at a cost of \$1.6 million. The

stock had fallen so low by that time that it was delisted from the National Market System report.

As the stock price fell, Warner would frequently monitor its progress. He would call Canon and the other brokers that he purchased ALPS from to determine volume, bid, ask, last sale price, whether the last trade was up or down, and whether trades had been done that day. Canon received inquiries from Warner about ALPS trades two, three and sometimes as many as five times a day. Warner told Canon that he was interested in the trend. He said that he was particularly concerned about the downward trend because he owned so many shares and was chairman of the company. But the immediate reason for the inquiry was to determine whether a purchase was necessary to uptick the price of the stock.

The record reflects that Warner's trades from November 1987 to December 1989 would take place when the last transaction price was below the ask price. Warner would then purchase, typically 100, shares to move the price back up to the ask side of the market. He made his purchases at the end of the day. His purchases were undertaken with market information supplied by Canon and other brokers. Warner usually did not enter into transactions when the last transaction price was the same as the quoted price.

Warner trades during the Trading Period resulted in upticks 83 percent of the time. At Wilson-Davis where Canon was the broker for the nominee accounts, the Warner trades resulted in upticks 78.3 percent of the time. Although, in some months, 100 percent of the trades in ALPS at Wilson-Davis resulted in upticks. Warner

trades were the last trade of the day 65 percent of the time. Of his trades at Wilson-Davis, 73.3 percent of the trades were the last trade of the day.

Warner stated at the hearing that he engaged in the trades to try to stop the losses his friends were experiencing as the stock dropped in price. He felt responsible because he had induced them to invest in ALPS. He also gave a number of other reasons for his trades. He said that he wanted to protect the value of his company, ALPNET, he wanted to prevent margin calls, he was trying to protect the value of pledged collateral, he wanted to protect the value of the ALPS stock to be delivered in the acquisition agreements ALPS had entered into, and he wanted to counteract short selling.

Warner's transactions were manipulative because he was artificially effecting market activity when he tried to prevent the fall of the ALPS stock price. In re of Halsey, Stuart & Co., Inc., 30 S.E.C. 106, 112 (1949). Securities Exchange Act, Section 9(a) (2), 15 U.S.C. § 78i (a) (2), prohibits a series of transactions involving stocks listed on a national exchange that create actual or apparent activity or raise or depress the stock's price when it is done for the purpose of inducing others to buy or sell the security. Manipulations prohibited by Section 9 (a) (2), if it involves an over-the-counter security, violate Section 10(b) of the Securities Exchange Act and Rule 10b-5. See, SEC v. Resch-Cassin & Co., 362 F. Supp. 964, 975 (S.D.N.Y. 1973); In re Edward J. Mawod, 46 S.E.C. 865, 871 (1977), aff'd, Edward J. Mawod v. SEC,

591 F.2d 588 (10th Cir. 1979); In re Michael Batterman, 46 S.E.C. 304, 305 (1976); In re Russell Maquire & Co., Inc., 10 S.E.C. 332, 346-48 (1941). Respondent's argument that cases involving manipulation of exchange listed stocks are not precedent for similar conduct involving over-the-counter stocks is without merit. The Commission has long held that there is no difference. In re Barrett & Co, 9 S.E.C. 319, 328 (1941).

Warner's pattern of trading was irregular, irrational, and lacked economic merit. He sought to shore up the price through purchases of small amounts of ALPS stock which usually resulted in a slight increase in the price. His trades regularly sought to artificially influence or affect ALPS closing price. Investors observing market activity during the Trading Period could not assume that it was bona fide activity. Edward J. Mawod & Co., 46 S.E.C. at 871. Warner's device of using nominee accounts further exacerbated the deception that there was genuine demand for ALPS stock because it hide the fact that there was only one buyer, an ALPNET principal, acting under different names.

