

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION  
December 28, 1966

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In the Matter of :

ALFRED MILLER :  
THEODORE SOTELL :  
BERNARD FREIMARK :

Christopher & Co., Inc. :  
New York, New York :

File No. 8-9380 :

Securities Exchange Act of 1934 - :  
Sections 15(b) and 15A :

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FINDINGS,  
OPINION  
AND ORDER  
BARRING  
INDIVIDUALS

**BROKER-DEALER PROCEEDINGS**

Grounds for Bar from Association with  
Broker-Dealer

Fraud in Offer and Sale of Securities

Failure Promptly to Amend Registration  
Application

Where principal officers and salesman of registered broker-dealer participated in scheme to defraud investors by means of high-pressure campaign to sell securities without adequate knowledge or disclosure of adverse financial history and position of issuer, and false and misleading predictions and representations concerning, among other things, issuer's assets and prospects, and future market price of securities; and where officers failed to cause broker-dealer to file promptly amendments correcting information in its registration application which had become inaccurate, held, in public interest to bar respondents from being associated with broker-dealer.

APPEARANCES:

Joseph C. Daley, Joel M. Leifer, Gerald H. Goldsholle and Roberta Karmel, of the New York Regional Office of the Commission, for the Division of Trading and Markets.

Samuel Segal and Philip Segal, for Alfred Miller.

Irwin F. Deutsch and Joel M. Handel, for Theodore Sotell.

James V. Hallisey and Ernest H. Hammer, of Hallisey, Goldberg & Hammer, for Bernard Freimark.

Following hearings in these proceedings pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act"), the hearing examiner filed an initial decision in which he concluded, among other things, that Alfred Miller and Theodore Sotell, principal officers of Christopher & Co., Inc. ("registrant"), then a registered broker-dealer, and Bernard Freimark, a salesman, should be barred from being associated with a broker or dealer. 1/ We granted respondents' petitions for review, Freimark and our Division of Trading and Markets filed briefs, and Freimark, Sotell and the Division presented oral argument. Our findings are based upon an independent review of the record.

### Fraud in Offer and Sale of Securities

In the offer and sale of the stock of Alaska International Corporation ("Alaska") between April and October 1963, Miller, Sotell and Freimark willfully violated or willfully aided and abetted registrant's violations of the anti-fraud provisions of Section 17(a) of the Securities Act of 1933 and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 17 CFR 240.10b-5 and 15c1-2 thereunder.

We agree with the hearing examiner's findings that registrant engaged in a high-pressure campaign to sell Alaska stock, which was highly speculative, by means of fraudulent and extravagant representations and predictions made over the telephone, and that these respondents were participants in that campaign.

Miller, who had been vice-president of registrant and was president from April 1963 to May 27, 1963, sold a total of 5,800 shares of Alaska stock to seven customers. Sotell, also a former vice-president, who succeeded Miller as president and held that office until the middle of June 1963, sold a total of 39,050 shares to 55 customers. Freimark, who assertedly was employed by registrant on a part-time basis for less than a year, sold a total of 1,550 shares to nine customers. 2/

Miller variously represented to two customers who testified concerning their purchases of Alaska stock at 34¢ per share that the stock had real potential, had already appreciated and he expected it to appreciate further, would "something like" double, and had a possibility of increasing to \$5 or \$6 per share, that the company was "rapidly" or "fairly rapidly" paying off a large amount of liabilities and was taking over an oil company, and that some other mergers were contemplated.

Miller also prepared a memorandum on Alaska for use by the salesmen, assertedly on the basis of information furnished to him by Joseph Cannistraci, who had acquired control of registrant in early April 1963. 3/ The memorandum referred to Alaska as a holding company

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1/ Registrant's registration was revoked as a result of its failure to file an answer to the allegations in the order for proceedings. Securities Exchange Act Release No. 7659 (July 27, 1965). Other associated persons who failed to file an answer or a petition for review of the initial decision were barred or conditionally barred from association with a broker-dealer. Securities Exchange Act Release Nos. 7659, 7815 (as amended), and 7908 (July 27, 1965 and February 14 and June 29, 1966).

2/ During the period in question, registrant sold a total of about 191,000 shares of Alaska stock, of which at least 112,450 were sold to retail customers.

