IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| HAIGHT & CO., INC.,<br>A. DANA HODGDON,<br>JAMES F. HAIGHT,<br>BURTON KITAIN,<br>W. LYLES CARR, JR.,<br>JAMES W. HARPER, III,<br>DAVID M. ADAM, JR.,<br>HOMER E. DAVIS, and<br>ROBERT F. KIBLER,<br>Petitioners,<br><br>v.<br><br>SECURITIES AND EXCHANGE COMMISSION<br><br>Respondent. | : | No. 71-1136 |

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT, IN OPPOSITION TO PETITIONERS' MOTION FOR A STAY OF THE EFFECTIVENESS OF AN ORDER OF THE COMMISSION PENDING REVIEW BY THIS COURT.

The Securities and Exchange Commission ("Commission"), respondent in the above-captioned review proceedings, objects to petitioners' motion, dated March 3, 1971, for a stay of the effectiveness of the Commission's order, dated February 19, 1971 ("February 19 order"), and respectfully requests this Court to deny petitioners' motion for the reasons set forth in this memorandum.

Summary of Prior Proceedings

On February 19, 1971, the Commission entered an order (Op. 29-30) 1/ (1) revoking the registration as a broker and dealer of Haight & Co., Inc. 2/ ("registrant"), (2) expelling registrant from membership on the Philadelphia-Baltimore-Washington Stock Exchange ("PBW") and from membership in the National Association of Securities Dealers, Inc. ("NASD"); and (3) barring nine individual officers and employees of registrant from association with any broker or dealer. 3/

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1/ "Op. " refers to pages of the Findings and Opinion of the Commission and Order Imposing Remedial Sanctions, In the Matters of Haight & Co., Inc., et al., Securities Exchange Act Release No. 9082 (February 19, 1971), a copy of which is attached to petitioners' motion for a stay as Exhibit A.

"Motion " refers to pages of petitioners' motion for a stay filed in this Court on March 3, 1971.

"Stay " refers to pages of the Commission's Order on Motion For Stay, In the Matters of Haight & Co., et al., File No. 3-533 (February 24, 1971), a copy of which is attached hereto as appendix A.

2/ During the period relevant to these proceedings (May 1960 to June 1964), Haight & Co., Inc. was operating under the name of Hodgdon & Co., Inc. (Op. 2).

3/ The nine individuals barred by the Commission's order are A. Dana Hodgdon, who was president of registrant until July 1964; James F. Haight, who has been the president, a director, and the major stockholder of registrant since July 1964; W. Lyles Carr, Jr., the treasurer of registrant, David M. Adam, Jr., a vice-president of registrant; James W. Harper III, also a vice-president of registrant; Burton Kitain, the secretary of registrant; Louis S. Amann, a former vice-president and salesman of registrant; Homer E. Davis, a salesman for registrant; and Robert F. Kibler, another of registrant's salesmen (Op. 2). In addition, petitioners Haight, Carr, Adam, Harper and Kitain each own 10% or more of registrant's stock (Op. 28).

Petitioner Hodgdon is not a party to the motion for a stay now before this Court. Mr. Hodgdon terminated his association with registrant in December 1965 and apparently has left the securities business with no intention of returning (Op. 27-28). Mr. Amann is not a party either to this review proceeding or to the motion for a stay.

A petition for review of the Commission's order was filed with this Court on February 22, 1971, and on the same day petitioners filed a motion with the Commission for a stay of its February 19 order pending final disposition of this review proceeding, or, alternatively for a ten-day stay within which period they would apply for a further stay from this Court. By order dated February 24, 1971, the Commission denied petitioners' motion insofar as it sought a stay pending final disposition of this review proceeding, stating that a stay pending appeal was not warranted because "the serious fraud perpetrated by movants outweighed the considerations advanced by them, and required in the public interest that the termination of their privilege of engaging in the securities business not be deferred pending final disposition of their appeal." The Commission, however, did grant petitioners a ten-day stay.[4/] On March 3, 1971, petitioners moved this Court for a stay pending review. On March 4, 1971, upon petitioners further motion, the Commission extended the ten-day stay until March 11, 1971, noting that petitioners had taken seven out of the ten days to file their motion with this Court.[4a/]

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4/ On February 24, 1971, petitioner's filed an Emergency Motion For An Interim Stay in this Court, seeking a temporary stay and citing as grounds for the motion the Commission's delay of one day in acting on petitioners' February 22, 1971 motion. On the same day, however, the Commission granted petitioners a temporary stay (Stay 2), and counsel for the Commission notified the Chief Deputy Clerk of this Court, by letter dated February 24, 1971, that counsel for petitioners had agreed that Petitioners' Emergency Motion For An Interim Stay was now moot.

