BEFORE THE SECURITIES COMMISSIONER

OF THE STATE OF DELAWARE

IN THE MATTER OF:	)	
	)	
W.N. WHELEN & CO., INC.,	)	PROCEEDING TO SUSPEND OR
	)	REVOKE BROKER-DEALER AND
WILLIAM N. WHELEN, JR., PRESIDENT,	)	AGENT REGISTRATIONS
	)	
	)	
Respondents.	)	

David G. Culley, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, attorney for the State of Delaware.

William H. Whelen, Jr., respondent, pro se.

OPINION AND ORDER

Date: April 5, 1989

Wilmington, Delaware

I. The Charges

On January 25, 1989, the Delaware Securities Division issued a Notice of Allegations and Order for Proceeding to Suspend or Revoke Broker-Dealer and Agent Registrations against the respondents, W.N. Whelen & Co., Inc., a registered broker-dealer, and William N. Whelen, Jr., owner and president as well as registered agent of the broker-dealer. The Notice of Allegations ("Notice"), drafted and signed by Deputy Attorney General David G. Culley, charged the respondents with violations of 6 Del. C. §7314(d) and §7316(a)(2) of the Delaware Securities Act (Title 6, Chapter 73). Section 7314(d) requires that every broker-dealer maintain a minimum net capital amount of $25,000 and an aggregate indebtedness of no more than 2000% of net capital. Section 7316(a)(2) authorizes the Securities Commissioner to take disciplinary action against any broker-dealer or agent who has willfully violated any provision of the Securities Act. The Notice alleged that Mr. Whelen had impermissibly used non-allowable assets in the calculation and reporting of the broker-dealer's net capital in 1987. The non-allowable assets were two certificates of deposit that were used as collateral on personal loans in the amount of $200,000 to Mr. Whelen and his wife.

As the Securities Commissioner, I issued an order which accompanied the Notice and required Mr. Whelen's presence at a hearing on the charges on February 15, 1989. Mr. Whelen appeared on that date with his accountant, Mr. Louis A. Perrotto, but without counsel. Mr. Whelen stated that he had

read the allegations and did not want an attorney. (Tape 1, side A).[1]

II. The Hearing

Four witnesses testified at the hearing. Ms. Ann Marie Janda, a compliance examiner with the National Association of Securities Dealers, Inc. ("NASD"), the self-regulatory organization of the "over the counter" market, appeared first on behalf of the State. Her testimony and the documents placed into evidence during her testimony comprised the bulk of the State's case as to the violations.

Ms. Janda testified that respondents submitted reports to the NASD during 1987 showing net capital amounts in excess of $25,000 for each month. (Tape 2, side A; St. Ex. 2-4). Included as allowable assets were certificates of deposit ("CDs") in the amount of $100,000 for January and February 1987, and in the amount of $200,000 for March through December 1987. (St. Ex. 3-4).

Despite the apparent compliance by respondents with regulatory net capital requirements, NASD staff learned in February 1988 that the CDs had been encumbered throughout 1987 as collateral for loans to Mr. Whelen. Although Mr. Whelen's accountant, Mr. Louis Perrotto, had telephoned the NASD on

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[1] The electronic recording of the hearing, on five cassette tapes, will not be transcribed if respondents fail to file an appeal in the Court of Chancery. Since there is no transcript at this time, my references to the proceeding will cite the relevant tape number and side of each tape. The State's exhibits will be referred to as "St. Ex." and Mr. Whelen's single exhibit will be referred to as "Wh. Ex. 1."

February 3, 1988 with this information, it appears that the event that triggered this disclosure was a letter dated January 27, 1988 from Sussex Trust Company ("Sussex Trust"), the bank that had provided the loans and sold the CDs, to the independent accounting firm (Ballard, Jefferson, Moffitt & Urian, P.A.) that had conducted the broker-dealer's annual audit. (St. Ex. 5).

