ADMINISTRATIVE PROCEEDING
FILE NO. 3-6351

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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| In the Matter of | : |
| OWEN V. KANE | : |
| (A.G. BECKER, INCORPORATED n/k/a A.G. BECKER PARIBAS INCORPORATED) | : |
| | : |

# INITIAL DECISION

Washington, D.C.
March 22, 1985

Warren E. Blair
Chief Administrative Law Judge

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APPEARANCES: Neil S. Lang and John Courtade, for the Division of Enforcement.

W. Michael Drake, Judith A. Rogosheske, and James M. Odland, of Drake & Rogosheske, for Owen V. Kane.

BEFORE: Warren E. Blair, Chief Administrative Law Judge.

These public proceedings were instituted by an order of the Commission dated April 17, 1984 ("Order") issued pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 to determine whether A.G. Becker, Incorporated, now known as A.G. Becker Paribas Incorporated ("Becker") and Owen V. Kane ("Kane") had engaged in the misconduct alleged by the Division of Enforcement ("Division"), and what, if any, remedial action would be appropriate in the public interest.

In substance, the Division alleged that respondents wilfully violated Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act") by using the mails and means and instruments of transportation and communication in interstate commerce to offer and sell within the United States unregistered common stock of Grandma Lee's, Inc.("Grandma Lee's"), a Canadian corporation. The Division further alleged that the respondents acquired and distributed the Grandma Lee's stock in question during a period from about December, 1981 through January, 1982.

At the September, 1984 hearing respondents appeared and participated through counsel, with each being represented by the same law firm. 1/ In December, 1984 counsel representing

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1/ After the close of the hearing, Becker made an offer of settlement which, upon acceptance by the Commission and the issuance of the Commission's Findings and Order dated February 19, 1985, terminated these proceedings as to that respondent. Securities Exchange Act Release NO. 21774 (February 19, 1985). Hereinafter, the term "respondent" is not a reference to Becker.

Kane at the hearing withdrew their appearances for him and on January 8, 1985 Kane's present counsel filed their appearances in these proceedings.

As part of the post-hearing procedures, successive filings of proposed findings, conclusions, and supporting briefs were specified. Timely filings were made by Kane and the Division.

The findings and conclusions herein are based on the preponderance of the evidence as determined from the record and upon observation of the witnesses.

RESPONDENT

From July, 1978 to August, 1984, Kane was employed as a vice-president and a registered representative in the Becker office located in Minneapolis. With his time at Becker and other securities firms, including current employment, he has eighteen years experience in the securities business.

GRANDMA LEE'S

Grandma Lee's, a Canadian corporation with executive offices in Ontario, Canada, operates and franchises combination bakeries and fast-food restaurants, primarily in Canada. As of December, 1981, Grandma Lee's had 5,558,000 shares of common stock issued and outstanding, none of which had been registered under the Securities Act. Trading in Grandma Lee's

common stock has taken place on Canadian stock exchanges since 1979 and over-the-counter in the United States since June, 1981. Becker was a market-maker in Grandma Lee's stock at all times relevant to these proceedings.

VIOLATIONS OF SECTION 5 OF THE SECURITIES ACT

Kane's attention was attracted to Grandma Lee's in June, 1980 when a customer asked him to purchase one or two thousand shares of that company's stock. Following the purchase for the customer, Kane telephoned Grandma Lee's to get published information about it and was referred to Gordon Hanson who, Kane learned, was the company's vice-president and assistant secretary. Between July, 1980 and December, 1980 Kane received various interim reports and news releases issued by Grandma Lee's, had about 15 conversations with Hanson regarding the company, and was placed upon Grandma Lee's mailing list to receive current information.

Kane's continuing interest in Grandma Lee's led him to seek and receive from Hanson in January, 1981 copies of the company's annual report dated June 30, 1980, quarterly report as of September 30, 1980, and several other reports and documents for use by Becker's research and corporate finance departments. Kane immediately forwarded some of the material to Donald Trott, then responsible for Becker's research efforts.