3/ Cannistraci was one of the associated persons barred from being

with diversified interests and as presently carrying on negotiations to add new industries, including a Canadian company with extensive graphite deposits, to the Alaska "family." It stated that while Alaska "most certainly is rated as a speculation at this time, there are indications that aggressive new management could succeed in their dynamic plans to gain growth and increased income for the company in the near future."

Sotell variously represented to five customer-witnesses who purchased Alaska stock at 18¢ to 35¢ per share that Alaska was not "doing anything" at the time but was going to be taken over by new management and thereafter would mine graphite; there was a change in the management of Alaska and he expected the stock to go up in the near future because of certain acquisitions by the company; he anticipated a rise in the price of the stock to about 50¢-80¢; Alaska had invested \$1 million in an oil company which it had in Texas; Alaska was then operating at a loss, but a possible merger with a graphite company would cause the stock to increase in price; Alaska was operating at a slight loss which should be corrected when certain changes were made and that the stock should go up; and the stock had a chance of going up to \$1 or \$1.50 by the end of the year.

Freimark represented to three customer-witnesses who purchased Alaska stock at 34¢ per share that Alaska's position would probably improve because of the discovery or opening of graphite deposits and that the price of the stock would probably rise "fairly quickly"; that there would be a possible merger with a mining company and the stock would go up in price within several months; and that the price could more than double in three or four weeks.

There was no reasonable basis for the representations and predictions made by respondents. We have repeatedly held that predictions of substantial price increases within relatively short periods of time with respect to a promotional and speculative security of an unseasoned company are a "hallmark" of fraud and cannot be justified. <sup>4/</sup> Moreover, Alaska's financial history and current financial condition were materially adverse and no disclosure of any such information was made to the customers of Miller and Freimark or in Miller's memorandum, and only very limited and uninformative disclosure to two customers of Sotell. Alaska was incorporated in 1957 and engaged in the exploration and development of mining properties and owned or had an interest in developed and undeveloped real estate. It began to operate at a loss at least as early as 1959, and by the latter part of 1960, it was insolvent. In 1961, it embarked on a program of acquiring leases and other property by issuing its own stock, and by July 31, 1962, it had about 8,800,000 shares outstanding. For the three fiscal years ended July 31, 1960 to 1962 it had net operating losses of about \$273,000, \$981,000, and \$418,000, respectively, and its

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3 Continued/

associated with a broker or dealer by reason of his failure to answer the allegations with respect to him in the order for proceedings. Securities Exchange Act Release No. 7659 (July 27, 1965).

<sup>4/</sup> See, e.g., Hamilton Waters & Co., Inc., Securities Exchange Act Release No. 7725, p. 4 (October 18, 1965), and cases there cited.

accumulated net operating losses as of July 31, 1962 were about \$3,000,000. Its losses continued to mount and, according to the company's secretary-treasurer, it did not have sufficient funds to pay that officer's salary for fiscal 1963 and was unable to pay its accountants.

To one customer who requested a financial statement, Sotell stated that he could not give her one because negotiations for the sale of Alaska's products were in progress and he was not at liberty to divulge any further information. The record indicates that Sotell did not have any current financial information and it does not appear that any such information would be confidential. Moreover, as we stated in rejecting a similar excuse for a broker-dealer's failure to disclose adverse financial information to customers:

"Even if it be assumed that registrant owed a duty to [the issuer] to treat the financial information as confidential, in our opinion when registrant disseminated favorable and optimistic information with respect to [the issuer's] condition and prospects, it made itself subject to an overriding duty of disclosure to its customers." 5/

Further, while Cannistraci apparently contemplated a merger of Alaska with a graphite company controlled by him and Peter Lobkowicz, another respondent in these proceedings, 6/ provided they could obtain control of Alaska, their efforts in that direction were unsuccessful because Alaska's management rejected their offer to purchase its stock. In addition the graphite company had never engaged in commercial production and no financial statements as to it were made available to respondents. Clearly there was no basis for predicting a price rise for the stock merely because of a "possible" merger with that company. Moreover, the record shows that Alaska never had any graphite properties and had not invested \$1 million in a Texas oil company.

Finally, we reject the various arguments and assertions by respondents that any violations by them were not willful, and that their participation in registrant's fraudulent sales campaign and any fraudulent representations made by them were excusable.