4a/ See Exhibit B hereto.

**The Findings and Opinion of the Commission and Order Imposing Remedial Sanctions, dated February 19, 1971.**

Following extensive hearings before the hearing examiner,[5] and on the basis of briefs and oral argument on behalf of all parties, and its independent review of the record, the Commission concluded that the public interest required that registrant's broker-dealer registration should be revoked, that registrant should be expelled from membership in the NASD and the PBW, and that petitioners Hodgdon, Haight, Adam, Harper, Carr, Kitain, Davis and Kibler should be barred from association with any broker or dealer[6] (Op. 28). The Commission found "the various

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5/ The administrative proceedings below were instituted by the Commission in 1966, pursuant to Sections 15(b), 15A and 19(a)(3) of the Securities Exchange Act of 1934, 15 U.S.C. 78o, 78o-3 and 78s, on the basis of information obtained by the staff in the course of an investigation of registrant's activities ordered by the Commission on November 24, 1964. (Op. 29). The hearing examiner's initial decision, filed on May 15, 1969, concluded, in part, that registrant should be suspended for four months from membership in the NASD and the PBW; that Mr. Hodgdon and petitioners Haight, Adam, and Harper should be barred from association with any broker or dealer; that petitioners Kitain and Davis should be suspended from association with any broker or dealer for one year, that petitioners Carr and Kibler should be barred for ten months and five months respectively, and that Mr. Amann should be barred with the provision that he could become associated with a broker or dealer in a supervised capacity after a period of nine months (Op. 2, 26).

The initial decision of the hearing examiner also recommended that certain sanctions be imposed on Harvey A. Baskin, who was an assistant to Mr. Hodgdon. In its February 19 order, the Commission dismissed the proceedings with respect to Mr. Baskin, stating that it was unable to conclude on the basis of the record that he participated in any of the violations.

6/ In so ruling, the Commission upheld the hearing examiner's decision that petitioners Hodgdon, Haight, Adam and Harper should be barred from association with any broker or dealer but found that the sanctions imposed by the hearing examiner on registrant and the other individual petitioners "were inadequate in the public interest" (Op. 28).

mitigative factors" cited by petitioners as warranting lesser sanctions than those imposed by the hearing examiner "insufficient to overcome the serious fraud and other violations" (Op. 28) which, the Commission noted, included participation in a "nefarious scheme to defraud financial planning clients" and betrayal of "the trust clients were induced to place in them" (Op. 28).

The Commission based its February 19 order on findings that petitioners had willfully violated the antifraud provisions of the federal securities laws [7/] by engaging in a scheme to defraud public investors who used registrant's financial planning services in the purchase and sale of securities (Op. 3), and by making materially false and misleading statements to customers in connection with the offer and sale of particular securities (Op. 15-20).

As the Commission stated in its opinion,

> "[t]he record shows that the gist of the scheme was respondents' holding themselves out as financial planners who would exercise their talents to make the best choices for their clients from all available securities, when in fact their efforts were directed at liquidating clients' portfolios and utilizing the proceeds and their clients' other assets to purchase securities which would yield respondents the greatest profits, in some instances in complete disregard of their clients' stated investment objectives." (Op. 3).

In this regard, we respectfully refer the Court to the numerous examples of serious fraud and other violations by petitioners which the Commission

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7/ Section 17(a) of the Securities Act of 1933, 15 U.S.C. 17q(a) and Sections 5, 10(b) and 15(c)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78e, 78j(b) and 78o(c)(i) and Rules 10b-5 and 15cl-2 thereunder, 17 CFR 240.10b-5 and 240.15cl-2.

described in great detail in its opinion. A review of the facts set forth in this opinion will convince the Court, as the Commission was convinced, that the public interest requires that petitioners' motion for a stay pending review be denied.