Subsequent to receiving this information, Ms. Janda and another member of the NASD staff investigated the matter. The investigation revealed that on January 7, 1987, Mr. Whelen obtained a loan in the amount of $100,000 and also on that date purchased a CD ( ) in that amount, using the CD as collateral for the loan. (St. Ex. 6). The maturity dates of both the loan and the CD were July 8, 1987, at which time the loan/CD transaction was then "rolled over" (renewed for another six months). On March 5, 1987, Mr. Whelen conducted another such transaction, obtaining a loan in the amount of $100,000 and purchasing a CD ( ) in the same amount, pledging the CD to secure the loan. The maturity dates of both the loan and the CD were March 5, 1988. (St. Ex. 9-10). In January the loan was to Mr. Whelen personally, and in March it was to Mr. Whelen and his wife personally, but the CD was in both instances put in the name of the broker-dealer. In both transactions the interest rate on the loan was 1% per annum higher than the rate on the CD.

After confirming that the two CDs had been encumbered, Ms. Janda adjusted the broker-dealer's net capital figures by

subtracting $100,000 from the firm's January and February 1987 figures and subtracting $200,000 from the firm's figures for March through December 1987. The result was that the firm was deficient for every month in 1987, and in fact it had a negative net capital amount for every month in that year. (St. Ex. 22). Ms. Janda testified that the firm's negative net capital would necessarily mean that its aggregate indebtedness was greater than 2000% of its net capital. (Tape 2, side B).

There was also testimony by Ms. Janda as to a third loan/CD transaction in June 1987. The amount was again $100,000, and the value of the CD was added by the broker-dealer to its Special Reserve Account, which was to be maintained for the exclusive benefit of customers. There was conflicting evidence as to whether this CD had been effectively secured as collateral by Sussex Trust. The NASD gave respondents the benefit of the doubt on this issue by treating the CD as an allowable asset, and therefore the June 1987 loan/CD transaction did not affect the net capital adjustments discussed above.

Ms. Denise Salvatore, an investigator employed by the Securities Division, provided testimony and documents as to prior violations by the respondents. With the exception of prior net capital violations, the evidence as to prior violations and sanctions was admitted for the limited purpose of determining the appropriate penalty in the event that a violation were to be found.

As part of her investigation of the broker-dealer, Ms. Salvatore obtained copies of various regulatory orders against respondents. These orders, which were final, included the following:

(1) an NASD "Letter of Admission, Waiver and Consent" dated May 3, 1982, in which respondents admitted that the broker-dealer had a net capital deficiency in the amount of $17,757 in 1981 and that its books and records and its financial report to the NASD failed to disclose an unsecured loan by the firm in the amount of $18,435, in addition to the inclusion of $1,030 in non-allowable assets and other violations, resulting in a censure of the broker-dealer and Mr. Whelen individually, plus a fine of $1000 (St. Ex. 28);

(2) an NASD decision dated September 20, 1983, which followed a hearing on May 23, 1983, finding four violations by respondents of the NASD's Rules of Fair Practice, to-wit: a) inaccurate reporting of net capital and understatement of non-allowable assets, b) improper use of customer funds contained in a Special Reserve Account for the exclusive benefit of customers, by using customer funds to pay for securities purchased by the broker-dealer for its own account, c) failure to disclose to its customers the amount of its mark-up or mark-down for certain transactions, and d) failure to cancel purchases not paid for within seven business days of trade date, in violation of Regulation T, the four violations resulting in a censure of respondents and fine in the amount of $1500, plus $695 in costs (St. Ex. 29);

(3) an NASD "Letter of Admission, Waiver and Consent" dated September 27, 1983, in which respondents admitted that the broker-dealer had charged to customers both a commission and an undisclosed mark-up or mark-down in price in violation of the Rules of Fair Practice, resulting in a censure of respondents and a fine of $500 (St. Ex. 30); and

(4) a consent order issued against respondents by the Delaware Securities Commissioner on January 6, 1984, resulting in a suspension of Mr. Whelen's agent license during the seven-day period of February 6 through February 12, 1984. (St. Ex. 31). Respondents had been charged by the Securities Division with a misleading filing in the form of a letter dated May 11, 1983, from Mr. Whelen to the Commissioner, representing that a stock named "GeoSurveys, Inc." had been purchased in the amount of $25,000 when in fact no such purchase had been made. The consent order stated that respondents denied the charges. I admitted this order into the record for the purpose of showing that a suspension of Mr. Whelen's license had occurred.