Sotell asserted that each of the customer-witnesses was aware that the Alaska stock was speculative, and that because they were friends or former customers he was able to ascertain that they could afford to take small speculative risks. Miller asserted that he believed any representations he made to the customer-witnesses to be the truth, that those customers had sought him out and he told them the stock was speculative, and that it was incredible that such customers, "experienced as they were," would believe that the price would increase to \$5 or \$6 per share. He further contended that since the Division called only two of his customers as witnesses, and offered no reason for not calling the other five, it must be inferred that if they had been called their testimony would have been adverse to the Division. He claimed that he was naive and gullible and an "innocent dupe" of Cannistraci and Lobkowicz, who induced him, together with his family, to make a substantial investment in their graphite company which was supposed to be merged with Alaska, and that he was also misled by Cannistraci when he prepared the memorandum for the salesman. In addition, he asserted

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5/ Van Alstyne, Noel & Company, 33 S.E.C. 311, 321 (1952).

6/ Lobkowicz, who was associated with Cannistraci in acquiring control of registrant, was one of the persons against whom bar orders have been issued in these proceedings. Securities Exchange Act Release No. 7908 (June 29, 1966).

that he was appointed president of registrant by Cannistraci and Lobkowitz, and held that office in name only. Freimark, who did not testify, asserted in his briefs or oral argument that he was unsophisticated and naive and a mere dupe of the other respondents in these proceedings; that the record does not show whether he had or should have had knowledge of Alaska's adverse financial history and condition; that the three customer-witnesses who purchased stock through him were friends of his and that at least two of them were aware that the stock was speculative; that he was employed by registrant for less than a year on a part-time basis and had no prior experience in the securities business; and that, based on the information revealed to him, he personally purchased 500 shares of the 1550 shares of Alaska stock sold by him.

It is clear that respondents' violations were willful within the meaning of the Exchange Act since they intentionally made optimistic predictions and representations without a reasonable basis. 7/ And merely informing a customer, whether he is a friend or a former customer, that the stock is speculative, is not sufficient disclosure of an issuer's adverse financial condition, and in any event cannot excuse making false or misleading representations to him. 8/ Moreover, such representations cannot be excused because the amount of money involved is small and the salesman believes the customer can afford the risk. Miller's and Freimark's asserted reliance upon the optimistic information furnished by controlling persons was hardly warranted in the context of the high-pressure sales campaign that was being conducted. 9/ At the least, the failure to supply them with financial statements should have put them on notice that the information was not reliable. 10/ The protection from fraud to which investors are entitled cannot be dissipated by claims of naiveté or gullibility on the part of those who hold themselves out as professionals with specialized knowledge and skill and undertake to furnish guidance but nevertheless participate in a high-pressure campaign to sell speculative securities. 11/ That respondents may have made personal investments does

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7/ See Tager v. S.E.C., 344 F.2d 5, 8 (C.A. 2, 1965): "It has been uniformly held that 'willfully' in this context means intentionally committing the act which constitutes the violation. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts."

8/ Underhill Securities Corporation, Securities Exchange Act Release No. 7668, p. 6 (August 3, 1965); Arnold Securities Corp., Securities Exchange Act Release No. 7813, p. 4 (February 7, 1966).

9/ See Mac Robbins & Co., Inc., Securities Exchange Act Release No. 6846, p. 12 (July 11, 1962), aff'd sub nom. Berko v. S.E.C., 316 F.2d 137 (C.A. 2, 1963).

10/ Shearson, Hammill & Co., Securities Exchange Act Release No. 7743, p. 21 (November 12, 1965). The most recent financial information concerning Alaska in registrant's office apparently was an un-certified balance sheet as of July 31, 1961. Miller admitted he saw no financial statements dated later than September 1961.