The record establishes that Warner acted with scienter. It is apparent that at a minimum he was reckless. He sought to prevent triggering provisions of acquisition agreements involving interests in ALPNET which would have required the delivery of additional ALPS shares. He also sought to mark the close in order to avoid margin calls in the nominee accounts. He attempted to prevent the fair valuation of ALPS shares which were held by banks to avoid having to increase collateral. In this case a prima facie

inference of intent exists because of Warner's large financial stake in ALPS through his stock ownership, the acquisition agreements and collateralized loans tied to the market price of the stock, stock held in margin accounts, his financial interest in the nominee accounts, and his role as Chairman and President of ALPNET. See, In re The Federal Corporation, 25 S.E.C. 227, 230 (1947); In re Halsey, Stuart & Co., Inc., 30 S.E.C. 106, 123-24 (1949). Warner admits that he believed that his trading efforts to support the market price would have the effect of showing market strength which would be good for his various financial interests.

Warner's conduct in up-ticking the price of ALPS stock was economically irrational. Warner claims he was trying to accumulate stock as cheaply as possible in anticipation of the stock eventually turning around. If that was really what he intended, he acted contrary to his interest when he purchased small lots at the inside asked quote. Had he really been pursuing that goal, he would have bought as close as possible to the bid, not the ask price, as he could, and he would have purchased large blocks of stock to minimize the transaction costs. Moreover, there was no apparent rational reason for his making the purchases secretly through nominee accounts for which he had no authorization. Warner's market transactions were manipulative because they did not reflect genuine demand. United States v. Stein, 456 F.2d 844, 850 (2d Cir. 1972), cert. denied, 408 U.S. 922 (1972).8/

8/ Respondent appears to be urging that Warner did not have notice that his scheme would be viewed by the Commission as
(continued...)

Respondent asserts that Warner's objective of supporting the stock and counteracting short selling would not as a matter of law amount to manipulation. In this case, however, Warner's motive was to manipulate the price of ALPS through repeated small lot transactions at the end of the day and during the day to give the appearance of demand at a higher price. His trades distorted the actual market for the stock and were materially deceptive.

Canon Was Aware ~~the~~ His Role Was Part of an Overall Improper Activity

The record supports the conclusion that Canon knew that he was assisting Warner in carrying out his manipulative scheme. Canon knew of and understood why Warner was doing what he was doing and he knew what impact Warner's trading had on the market for ALPS stock. Canon understood that Warner was entering trades in the nominee accounts at Wilson-Davis because Warner wanted the see the stock higher -- that is, move the price to the ask price. Canon knew during the Trading Period that the significance of purchasing

8/ (...continued)

manipulation. Canon claims that decisions of the Commission relied on by the Division of Enforcement were actions taken on settlements without a full evidentiary record. Canon does not point to any settlement that did not recite the facts that gave rise to the case. Nor does he demonstrate that the recitation of the facts and policy did not clearly reflect which practices the Commission believed were proscribed. The law has long been that when a stock price is artificially inflated by manipulative activity, or a price fall artificially slowed, that activity is deception. While a deception may or may not have greater impact on investors when manipulative trades are made at the end of the day, deceptive trades, which are executed at other times during the day, are no less illegal.

the stock on the offer side was to make the stock look like it was trading higher than it really was.

Canon testified that he was aware of the deception being practiced on the market by Warner's trading of ALPS was to make ALPS "look[] like it's trading at the top of the market rather than at the bottom of the market." Canon explained that the impact was that "if somebody's reading the newspaper, it doesn't look like their stock is trading on the down side." Canon knew that Warner had established a pattern of trading through the Christenson accounts where he was marking the close. Canon was aware that it was Warner's intent to "purchase[] the stock ... on the offer side near or at the close," to insure that reports on the stock in the newspaper showed that ALPS had closed at the offer side. In this way, he testified, Warner's practices would help support the market for ALPS stock.

The record reflects that Canon knew of the underlying reasons for Warner's trades and their consequences. While Canon may not have had knowledge of the labels the law puts on Warner's actions, his knowledge of the facts and consequences is sufficient. SEC v. Falstaff Brewing Corp., 629 F.2d 62, 77 (D.C. Cir. 1980), cert. denied, 449 U.S. 1012 (1980). The preponderance of the evidence in the record establishes that Canon acted recklessly in responding to Warner's manipulations of the market. The record shows that he "failed or refused, after being put on notice of a possible material failure ... to apprise [himself] of the facts where [he] could have done so without any extraordinary effort." Lanza v.