For example, the Commission found that petitioners' "nefarious scheme to defraud" included the use of fraudulent radio advertising to entice the unwary, advertisements which promised counselling by experts in financial planning, informed specialists, and a research staff, _when in fact_ registrant had _no_ research staff, its "experts" in financial planning included _inexperienced_ salesmen, and, as petitioner Haight admitted, registrant's "'specialists' in various fields had "_something less than expert or professional knowledge_'" (emphasis added) (Op. 3-4). Further, registrant's salesmen, who were instructed to "'Get [the client's] cash first, then go after insurance, our only purpose in discussing insurance is to free more monies.'" (Op. 6), induced clients to cash in life insurance policies, to sell listed securities they already owned, and to use the proceeds to purchase more speculative securities promoted by registrant. (Op. 6-7). The Commission found that "under the guise of comprehensive 'financial planning' . . ." petitioners "induced customers, who were generally inexperienced and unsophisticated, to believe that their best interests would be served by following the investment program designed for them by respondents" (Op. 13-14), when, in fact, the investment programs were designed to sell securities on which petitioners could earn the highest commissions and not to further the interests of customers, and were in some cases

directly contrary to their customer's stated investment needs and objectives (Op. 14). Such conduct, as the Commission found, "was clearly contrary to the basic obligation of professionals in the securities business to deal fairly with the investing public." (Op. 14). In addition, the Commission found that registrant and petitioners Hodgdon, Haight, Carr, Harper, Kitain, Davis and Kibler sold securities to Virginia residents without disclosing that the State of Virginia had banned the sale of such securities on the grounds that the issuer of those securities was insolvent (Op. 16) and, in connection with these sales, made representations to customers which the Commission characterized as "outright falsehoods and . . . extravagant predictions" (Op. 17), which "were entirely at variance with the picture given in the prospectus" (Op. 16).

The Commission also based its February 19 order on findings that registrant, and petitioners Hodgdon, Carr, Kitain, and Davis, willfully violated the registration provisions of Sections 5(a) and 5(c) of the Securities Act of 1933, 15 U.S.C. 77e(a) and (c), in connection with the offer and sale of unregistered securities which petitioners should have known were required to be registered (Op. 21). The Commission found that the securities in question were offered to "inadequately informed persons who clearly did not occupy a relationship to the issuers giving them access to the same kind of information that a registration statement . . . would provide . . ." and who did not "possess such information." (Op. 20).

In addition, the Commission found that registrant willfully violated the recordkeeping provisions of Sections 17(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78(a), and Rule 17a-3 thereunder, 17 CFR 240.17a-3, by falsely marking order tickets and sales confirmations sent to Virginia residents "unsolicited" in cases where registrant had sold to Virginia residents the securities of a particular company, the sale of which, as petitioners knew, had been banned by the State of Virginia, and that petitioners Haight and Adam willfully aided and abetted registrant in these recordkeeping violations (Op. 21).

Finally, the Commission found that registrant willfully violated Section 15(b) of the Exchange Act, 15 U.S.C. 78o(b), and Rule 15b-3-1 thereunder, 17 CFR 240.15b3-1, by failing to amend its broker-dealer registration application to reflect changes in its officers and directors (Op. 22), and that registrant willfully violated Section 15(c)(2) of the Exchange Act, 15 U.S.C. 78o(c)(2), and Rule 15c2-4 thereunder, 17 CFR 240.15c2-4, by failing promptly to transmit funds to the issuer when participating in a distribution of securities (Op. 22).

Argument

As the decisions of this Court and those of other courts of appeals make clear, petitioners bear a heavy burden in seeking to stay the effectiveness of the Commission's February 19 order pending review. In its frequently cited decision in Virginia Petroleum Jobbers Ass'n v. Federal Power Commission 104 U.S. App. D. C. 106, 110, 259 F. 2d 921, 925 (1958), this Court held that a movant for a stay, in order to justify

the granting of such "extraordinary relief" [8/] must make:

(1) A strong showing that petitioners are likely to prevail on the merits of their appeal;

(2) A showing that without a stay petitioners will suffer irreparable injury;

(3) A showing that the issuance of a stay will not substantially harm other persons interested in the proceedings; and

(4) A showing that there will be no harm to the public interest if a stay is granted.

As the Court of Appeals for the Tenth Circuit stated in denying a stay of a Commission order revoking the registration of a broker-dealer in Associated Securities Corp. v. Securities and Exchange Commission, 283 F. 2d 773, 775 (C.A. 10, 1960). (footnotes omitted):

> Irreparable injury to the petitioners is urged on the ground that they are excluded from the securities business and thus from earning their livelihoods in their chosen vocations. Serious as this personal injury may be, it is not of controlling importance as primary consideration must be given to the statutory intent to protect investors. Exclusion from the securities business is a remedial device for the protection of the public.