11/ See Trost & Company, Inc., 12 S.E.C. 531, 535 (1942); Ross Securities, Inc., Securities Exchange Act Release No. 7069, pp. 7-8 (April 30, 1963); Mac Robbins & Co., Inc., Securities Exchange Act Release No. 6846, p. 3 (July 11, 1962), aff'd sub nom. Berko v. S.E.C., 316 F.2d 137 (C.A. 2, 1963); Charles Hughes & Co., Inc. v. S.E.C., 139 F.2d 434, 436-37 (C.A. 2, 1943).

not aid them. As we recently stated, "a salesman's willingness to speculate with his own funds without reliable information gives him no license to make false and misleading representations to induce his customers to speculate." 12/

Miller's assertion that he was president in name only cannot relieve him of his responsibility as the designated head of registrant for inquiring into the accuracy of the information supplied to him and the salesmen by Cannistraci and for the fraudulent representations made not only by him in the memorandum prepared for the salesmen but also by the salesmen based on such memorandum and other information furnished to them. 13/ The same considerations are applicable to Sotell who also claimed, although not in connection with the fraud charges as to which he declined to testify, that he was president in name only. And Freimark's claim of inexperience and limited participation is not sufficient to relieve him of responsibility for his fraudulent representations and predictions, which were along the same lines as those of Miller and Sotell, and his participation in the selling activities. Moreover, it is unnecessary to show that respondents' customers in fact relied on the representations in order to establish violations of the anti-fraud provisions. 14/ Further, there is no basis for an inference that Miller's customers who were not called as witnesses would have testified adversely to the Division's position. 15/ In any event, Miller was free to call them.

On the basis of the foregoing, it is clear that in the offer and sale of Alaska stock Miller, Sotell and Freimark participated in a scheme to defraud and in transactions and a course of business which would and did operate as a fraud and deceit upon customers and made fraudulent representations to them.

#### Failure Promptly to Amend Registration Application

Miller and Sotell willfully aided and abetted registrant's violations of Section 15(b) of the Exchange Act and Rule 17 CFR 240.15b-2 (now 15b3-1) thereunder in that they failed to cause registrant to file promptly amendments correcting information in its application for registration which had become inaccurate.

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12/ Shearson, Hammill & Co., Securities Exchange Act Release No. 7743, p. 22 (November 12, 1965).

13/ See John T. Pollard & Co., Inc., 38 S.E.C. 594, 598 (1958); cf. Aldrich, Scott & Co., Inc., 40 S.E.C. 775, 778 (1961); Luckhurst & Company, Inc., 40 S.E.C. 539, 540 (1961).

14/ See Hamilton Waters & Co., Inc., Securities Exchange Act Release No. 7725, p. 6 (October 18, 1965), and cases there cited.

15/ Crow, Brouman & Chatkin, Inc., Securities Exchange Act Release No. 7839, p. 7 (March 15, 1966).

During the period from April to June 1963, as previously noted, Cannistraci acquired control of registrant, and Miller and then Sotell were made president. However, no amendments to registrant's registration application were filed to report these material changes. Sotell, noting that the hearing examiner found him responsible for registrant's failure to file an amendment to its registration application for the period "May 27 to June 1963," suggests that the failure to file an amendment "for a few days" does not constitute a violation on his part. By his own admission, however, Sotell was president until approximately the middle of June 1963. Moreover, for whatever period of time a person occupies a position entailing responsibility for effecting compliance with our requirements, when he resigns from that position he has an obligation to cause or alert his firm to achieve compliance promptly even though at the time of his resignation compliance was not yet required.

Miller and Sotell assert, as previously mentioned, that they had no actual authority as president. Sotell further argues that neither he, nor anyone else connected with registrant, considered that he was responsible for maintaining the accuracy of its registration application. However, we agree with the hearing examiner that, having accepted the title of president, these respondents assumed responsibility for registrant's compliance with the applicable requirements. 16/

#### Other Matters

Sotell contends that he was denied adequate representation by counsel at the hearings. His counsel had withdrawn a few days after commencement of the hearings, and the hearing examiner adjourned the hearings for six days to enable Sotell to employ new counsel. Upon resumption of the hearings on February 17, 1965, Sotell's new counsel requested a month's adjournment, stating that he had been retained the previous day. The hearing examiner proposed instead that the hearings continue until February 19, the end of that week, with the right reserved to counsel to recall for further cross-examination the Division witnesses scheduled to testify during that time, that the hearings thereafter be suspended for a week, and that after completion of the Division's case counsel be allowed whatever reasonable time was necessary to prepare a defense. Counsel rejected this proposal, and the examiner denied the requested adjournment. He adjourned the hearings, first until the following day and then until February 24, without any witness having testified, to allow counsel to seek review of the examiner's ruling. Sotell's defense did not begin until April 1, the hearings were closed the next day, and the examiner reopened the record on April 22 to enable Sotell to present additional evidence. Under these circumstances, any claim that Sotell's counsel did not have an adequate opportunity to prepare a defense is clearly untenable. 17/