Respondents were also the subject of an NASD complaint filed May 31, 1985, which resulted in a letter of caution dated February 12, 1986, urging that respondents be more diligent in complying with the rules. (St. Ex. 32).

Mr. Whelen and Mr. Perrotto testified on behalf of the respondents. Mr. Whelen did not dispute with any vigor the issue of the net capital and aggregate indebtedness violations. He did not disagree with Ms. Janda's calculations as to the firm's net capital deficiency. (Tape 4, side A). He argued,

however, that the violation was technical in nature and not willful.

Mr. Perrotto was permitted wide latitude in his role at the hearing as he at times questioned the State's witnesses in the manner of an attorney. This was allowed only to the extent that it was thought necessary to assist Mr. Whelen in his defense. According to his testimony, Mr. Perrotto had had most of the responsibility for the firm's financial statements and net capital calculations. (Tape 4, side B). He testified that he had been employed by the SEC for three years as a compliance examiner. Mr. Perrotto said that he had performed the net capital calculations without knowledge of the fact that the CDs were encumbered, and Mr. Whelen said that he knew that the CDs were encumbered but did not understand that they were non-allowable assets. Both Mr. Whelen and Mr. Perrotto stated or implied that the respondents were victims of NASD examiners who lack experience and have exaggerated the magnitude of respondents' regulatory compliance problems.

Mr. Whelen and Mr. Perrotto testified that the January 1987 loan/CD transaction was a "roll over" or continuation of prior transactions in the amount of $100,000 that had occurred every six months, going back at least to 1983. An exhibit was admitted showing the existence of a loan note dated January 10, 1983, from Sussex Trust in the amount of $100,000 and secured by a certificate of deposit ( ). (Wh. Ex.1). Mr. Perrotto testified that the broker-dealer's books showed that when Mr. Whelen started the firm in 1977 he financed it by

borrowing $100,000 and using the loan proceeds to purchase the firm's common stock. Subsequent NASD audits did not detect these encumbrances or impose sanctions as a result of them. (Perrotto direct, tape 4, side B).

III. The Law

The net capital requirements for a Delaware broker-dealer are stated in §7314(d) of the Delaware Securities Act:

> (d) Any broker-dealer registered in this State shall have and maintain a net capital of not less than $25,000, and no such broker-dealer (other than one who deals exclusively in securities exempt under §7309(a)(1) or §7309(a)(2) of this title) shall permit his aggregate indebtedness to all persons to exceed two thousand percentum of his net capital. The terms "aggregate indebtedness" and "net capital" shall be defined by rule of the Commissioner.

6 Del. C. §7314(d). Rule 14(d) of the Rules Pursuant To Delaware Securities Act contains the administrative definitions of the terms "net capital" and "aggregate indebtedness." Rule 14(d) references and is dependent on Rule X-15C3-1 of the United States Securities and Exchange Commission ("SEC"):

RULE 14(d)

Net Capital and Aggregate Indebtedness

> 1. For the purposes of Section 7314(d) of the Delaware Securities Act, the terms "net capital" and "aggregate indebtedness" shall have the following meanings:
>
> A. With respect to broker-dealers who are registered with the Securities and Exchange Commission and subject to Rule X-15C3-1 of the Securities and Exchange Commission, the terms "net capital" and "aggregate indebtedness" shall have the meanings set forth in Rule X-15C3-1.

Rule X-15C3-1, more commonly referred to as "Rule 15c3-1," is presently codified in the Code of Federal Regulations at 17 C.F.R. §240.15c3-1 (1988).

Delaware's Rule 14(d) sets forth three alternative definitions of "net capital" and "aggregate indebtedness." The first alternative applies to broker-dealers who are registered with the SEC. This alternative is found in subsection 14(d) 1.A., the language quoted above, and it is dependent on the SEC's definitions. The second alternative is found in subsection 14(d) 1.B., which references and corresponds to the former exception carved out in SEC Rule 15C3-1 for members of a national exchange--requiring reference to the rules of the particular exchange. The third alternative, found in subsection 14(d) 1.C., applies to "all other broker-dealers."