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8/ Cited in, e.g. North Atlantic Westbound Freight Ass'n v. Federal Maritime Commission, 130 U.S. App. D. C. 122, 124, 397 F. 2d 683, 685 (1968); Strathmore Securities, Inc. v. Securities and Exchange Commission, No. 21, 520 (C.A.D.C. Dec. 21, 1967); Eastern Airlines v. Civil Aeronautics Board, 261 F. 2d 830 (C.A. 2, 1968); Associated Securities Corp. v. Securities and Exchange Commission, 283 F. 2d 773, 774 (C.A. 10, 1960), Hamlin Testing Lab. v. United States Atomic Energy Commission, 337 F. 2d 221, 222 (C.A. 6, 1964).

> In the balancing of an injury to the individual by exclusion from the security business and of harm to the public by proscribed activities in security transactions the necessity of protection to the public far outweighs any personal detriment resulting from the impact of applicable laws. In each of the cases before us, the Commission has found that the public interest is served by the actions which it has taken. . . . If we were to grant the requested stays and thus, temporarily at least, free . . . [petitioners] from the imposition of the Commission orders we would, in effect, be substituting our judgment as to the public interest for that of the Commission. Primary responsibility rests on the Commission and its determinations should not be upset by the courts except for cogent reasons. The United States Supreme Court has said that: "Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest."

The petitioners have not made a sufficient showing to satisfy any of the applicable conditions for a stay, much less all of them.

1. <u>Petitioners Have Failed to Show a Strong Likelihood of Success on the Merits of Their Petition</u>

At the outset it should be noted that petitioners do not contest the fact that they engaged in the fraud and other misconduct on which the Commission based its February 19 order barring petitioners from the securities business. Instead, petitioners have limited their discussion of the merits to two "issues": (a) whether the Commission erred in imposing as a sanction a complete bar from the securities business; and (b) whether the Commission's order instituting these proceedings was so vague as to deny petitioners due process (Motion 9-22). A brief analysis will show that there is no substance to these issues.

<u>The Commission correctly barred petitioners from the securities business.</u> Petitioners contend that the remedial sanctions imposed on petitioners are "punitive", that the Commission failed to articulate its

reasons for imposing these sanctions, and that the sanctions operate "retrospectively to punish" the petitioners and not "prospectively to protect the public interest" (Motion 9-10). On these grounds, petitioners argue, there is a strong likelihood that this Court will reverse the Commission's February 19 order.

It is clear upon the face of the Commission's opinion that petitioners' contentions in this regard are without merit. The Commission did not, as petitioners suggest, "punish" them for exercising their statutory right to a hearing. Rather, the Commission correctly based the sanctions imposed solely on the violations found in this case, with reference to the particular persons involved (Op. 27). Any attempt to compare the sanctions imposed on different persons, even in the same proceeding, is irrelevant.[9/] Dlugash v. Securities and Exchange Commission, 373 F. 2d 107, 110 (C.A. 2, 1967); accord, Winkler v. Securities and Exchange Commission, 377 F. 2d 517 (C.A. 2, 1967) (per curiam).

The Commission's opinion sets forth clearly the findings on which its February 19 order is based, and articulates with equal clarity its reasons for barring petitioners from the securities business. The Commission found that petitioners "participated in a nefarious scheme to defraud financial planning clients and betrayed the trust clients were induced to place in them" (Op. 28); that, with the exception of Mr. Adam, petitioners "made fraudulent representations to customers in offer and sale of various securities" (Op. 28); and that "registrant,

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9/ Petitioners' assertion (p. 10) that the Commission was somehow "punishing" them for demanding a hearing is wholly without merit.

Hodgdon, Carr, Kitain and Davis violated the registration provisions of the Securities Act" (Op. 28). On the basis of these specific findings, the Commission stated "[w]e conclude that the various mitigative factors cited are insufficient to overcome the serious fraud and other violations of the respondents. We agree with the hearing examiner's determination that Hodgdon, Haight, Adam and Harper should be barred. We find, however, that the sanctions which the examiner imposed on registrant and the other individual respondents were inadequate in the public interest" (footnote omitted) (emphasis added) (Op. 28); "[w]e conclude that registrant's broker-dealer registration should be revoked, that it should be expelled from NASD and PBW membership, and that Carr, Kitain, Davis, Kibler, and Amann as well as the other individual respondents should be barred. 9a/ In our judgment the sanctions we are imposing are appropriate in the public interest notwithstanding that we have not affirmed all of the adverse findings made by the hearing examiner with respect to various of the respondents" (footnote omitted) (Op. 28). 10/

Petitioners reliance in this regard on the opinion in Beck v. Securities and Exchange Commission, 413 F. 2d 832 (C.A. 6, 1969), is misplaced. In Beck, supra, 413, F. 2d at 834, the court held that, in view of a reference in the Commission's opinion to the fact that Mr. Beck had been retrained, it was not clear to the court why the Commission had imposed

9a/ See, O'Leary v. Securities and Exchange Commission, 137 U.S. App. D.C. 420, 422-23, 424 F. 2d 908, 911-12 (1970).