Sotell also objects to the admission in evidence of shorthand notes taken by a customer-witness during a conversation with Sotell and urges that the customer's testimony translating her notes should have been stricken. The generally accepted view favors liberality in the

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16/ Cf. John T. Pollard & Co., Inc., *supra*.

17/ Cf. Mac Robbins & Co., Inc., 40 S.E.C. 497, 507 (1961), *remanded on other grounds*, 297 F.2d 112, 116 (C.A. 2, 1961); Herbert Rapp, Securities Exchange Act Release No. 7243 (February 14, 1964). See Ungar v. Sarafite, 376 U.S. 575 (1964).

admission of evidence in administrative proceedings, and administrative agencies are not bound by the technical common law rules of evidence applicable to jury trials. 18/ A faithful record of the events or statements in issue prepared by a witness when his recollection is fresh is logically superior to his recollection at a later time when the trial or hearing takes place. 19/ We think the examiner properly admitted the notes and that the witness' testimony was necessary to make the notes useful as a record of the prior events. Sotell's further objection to the receipt in evidence of portions of a transcript of pre-hearing testimony given by him is clearly invalid since they represented admissions. 20/

Finally, it is urged that the Division's cross-examination of Sotell went beyond the scope of the direct examination, which was limited to his alleged participation in the violations regarding the accuracy of the registration application, and that his testimony during cross-examination should therefore have been stricken. We are satisfied that the hearing examiner did not abuse his discretion in overruling objections of this nature raised during the hearings.

#### Public Interest

Miller urges that the sanction against him proposed by the examiner is excessive. He claims that by reason of his trust in Cannistraci both he and his family suffered substantial loss, and he states that he does not intend to engage in the securities business in the future. These factors, in our opinion, do not overcome his misconduct in the context of a high-pressure selling campaign without adequate financial information concerning the issuer.

Sotell asserts that he resigned from registrant because he did not like the way it was being run by its controlling persons, that he is presently employed as a registered representative in a supervised capacity by a member firm of the New York Stock Exchange, and that, according to the testimony of an official of that firm, no complaints had been received from any of Sotell's customers. He urges that he be permitted to continue in such employment. Freimark states that he is a graduate chemist and argues that his inexperience and his own losses in Alaska stock show that he acted in good faith. In view of the serious fraudulent representations made by Sotell to his customers, we think that the facts presented regarding his subsequent employment are inadequate to warrant a lesser sanction than that proposed by the examiner. In the case of Freimark also, in view of his participation in the fraudulent selling activities, we find no basis for a conclusion that the proposed sanction should be reduced.

18/ See Samuel H. Moss, Inc., v. F.T.C., 148 F.2d 378, 380 (C.A. 2, 1945), cert. denied 326 U. S. 734; Siltronics, Inc., Securities Act Release No. 4645, p. 5 (September 30, 1963), and cases there cited.

19/3 Wigmore, EVIDENCE (3rd ed. 1940) §§738-747. See also McCormick, EVIDENCE: (1954) §§278-279.

20/ See R. Baruch and Company, Securities Exchange Act Release No. 7932, n. 15 (August 9, 1966); 4 Wigmore, EVIDENCE (3rd ed. 1940) §1048.

Under all the circumstances, we agree with the hearing examiner's conclusion that these three respondents should be barred from association with a broker-dealer. 21/

Accordingly, IT IS ORDERED that Alfred Miller, Theodore Sotell and Bernard Freimark be, and they hereby are, barred from being associated with a broker or dealer.

By the Commission (Chairman COHEN and Commissioners WOODSIDE, OWENS, BUDGE, and WHEAT).

Orval L. DuBois  
Secretary

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21/ To whatever extent the exceptions to the initial decision of the hearing examiner involve issues which are relevant and material to our decision, we have by our findings and opinion sustained or overruled such exceptions to the extent that they are in accord or inconsistent with the views herein.