The third alternative is not our concern here because the respondent broker-dealer, being a member of the NASD, is necessarily registered with the SEC. See NASD MANUAL par. 1101(n), par. 1121 (CCH). Also, the second alternative is irrelevant because Rule 15c3-1 no longer contains an exemption for members of national securities exchanges. We are left with subsection 14(d) 1.A. as the pertinent provision, which incorporates the definitions of "net capital" and "aggregate indebtedness" contained in SEC Rule 15c3-1.

The definition of "aggregate indebtedness" is found in subsection 15c3-1 (c)(1), and the definition of "net capital" is found in subsection 15c3-1 (c)(2). The definitions are indeed complicated, but it is unnecessary to go through them step-by-step to determine whether respondents violated the net

capital and aggregate indebtedness rules.[2] Ms. Janda, the NASD's compliance examiner, testified that she had performed the calculations, and during her testimony she summarized the results of those calculations. Mr. Whelen explicitly stated that he did not contest her calculations or conclusions. (Tape 4, side A). Mr. Perrotto, the accountant for the respondents, also did not challenge Ms. Janda's findings. Therefore, I find it unnecessary to delve into the mechanics of Rule 15c3-1 and its application to the immediate case to find a violation of Rule 14(d), and thereby a violation of 6 Del. C. §7314(d).

I will pause to note, however, that although the rules and the calculations may be complicated, the way in which respondents violated SEC Rule 15c3-1 (c)(2), and thereby Rule 14(d) and 6 Del. C. §7314(d), was very simple. Rule 15c3-1 (c)(2) states that:

> The term "net capital" shall be deemed to mean the net worth of a broker or dealer, adjusted by:
>
> * * *
>
> (iv) Deducting fixed assets and assets which cannot be readily converted into cash....

It is obvious to me, and I think it must have been obvious to Mr. Whelen, that a pledged certificate of deposit is not

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[2]The complications in the calculation of net capital arise in the context of how to treat specific types of assets and liabilities. The general formula is simple. Total liabilities are subtracted from total assets to arrive at the firm's net worth. Non-allowable (i.e., non-liquid) assets are then subtracted from net worth. Certain other deductions are then subtracted from net worth, primarily to take into account the market value of securities in inventory. (Janda direct, tape 2, side A).

readily convertible into cash when none of the loan principal has been repaid. Thus, despite the circuitous manner in which the meaning of 6 Del. C. §7314(d) must be found, and despite the complexity of SEC Rule 15c3-1, the nature of the violation here is easily understood--both analytically and intuitively.

IV. Findings of Fact and Conclusions of Law

In view of respondents' failure to contest the State's evidence, I find that respondent W. N. Whelen & Co., Inc. and William N. Whelen, Jr., by his individual actions, violated 6 Del. C. §7314(d) and Rule 14(d) by maintaining net capital of less than $25,000 throughout each month of 1987. I further find that the net capital of the broker-dealer was -$26,945 in January 1987; -$1,472 in February 1987; -$67,473 in March 1987; -$141,227 in April 1987; -$100,347 in May 1987; -$57,559 in August 1987; -$76,153 in September 1987; -$101,574 in October 1987; -$72,877 in November 1987; and -$34,674 in December 1987. (St. Ex. 22). Thus, not only was the broker-dealer in violation of 6 Del. C. 7314(d) throughout the entire year, the degree of non-compliance was indeed substantial as it never even rose to zero at any point during the year.

Additionally, I find that for each month in 1987 respondents further violated 6 Del. C. §7314(d) and Rule 14(d) by maintaining an aggregate indebtedness in excess of 2000% of the firm's net capital. This conclusion follows from the negative net capital figures for each of those months. (St. Ex. 22). Ms. Janda testified that the negative net capital amounts implied an aggregate indebtedness greater than 2000% of

net capital, and respondents did not dispute that fact. (Tape 2, side B). I note that since the aggregate indebtedness to net capital ratio may be expressed as a fraction (AI/NC), and since a positive number divided by zero yields an infinite amount, Ms. Janda's statement is mathematically obvious.