Drexel & Co., 479 F.2d 1277, 1306 n. 98 (2d Cir. 1973) (en banc). His recklessness is sufficient to make him liable for aiding and abetting Warner in his illegal activities.

Canon behavior indicates that he did not care whether the trades were improper. Canon testified that after Warner's pattern of trading "jelled in his mind," he did not make any inquiry of Warner or Christenson as to why the trades were being placed, and he did not tell his supervisors about the transactions until the NASD brought the questionable trades to his attention and his supervisors ordered him to stop accepting Warner's trades.

There is no question that Canon had a duty to inquire. The Commission requires that "[r]ed flags and suggestions of irregularities demand inquiry as well as adequate follow-up and review." In re Frederick H. Joseph, Securities Exchange Act Release No. 34-32340 (May 20, 1993), 54 S.E.C. Docket 283, 291; In re Edwin Kantor, Securities Exchange Act Release No. 34-32341 (May 20, 1993), 54 S.E.C. Docket 293, 301. Canon's recklessness presented the danger that buyers and sellers would be misled if they relied on the market information reported to NASDAQ and circulated in the market by the vendors of the "transparency."

Even after there was a clear pattern of what Warner was doing, Canon continued to accept and execute his orders and provide market information to Warner. He did this despite the fact that the trades were being done through nominee accounts without the required powers of attorney. Canon's behavior on these facts exhibits knowing and intentional conduct. He is just as culpable

as someone who acts with actual knowledge of the potential consequences.

Canon Knowingly and Substantially Assisted Warner's Illegal Activities

Warner's " manipulative activities, ... as so often is the case[,] could not have succeeded without the active or passive assistance of [his] broker-dealers." In re Alessandrini & Co., Inc., 45 S.E.C. 399, 410 (1973) (broker-dealer held to have willfully violated or willfully aided and abetted the violations of Section 17(a) of the Securities Act of 1933 and Securities Exchange Section 10(b) and Rule 10b-5).

Canon, as one of Warner's brokers, provided market information to Warner upon which he based his decisions to trade ALPS stock, and Canon knew that the transaction once executed would result in a new "transparency" upon which the investing public and others would rely. Canon's conduct was a causal factor in bringing about Warner's violations. Canon was the broker that allowed execution of the orders at prices intended to inject fiction into the market. Those orders would not have impacted the market -- and its pricing mechanism -- had Canon not allowed them.

Canon knew that his actions in causing the order tickets to get executed was the mechanism which allowed Warner to effectuate his trading scheme. He knew what market impact would follow. He realized that his execution of Warner and Christenson's tickets would create the appearance that the stock was trading at the top of the market instead of at the bottom. He conceded that such a

perception could have the effect of slowing the stock's price decline. In similar circumstances, when brokers have executed orders placed at the end of the day in order to cause the stock to close on an uptick, the Commission has found brokers liable as aiders and abettors. See In re Jacob Schaeffer and Evans & Co., Securities Exchange Act Release No. 13736 (July 11, 1977), 12 S.E.C. Docket 1128. 1129.

Canon, as Warner and Christenson's broker, had a duty not just to them, but also to the marketplace as a whole. If the markets are rigged by moving the stock price up at the end of the day, investors will lose their confidence in the market. The integrity of the market as a pricing mechanism will then be suspect.

Canon Caused the Violations

Section 21C of the Securities Exchange Act provides that not only the person who violates the statutes and rules is subject to an order to cease and desist from committing or causing such violation but "any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation" When Canon aided and abetted Warner's violations, his actions constituted a cause of the violation under Section 21C. In re Dominick & Dominick, Inc., 48 S.E.C. Docket 1740, 1748, n.11.