10/ In this regard, the Commission noted that it had "not sustained the hearing examiners findings "that fraudulent representations were made with respect to the rate of return on certain real estate securities offered and sold by respondent," (Op. 28, n. 50). The Commission did not, as petitioners have stated, explicitly acquit "all petitioners of misrepresentation of real estate returns" (Motion 13) or find "that petitioners had not misrepresented the rate of return of real estate investments" (Motion 8).

a four-month suspension on Mr. Beck; that is, whether the sanction was intended to be a deterrent to future violations by Mr. Beck or a warning to others. In the present case, there is no such ambiguity. The Commission clearly stated its findings of misconduct (Op. 28), listed the factors it considered in determining the appropriateness of the particular sanctions (Op. 27), held that "[t]he imposition of sanctions here is no less remedial because of the lapse of time since the misconduct occurred", (Op. 27) and concluded that the public interest required that petitioners be barred from the securities business (Op. 28). The Commission's opinion leaves no doubt as to the reasons for the sanctions imposed on petitioners. As expressed by the Commission (Op. 14), petitioners "conduct was clearly contrary to the basic obligations of professionals in the securities business to deal fairly with the investing public."

Finally, there is no merit to petitioners' contention that the Commission erred in barring them from the securities business without first considering petitioners' profferred evidence that "after the hearings registrant had added supervisory personnel, installed new equipment, and adopted new policies and procedures" (Op. 27) designed to prevent future violations (Motion 16). As petitioners themselves recognized in their moving papers, (Motion 11-12) this same evidence, _i.e._, that petitioners had adopted new compliance policies and procedures to prevent further violations from occurring after these proceedings

were instituted, had been presented before the hearing examiner, and was considered by both the examiner and the Commission in determining the sanctions to be imposed on petitioners (Op. 27-28). The Commission concluded, however, that this evidence, as well as other mitigating factors cited by petitioners, was "insufficient to overcome the serious fraud and other violations" (Op. 28) of petitioners. As the Commission noted in its opinion, the evidence referred to in petitioners' motion to remand the proceedings to the hearing examiner for the proffer of further evidence as to their post-hearing compliance was merely evidence "to show that after the hearings registrant had added supervisory personnel, installed new equipment, and adopted new policies and procedures" (Op. 28). The Commission correctly denied the petitioners' motion on the grounds that "the evidence sought to be introduced appeared essentially cumulative" and "the requested reopening would be an inappropriate departure from orderly procedures and an unwarranted prolongation of the proceedings . . ." (Op. 27, n. 48).

In relying on _Beck_ v. _Securities and Exchange Commission_, 430 F. 2d 674 (C.A. 6, 1970), petitioners have misstated the holding in that case. In _Beck_, the Court did not deal with the question of whether additional evidence of post-hearing activities by the petitioner need be taken but simply held that activities subsequent to the institution of administrative proceedings are a relevant factor to be considered in determining what sanctions are appropriate in the public interest. In the present case, the Commission _did consider_ evidence of petitioners' activities subsequent to the institution of the proceedings in determining the

sanctions, but concluded that this factor was insufficient to overcome petitioners' serious fraud and other misconduct (Op. 28). Nor did the Court in Beck, as stated by petitioners (Motion pp. 18-19), hold "that the Commission had erred as a matter of law in imposing any sanction at all in view of petitioners' post-hearing conduct." Indeed, Mr. Beck had not challenged nor did the Court disturb that portion of the Commission's order which directed that his future employment in the securities business be in a non-supervisory capacity. Rather, the Court in Beck simply concluded that the Commission's four months suspension of Mr. Beck was inappropriate under the facts of that particular case. Moreover, unlike the instant case, the Commission in Beck had not concluded that the character of Mr. Beck's conduct was such as to demonstrate that the public interest required his being permanently barred from the securities business. Indeed, as noted, supra, the Commission's order expressly provided that he could re-enter the securities business. Beck, supra, 430 F. 2d at 674-675.