The next question is really the gist of the dispute: whether the violation was inadvertent or willful. If it was inadvertent, there was no violation of §7316(a)(2)--which in this case is the statutory predicate for disciplinary sanctions. The statute reads as follows:

> §7316. Denial, Revocation, Suspension, Cancellation and Withdrawal of Registration of Broker-Dealers, Investment Advisers and Agents
>
> (a) The Commissioner may by order deny, suspend, or revoke any registration if he finds that the order is in the public interest and that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, director, or any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser:
>
> (1) * * *
>
> (2) has wilfully violated or wilfully failed to comply with any provision of this chapter....

6 Del. C. §7316(a)(2).

My first task is to determine the meaning of "wilfully" as the term is used in 6 Del. C. §7316(a)(2). This section of the Delaware Securities Act was derived from section 204(a)(2)(B) of the Uniform Securities Act, which contains very similar language. I note that the Official Code Comment on this clause is the following:

> Clause (B): As the federal courts and the SEC have construed the term "willfully" in §15(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(b): all that is required is proof that the person acted intentionally in the sense that he was aware of what he was doing. Proof of evil motive or intent to violate the law, or knowledge that the law was being violated, is not required. The principal function of the word "willfully" is thus to serve as a legislative hint of self-restraint to the Administrator.

1 BLUE SKY LAW REPORTER par. 5524 (CCH).

It is not difficult to see the rationale behind this interpretation: a license suspension may be appropriate in the case of incompetence as well as in the case of bad motive. Where there is a net capital violation, for example, the broker-dealer puts the public equally at risk by its proximity to insolvency whether or not the principals are ignorant of the law and the rules for net capital calculations. Those who act willfully but without bad motive are protected from the criminal penalties of the Securities Act by §7322, which allows the defense of ignorance of the rule or order that was violated.

Moreover, as the official comments to the Uniform Act observe, the term "willfully" in §15(b) of the Securities Exchange Act of 1934, codified at 15 U.S.C. §78o, which is similar to the applicable provision here, has been interpreted by the federal courts to require only an intentional commission of the act constituting the offense. It does not require an intent to violate the law. Hinkle Northwest, Inc. v. SEC, 641 F.2d 1304, 1307 (9th Cir. 1981); Decker v. SEC, 631 F.2d 1380, 1386 (10th Cir. 1980); Nees v. SEC, 414 F.2d 211,221 (9th Cir. 1969); Capital Funds, Inc. v. SEC, 348 F.2d 582,588 (8th Cir.

1965); Tager v. SEC, 344 F.2d 5 (2d Cir. 1965); Gearhart & Otis, Inc. v. SEC, 348 F.2d 798, 802 (D.C. Cir. 1965); Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949).

For the above-stated reasons, my opinion is that "wilfully" in 6 Del. C. §7316(a)(2) refers to an awareness that one is committing the act, not that one is violating the law. When that standard is applied to the facts of this case, there can be no doubt that respondents willfully violated section 7314(d) of the Delaware Securities Act.

Whether Mr. Whelen was aware that he was violating the law is a relevant consideration, however, in the context of the issue of what constitutes an appropriate penalty. Therefore, I will add that in my opinion Mr. Whelen knew that he was violating the regulatory net capital requirements when he pledged the certificates of deposit. His loan/CD transactions in January 1987 and March 1987 appear to have been a sham for the purpose of inflating his firm's net capital. The transactions netted each other out but for relatively small interest payments made by Mr. Whelen to Sussex Trust.

It is, I suppose, conceivable that Mr. Whelen thought that even though the CDs were pledged to the bank that this sort of transaction was sufficient for net capital purposes. Though conceivable, it is highly unlikely. Mr. Whelen has taken and passed NASD examinations to be an agent and a general principal, and he passed an examination in the area of financial operations. These examinations covered the subject of net capital requirements--a fact which he admitted at the hearing.

(Tape 4, side B). Also noteworthy is the fact that Mr. Whelen had a meeting with NASD staff members in February 1987, at which time the firm's net capital problems and suggested solutions to those problems were discussed at length. (Janda direct, tape 2, side B; St. Ex. 13). Mr. Perrotto, who is well versed in the net capital rules, accompanied Mr. Whelen to that meeting at the NASD's district office in Philadelphia. (Tape 5, side A; Ex. 13). At that meeting the use of a "subordinated loan" was discussed. (Perrotto cross, tape 5, side A; Ex. 13). The whole point of a subordination agreement is to free the loan proceeds of what may otherwise be the senior claim of the lender. See 17 C.F.R. §240.15c3-1d (b)(3)(1988). Therefore, even though he might have engaged in these transactions in the past, I find it difficult to believe that Mr. Whelen's mistake was innocent in nature.