Suspension and an Order to Cease and Desist From Violation of 10(b) of the Securities Exchange Act and Rule 10b-5 Is Warranted Pursuant to Sections 15(b)(6) and 21C of the Securities Exchange Act

The Division urges that Canon be suspended for six months to a year from the industry and ordered to cease and desist from violating 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder. The Division argues that the sanctions are warranted because of the egregiousness of the respondent's actions, the recurrent nature of the infraction, the degree of scienter involved, the lack of sincerity of respondent's assurances against future violations, respondent's lack of recognition of the wrongfulness of his conduct, and the likelihood that respondent's occupation will present opportunities for future violations. See, Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd, 450 U.S. 91 (1981).

In addition, the Division urges consideration of whether the sanction is desirable to deter respondent and all others who may be tempted to engage in similar misconduct, whether an alternative sanction would fail as a deterrent because it would allow respondent to "go virtually scot-free" and "continue without change or interruption the activities in which he now engages," (In re Michael J. Fee, File No. 3-7023, 1990 SEC LEXIS 3506 (Initial Decision, pp. 25-26, (Oct. 19, 1990))), how the respondent's demeanor and attitude while testifying as a witness foretell his future conduct, and whether respondent evidences a present lack of understanding of the high standard of conduct that is expected of those engaged in the securities business. Section 15(b) of the Securities Exchange Act, views past misconduct as the basis for an

inference that the risk of probable future misconduct is sufficient to require exclusion from the securities business.

Canon aided and abetted Warner in his fraudulent efforts to manipulate the market. Warner could not have carried out his scheme without market information from Canon and Canon's willingness to allow Warner to trade in ALPNET stock through accounts of third parties without their written authorization or oral agreement to the trade, in violation of the rules of his firm. In addition, Warner was an officer of the ALPNET in whose stock he was trading. Canon ignored his firm's rules which required written authorization for Warner's trades because of his interest in and relationship to ALPNET. All of this was in aid of allowing Warner to manipulate the price of ALPS.

The manipulative scheme was very serious and Canon was involved in providing Warner with market information and taking his unauthorized orders over a period of 14 months. Canon did not stop taking Warner's trades until he was ordered by his supervisor not to do so, although, it was long after the full nature of Warner's illegal scheme had become known to him. Even after he became aware of what Warner was doing, he did not question him about the purpose of the transactions. Canon stated at the hearing that he believed his only responsibility was to take the orders and execute them. He either ignored or was unfamiliar with the requirements of his firm, although he has been a broker for many years.

Canon still claims that he did nothing wrong. During the hearing he showed no concern or understanding of the significance of his activities. His unwillingness to recognize his role in Warner's manipulation, after it was apparent to him through Warner's testimony, raises a serious public interest concern that he would do the same thing again. Canon is still employed in the brokerage business, albeit at a different firm. Therefore, he will still have an opportunity to aid other manipulators. Under these circumstances, a six-month suspension is necessary to protect the public interest.

To insure that Canon does not carry out the same illegal activities again, a cease and desist order will issue, directing him not to commit or cause any violation of, and commit or cause any future violation of, Section 10(b) of the Securities Exchange Act and Rule 10b-5.

ACCORDINGLY, IT IS ORDERED pursuant of Section 15 (b) (6) of the Securities Exchange Act of 1934 that Canon be and hereby is, suspended for a period of six months from association with any broker or dealer.

IT IS FURTHER ORDERED pursuant to Section 21C of the Securities Exchange Act of 1934 that Canon permanently cease and desist from committing or causing any violation and committing or causing any future violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

Pursuant to Rule 17(f) of the Rules of Practice, this initial decision will become the final decision of the Commission as to any

party who has not, within fifteen days after service of this initial decision, 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 the decision. If the respondent timely files a petition for review, or the Commission takes action to review, the initial decision will not become final. 9/


Edward J. Kuhlmann
Administrative Law Judge

Washington, D.C.
December 8, 1993

9/ The respondent raises various other arguments which have been considered and rejected. All proposed findings and conclusions submitted by the parties have been considered, as have their arguments. To the extent such proposals and contentions are consistent with this initial decision, they are accepted. In all cases where applicable, the demeanor of the witnesses has been considered in assessing their testimony. The conclusions reached are based upon a preponderance of the evidence.