The Commission's Order instituting these proceedings did not deny petitioners due process of law. The Commission's order, 11/ dated March 2, 1966, instituting these proceedings set forth with specificity four allegations of misconduct by petitioners (lettered "B" through "E"). Although the charges against petitioners, particularly with respect to the scheme to defraud customers, were broad, as the Commission itself noted in its opinion, they were necessarily so, since the scheme found by the Commission "encompassed registrant's whole method of operation" (Op. 25). Petitioners' characterization of the Commission's order

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11/ A copy of the order is attached to petitioners' motion as Exhibit "B".

instituting the proceedings as "a broadbrush indictment of registrant's methods of doing business, [and] training program . . ." is correct and that is what the Commission found. Petitioners' assertion, however, that the order instituting the proceeding involved" every customer transaction in which it had engaged for a fifty-month period beginning in May 1960 and ending in June 1964" (Motion 19) is simply incorrect.

The mere fact that the Commission did not find it necessary to make findings of violations with respect to each and every security and customer account dealt with in the hearings and encompassed in the allegations to support the sanctions imposed on petitioners, in no way implies that the charges against petitioners were unduly vague or general or did not provide adequate notice (Motion 21). Moreover, petitioners' motion for a more definite statement of charges was in large part granted and petitioners presented a vigorous defense to all of the allegations made (Op. 25).

Petitioners also claim (Motion 20) that they were denied a fair hearing because they were not furnished with the names of prospective witnesses (customers allegedly defrauded) prior to the hearing. The courts have consistently held that there is no requirement that administrative agencies supply a respondent with an advance list of the witnesses. See, e.g., Armstrong, Jones & Co. v. Securities and Exchange Commission, 421 F. 2d 359, 364 (C.A. 6), certiorari denied, 398 U.S. 958 (1970); Dlugash v. Securities and Exchange Commission, 373 F. 2d 107, 110 (C.A. 2, 1967). Moreover, petitioners have not shown that they were prejudiced by the procedures employed. If, at any time, petitioners

felt that they were unfairly surprised by the testimony of a witness, they could have applied to the hearing examiner for a continuance. They make no claim that they were prejudiced in this regard.

The Commission contends that petitioners have failed to meet this aspect of their burden on this motion for a stay. They have not even demonstrated that the case presents a close question. In any event, however, petitioners must demonstrate more than that the case presents a close question; "'[they] must make 'a strong showing that . . . [they] are likely to prevail on the merits of . . .[their] appeal.'" (citation omitted), North Atlantic Westbound Freight Ass'n v. Federal Maritime Commission, 130 U.S. App. D.C. 122, 123, 397 F. 2d 683, 684-85 (1968). They have not met this burden.

2. Petitioners Have Not Sustained the Burden of Establishing That the Requested Stay Will Not be Harmful To the Public Interest.

Petitioners seek to justify a stay by asserting simply that the Commission has allowed them to remain in the securities business during the course of the proceeding. While it is not disputed that the Commission has the authority to order a proceeding for the suspension of petitioners during the course of the full proceeding or to seek an injunction from a United States District Court, and that it did not do either, any such proceeding also requires a hearing and a determination of violations of the securities laws. Contrary to petitioners' assertion (p. 26), there was no "determination" by the Commission to allow petitioners to remain in business. The only prior "determination" made by the Commission in this regard was that the allegations made by its staff required the

institution of a proceeding to determine whether those allegations were true and if so, what, if any, remedial action was appropriate in the public interest. See Ex. B to petitioners' motion, pp. 5-6. It was only after a full hearing was had on the matter that the Commission "determined" that petitioners had violated the securities laws and concluded their activities evidenced conduct "clearly contrary to the basic obligation of professionals in the securities business to deal fairly with the investing public" (Op. 14), which required that they be permanently barred from that business. The scheme found to have been perpetrated by petitioners is not, as is evident from the opinion, a single or small number of isolated situtations. It represents, as characterized by the Commission, a "nefarious scheme to defraud" and a betrayal of trust, which petitioners had induced public investors to place in them (Op. 28). The character of petitioners' conduct is such as to demonstrate that they lack the qualities that are required of those in the securities business.