Even if it is true that Mr. Whelen's talents lie in the area of sales rather than in "back office" work, as was stated at the hearing, the transactions at issue here are not complicated. Mr. Whelen admitted on cross examination that the relevant computations in this case are "really rather simple." (Tape 4, side A). Mr. Perrotto, whose enthusiasm for Mr. Whelen's defense was evident during the hearing, admitted that the rule which provides that encumbered assets are non-allowable for net capital purposes is "basic." (Tape 4, side B). Mr. Perrotto testified that he performed the net capital calculations and that there was no discussion between Whelen and him concerning the fact that the CDs were

encumbered. (Tape 5, side A). Even if Mr. Perrotto's testimony is believed, the credibility of Mr. Whelen's defense is not enhanced. Although Mr. Perrotto asserted or implied that Mr. Whelen did not understand the significance of his transactions, Mr. Perrotto did not have personal knowledge of what Mr. Whelen knew or did not know.

Mr. Whelen relayed to the NASD a letter from Sussex Trust confirming the existence of the CDs without disclosing the existence of the encumbrances. (St. Ex. 19). Moreover, the loan officer at the bank recorded on bank records the purpose of the loans as being merely to enable book entries on a financial statement, stating that there was no real purpose. (St. Ex. 8, 14). Although the loan officer incorrectly used the term "income statement" rather than "balance sheet," I find that the error does not change the impact of this evidence. My inference is that Mr. Whelen told the loan officer that there was no purpose to the loan/CD transactions other than that of enabling certain book entries.

I conclude that respondents willfully violated 6 Del. C. §7316(a)(2) throughout calendar year 1987 by knowingly maintaining the company's net capital well below the statutory requirement of $25,000 and by knowingly maintaining an aggregate indebtedness far in excess of 2000% of net capital.

V. The Penalty

The final issue is that of the appropriate penalty for the violation. Section 7316(a) of Title 6, Del. C., creates a standard whereby the Commissioner must determine that any

suspension or revocation is in the "public interest." The penalty should be prophylactic in nature. That is, it should be forward-looking to protect investors and the public. Blinder, Robinson & Co., Inc. v. Bruton, Del. Ch., C.A. No. 9096, Allen, C. (March 31, 1988) at 8, aff'd in part and rev'd in part, Del. Supr., No. 162, 1988, Walsh, J. (January 9, 1989). At the same time, however, the penalty should not be extremely disproportionate to the offense. Id., Del. Supr., at 20. Thirdly, suspension or revocation should not be imposed for a mere technicality. Mayflower Sec. Co. v. Bureau of Securities, N.J. Supr., 312 A.2d 497, 500 (1973).

During the hearing, Mr. Whelen asserted that he had received virtually no customer complaints since he established his firm in 1977. The State did not rebut that testimony. Although I believe Mr. Whelen's assertion to be colored by self-interest, the record does not reflect any documented customer complaints against respondents in the past.[3] Some of respondents' past problems with the NASD appear to be more the result of a lack of technical expertise than of a knowing intent to deceive. Given that Mr. Whelen has been in business for more than a decade in a relatively small rural community, I am inclined to the conclusion that respondents do not pose a threat of intentional financial fraud upon the public. For that reason, despite respondents' history of disciplinary

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[3]The matter is unclear, however. Some of the NASD's findings indicate that certain actions by respondents took unfair advantage of customers. See State's Exhibits 29 and 30.

problems, I will not revoke the registration of W. N. Whelen & Co., Inc., or that of Mr. Whelen.

Mr. Culley requested that a "lengthy suspension" be imposed as an alternative to revocation. (Tape 5, side A). If by that term Mr. Culley meant one or two years, I cannot agree to that sanction either. Despite the fact that his firm is incorporated, Mr. Whelen's operation is essentially that of a sole proprietorship. His customers are primarily, if not exclusively, Delaware residents. I am not sure that his company has the financial wherewithal to survive a lengthy suspension, and I would not want to do inadvertently that which I would not do intentionally.

Therefore, I focus on a suspension of six months duration or less. So far on the public interest issue I have enumerated the considerations in respondents' favor. I will now discuss those which are adverse.

Although a net capital violation may not be the most serious type of securities violation, it is both serious and important. The theory of the net capital "cushion" is to protect the firm from insolvency, a necessary precaution when one considers that a brokerage firm's inventory is subject to market fluctuation of greater variability than that of most industries. By protecting the financial viability of the firm, one in turn protects the investors. A brokerage firm's customers are creditors who are often at greater financial risk than the owner(s) if the firm becomes insolvent or files for bankruptcy.

This is not the first time respondents have had net capital and other disciplinary problems. Mr. Whelen has been censured and fined on three occasions by the NASD and has had his license previously suspended by the Delaware Securities Division. Although I did not consider these prior violations on the issue of liability for the immediately charged violation, they do carry some weight when one considers what penalty is appropriate.

Mr. Whelen and his company are walking a fine line between legitimacy and impropriety or worse. Mr. Whelen has had years of experience in Georgetown without major disciplinary action, but that does not mean his casual attitude towards honesty and risk does not threaten his customers. Those broker-dealers and agents who go astray generally do not do so their first day, or their first year, in the industry. They begin to go astray by taking increasingly higher risks and cultivating an extravagant lifestyle. I note that although Mr. Whelen did not have the money to maintain his firm's net capital in compliance with the Delaware Securities Act for even a brief moment during 1987, he had the money to maintain a private airplane that year. (St. Ex. 1).

The Delaware Securities Division is perhaps somewhat dissimilar to the NASD in its regulatory approach. Mr. Perrotto complained during the hearing that after Mr. Whelen had admitted the first violation to the NASD his firm was put on a special surveillance list, causing intensive and unremitting scrutiny that led inevitably to further regulatory

actions. Assuming (without deciding) that Mr. Perrotto's assertion has some truth, I note that the Delaware Securities Division does not have such a surveillance list. It is understaffed and does not have the resources to indulge in mechanical enforcement responses to technical violations. Neither, however, does it have the resources to take each broker-dealer by the hand and embark on a joint venture to discover the rules and how they may be implemented at each firm. Respondents are expected to know the rules and to follow them without routine feedback from the Securities Division. They depart from those rules at their own risk.

The next time Mr. Whelen or his firm is found to have willfully violated the Delaware Securities Act in a significant manner, revocation of the violator's license is a likely result.

Respondents, both broker-dealer and individual, shall have their registrations suspended for three months. Under the authority of 6 Del C. §7316(g), I fine respondents jointly and severally in the amount of $1000. These sanctions are in the public interest and I so find.

Respondents have 60 days in which to appeal this decision to the Delaware Court of Chancery in and for New Castle County. 6 Del. C. §7324. In the absence of an appeal, the suspension period shall begin on June 6, 1989 and continue to September 5,

1989, the last day of suspension.

SO ORDERED.

Richard W. Hubbard

RICHARD W. HUBBARD
Securities Commissioner

Date: April 5, 1989

AFFIDAVIT OF MAILING

STATE OF DELAWARE)
) SS:
NEW CASTLE COUNTY)

Cynthia K. Evans, being first duly sworn, deposes and says that:

1. She is a secretary with the Department of Justice.

2. That on April 5, 1989 she caused to be hand delivered or placed in the U.S. Mail, State Office Building, Wilmington, Delaware, true and correct copies of the within document:

William N. Whelen, Jr., President
W.N. Whelen & Co., Inc.
9 The Circle
Georgetown, DE 19947

David G. Culley, Esq.
Deputy Attorney General
Department of Justice
State Office Building
820 N. French Street, 8th Floor
Wilmington, DE 19801

Cynthia K. Evans
Cynthia K. Evans

SWORN TO AND SUBSCRIBED before me on this 5th day of April, 1989.

Richard W. Hubbard
Richard W. Hubbard
Securities Commissioner

Pursuant to 29 Del.C. sec. 2508