The so-called controls and procedures instituted by registrant and urged in support of the instant motion (Motion 11-13), which were referred to by the Commission as "various mitigative factors" (Op. 28), were rejected by the Commission as "insufficient to overcome the serious fraud" found to have been committed by petitioners (Ibid). In short, even in today's electronic world, mechanical procedures and controls are no substitute for individual character and integrity, particularly where, as here, the person who is in charge of those

controls is similarly lacking in those requisite qualities, as the findings concerning petitioner James F. Haight so clearly demonstrate. Mr. Haight is president of registrant (Op. 2). Indeed, it was Mr. Haight who trained the salesman in the conduct of this "nefarious scheme" (Op. 4). It was Mr. Haight who outlined in a memorandum to the other officers of the firm how to mislead customers (Op. 5). It was Mr. Haight, along with others, who taught the sales staff "to utilize a variety of high pressure and fraudulent tactics" (Op. 6). It was Mr. Haight who personally induced his own customers, elderly women, to liquidate their portfolios of high grade securities so that they could purchase, as recommended by Mr. Haight, "new issues being underwritten by registrant [Haight & Co.] and securities sold by registrant as principal" (Op. 12-13). This conduct was, as the Commission found (Op. 13-14), designed to provide the greatest gain to petitioners, rather than promote the customers' interests and was contrary to the customers' expressed investment needs and objectives. It was Mr. Haight who made fraudulent representations to customers in the sale of securities and who represented that one issuer had a "bright future," but did not dislcose to that customer, a Virginia resident, "that Van-Pak stock was disqualified from sale in that state because of [the State of] Virginia's finding of insolvency" (Op. 15-16). In the face of these findings and others, it should be perfectly clear why the Commission imposed the sanctions it did. It should be equally clear why the Commission felt that the public interest demanded that no stay be granted pending appeal.

Is this Court prepared to trust Mr. Haight to supervise most of petitioners' activities pending appeal? 12/

To grant a stay to the petitioners in this case without a strong showing of a likelihood of success on the merits and without any semblance of a showing that the public interest would be adequately protected, would only encourage these petitioners, who have already perpetrated serious violations and believe they have little to lose, to take further advantage of the investing public. The course of conduct found by the Commission shows an outright contempt by petitioners for the responsibilities of a broker-dealer. A stay pending appeal simply invites further misconduct.

In view of petitioners' clear failure to meet two of the four essential conditions for the granting of a stay, which we enumerated on page 9, supra, i.e., showing a strong likelihood of their success on the merits or showing that there will be no harm to the public interest if a stay is granted, there is no need to burden this Court with additional discussion of whether a stay will cause harm to interested third parties or irreparable injury to petitioners.

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12/ Moreover, the other present managers of the corporate petitioner include, in addition to Mr. Haight, petitioners Carr, Adam and Harper (Motion p. 23), all of whom engaged in the "nefarious scheme" described by the Commission in its opinion. Further, Haight, Carr, Adam, Harper and Kitain each own 10% or more of the stock of the corporate petitioner (Op. 28).

## Conclusion

For the foregoing reasons, the petitioners' motion for a stay should be denied.

Respectfully submitted,

Walter P. North
Associate General Counsel

Theodore Sonde
Assistant General Counsel

Kathryn B. McGrath
Attorney

Dated: March 5, 1971

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the foregoing Memorandum of the Securities and Exchange Commission, Respondent, in Opposition to Petitioners' Motion for a Stay of the Effectiveness of an Order of the Commission Pending Review by this Court on petitioners, by having caused to be mailed two copies of said Motion, under frank, to counsel for petitioners at the following address:

Sidney Dickstein, Esq.
Dickstein, Shapiro & Galligan
1819 H Street, N. W.
Washington, D. C. 20006

KATHRYN B. McGRATH

Dated: March 5, 1971

ADMINISTRATIVE PROCEEDING
FILE NO. 3-533

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
February 24, 1971

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| In the Matters of<br><br>HAIGHT & CO., INC.<br>(formerly HODGDON & CO., INC.)<br>1101-17th Street, N. W.<br>Washington, D. C.<br><br>(8-8427)<br><br>JAMES F. HAIGHT<br>BURTON KITAIN<br>W. LYLES CARR, JR.<br>DAVID M. ADAM, JR.<br>JAMES W. HARPER III<br>HOMER E. DAVIS<br>ROBERT F. KIBLER<br><br>Securities Exchange Act of 1934 -<br>Sections 15(b), 15A and 19(a)(3) | ORDER<br>ON MOTION<br>FOR STAY |

In these proceedings pursuant to Sections 15(b), 15A and 19(a)(3) of the Securities Exchange Act of 1934 ("Act"), the above-captioned respondents, on February 22, 1971, filed a motion for a stay of the Commission's Order of February 19, 1971 (Securities Exchange Act Release No. 9082). That order revoked the broker-dealer registration of Haight & Co., Inc. ("registrant"), expelled it from membership on the Philadelphia-Baltimore-Washington Stock Exchange and in the National Association of Securities Dealers, Inc., and barred the individual movants from association with any broker or dealer. Movants requested that the Commission's Order be stayed until final disposition of their petition for review filed in the Court of Appeals for the District of Columbia Circuit, or, in the alternative, for a period of 10 days during which period they would apply for a further stay from that Court.

In support of the motion, movants asserted, among other things, that the Commission had not chosen to invoke its power "to summarily suspend registrant's broker-dealer registration"

pending final determination of the revocation issue, if it found that the public interest so required, that respondents were not alleged to have engaged in acts of misconduct subsequent to those found by the Commission, and that denial of a stay would effectively deprive them of their right to judicial review.

The Commission was of the opinion that a stay of its order pending appeal was not warranted. It noted that, under Section 15(b)(6) of the Act and its Rules of Practice, its power to suspend a broker-dealer's registration pending final determination was not "summary" but was exercisable only after an opportunity for hearing and post-hearing procedures including an initial decision by the hearing examiner, and that the determination not to seek registrant's suspension in no way implied that the public interest would not be adversely affected by registrant's remaining in business either until the final determination of the issues by the Commission or thereafter during appellate review. It also noted that the Act made no provision for suspending the securities activities of the individual respondents during the proceedings. The Commission further observed, as stated in its decision, that its staff was under no duty to adduce evidence as to movants' conduct subsequent to the alleged violations. It concluded that the serious fraud perpetrated by movants outweighed the considerations advanced by them, and required in the public interest that the termination of their privilege of engaging in the securities business not be deferred pending final disposition of their appeal. It determined, however, to grant a stay for a period of 10 days provided that, if the Court should act upon a request for a stay within such period, such stay shall terminate upon such action.

Accordingly, IT IS ORDERED that the request of movants for a stay of the Commission's Order of February 19, 1971 pending determination of their appeal from that Order be, and it hereby is, denied, but that such Order be, and it hereby is, stayed as to movants for a period of 10 days from the date hereof subject to the condition set forth above.

By the Commission.

Rosalie F. Schneider
Recording Secretary

ADMINISTRATIVE PROCEEDING
FILE NO. 3-533

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
March 4, 1971

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| In the Matters of<br><br>HAIGHT & CO., INC.<br>(formerly HODGDON & CO., INC.)<br>1101-17th Street, N. W.<br>Washington, D. C.<br><br>(8-8427)<br><br>JAMES F. HAIGHT<br>BURTON KITAIN<br>W. LYLES CARR, JR.<br>DAVID M. ADAM, JR.<br>JAMES W. HARPER III<br>HOMER E. DAVIS<br>ROBERT F. KIBLER<br><br>Securities Exchange Act of 1934 -<br>Sections 15(b), 15A and 19(a)(3) | ORDER<br>GRANTING<br>EXTENSION<br>OF STAY |

On February 24, 1971, the Commission granted a stay of its Order of February 19, 1971, which imposed remedial sanctions upon the above-captioned respondents (Securities Exchange Act Release No, 9082), for a period of 10 days during which period they proposed to apply to the Court of Appeals for the District of Columbia Circuit for a stay pending appeal.

On March 3, 1971, respondents filed a motion with the Commission for an order extending the 10-day stay pending disposition by the Court of Appeals of their application for a stay pending appeal, which was filed on the same day.

In support of their motion for an extension, respondents asserted, among other things, that the time required for the Commission to reply to the application filed in the Court of Appeals and for the Court to consider and act upon

-EXHIBIT "B"-

such application may exceed the 10-day stay, and that they will cooperate in all reasonable efforts to obtain a prompt resolution of the matter by the Court.

As noted above, respondents did not file their application to the Court for a stay until seven days after the Commission had granted the 10-day stay, and notwithstanding the implication in their initial motion to the Commission that a 10-day stay would provide adequate time to obtain a ruling from the Court. Nevertheless, under the circumstances, the Commission determined to grant a 5-day extension of the stay previously granted by it.

Accordingly, IT IS ORDERED that the Commission's 10-day stay of its Order of February 19, 1971, be, and it hereby is, extended for a period of five days to the close of business on March 11, 1971.

By the Commission.

Rosalie F. Schneider
Recording Secretary

## CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the foregoing Memorandum of the Securities and Exchange Commission, Respondent, in Opposition to Petitioners' Motion for a Stay of the Effectiveness of an Order of the Commission Pending Review by this Court on petitioners, by having caused to be mailed two copies of said Motion, under frank, to counsel for petitioners at the following address:

Sidney Dickstein, Esq.
Dickstein, Shapiro & Galligan
1819 H Street, N. W.
Washington, D. C. 20006

KATHRYN B. McGRATH

Dated: March 5, 1971