The enthusiasm for Grandma Lee's that Kane exhibited in his correspondence and conversations with Trott resulted in two meetings between representatives of Grandma Lee's and Becker, the first taking place in Becker's New York headquarters and the second at Grandma Lee's in Mississauga, Ontario. The first meeting, which Trott characterized as a "ritualistic kind of corporate finance introduction meeting," [2/] provided Becker with general information concerning Grandma Lee's current status and plans with a view toward the possibility of an investment banking relationship. Being impressed with what was happening at Grandma Lee's and with the fact that the company intended to seek a NASDAQ listing in the United States over-the-counter market, Trott had the second meeting with Hanson in Mississauga around the end of November, 1981, at which time Trott met briefly with other of Grandma Lee's officers and personnel. Near the conclusion of the meeting, Trott mentioned that there was a fairly good chance that Becker would recommend the purchase of Grandma Lee's stock. He also told Hanson that because previous Becker recommendations had resulted in an influx of "buy" orders, Becker would be interested in knowing of any large quantities of Grandma Lee's stock in the 100,000 to 200,000-share range that might be available to provide liquidity in the market.

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2/ Tr. 54.

In a telephone conversation several days later, Hanson informed Trott that he had put together a block of 150,000 shares of Grandma Lee's stock which was available for sale, and was told by Trott to give that information to James Volk, the head of Becker's over-the-counter trading department.

Shortly after he had spoken to Volk, Hanson talked by telephone with Kane. Kane said that he had been in touch with Volk and that he, Kane, would be handling the transaction for Becker. A discussion then took place about the use of an account at the Toronto-Dominion Bank of Canada to transmit the Grandma Lee's shares to Becker, and about the identity of the actual sellers of that stock. Conflicting testimony exists regarding what Hanson said in the latter regard. In his testimony taken by deposition in Canada, Hanson stated that he disclosed that he was one of the sellers. Kane denied this, testifying on his own behalf that when he asked Hanson who the sellers were, and if any of the stock was being sold by any of the corporate officers, directors, or control persons, Hanson replied "no that the sellers of the stock were friends of the corporation." 3/ Because of Hanson's disinterest as a witness and the actions taken by Kane in falsifying the form relating to the opening of a Becker account in the name of the Toronto-Dominion Bank, Hanson's testimony that

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3/ Tr. 532.

he identified himself as one of the sellers of Grandma Lee's is credited. 4/

On December 11, 1981 Kane entered three "sell" orders in the customer account for the Toronto-Dominion Bank, each for 25,000 shares of Grandma Lee's stock, and followed those 75,000 shares with "sell" orders on December 17 and 18 for 25,000 and 50,000 shares respectively. The 150,000 shares received in that account were sold by Becker to its customers and other broker-dealers in the United States. The source of the 150,000 shares coming through the Toronto-Dominion account for which Becker paid $1,821,250 were:

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| By Canal S.A. | 55,260 |
| Gordon T. Hanson | 21,052 |
| T.C. Gilks | 21,052 |
| William W. Hood | 21,052 |
| Hood Holdings | 21,052 |
| David Csumrik and Associates, Inc. | 10,532 |

Hanson was a vice-president and assistant secretary of Grandma Lee's at the time of these transactions, Hood was the company's president, and Hood Holdings was a company wholly owned by Hood. Gilks acquired his shares from a relative who was a secretary to Grandma Lee's chairman and an assistant secretary of some of Grandma Lee's subsidiaries. Csumrik was a former general manager of Grandma Lee's who acquired his shares from Grandma Lee's chairman immediately prior to the sale to Becker.

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4/ When Kane opened the Becker account in the name of the Toronto-Dominion Bank, he made false entries on the form and thereby concealed the fact that Hanson was the person with whom he was dealing.

There is no evidence of a relationship between Grandma Lee's and By Canal, S.A., a Bermuda corporation managed by an investment counsel in Montreal, Canada.

The record convincingly establishes that during the period alleged by the Division Kane was instrumental in and responsible for offering and selling unregistered stock of Grandma Lee's in the United States through use of the mails and of the means and instruments of transportation and comunication in interstate commerce. Since it further appears that no exemption from the registration provisions of the Securities Act was available and that Kane knew or should have known at the time the stock was being offered and sold that no registration statement under the Securities Act was on file or in effect as to Grandma Lee's securities, it is concluded that Kane wilfully violated Sections 5(a) and 5(c) of the Securities Act.

Kane's defense that he is not liable as a participant in the offer and sale of Grandma Lee's stock is without merit. It is true, as he argues, that he did not personally offer or sell the Grandma Lee's stock that Becker purchased, but it is also true that he directly and indirectly participated in the offer and sale of that stock and that his participation was a substantial factor in the activities that culminated in the Section 5 violations. Evidence of the extent and significance of Kane's participation is found not only in his

initial efforts to persuade Becker to take a trading position in Grandma Lee's, but in the fact that he was the contact for Becker's trading department regarding details of the amounts of that stock to become available and the price requirements imposed by Hanson. Further, it was Kane's responsibility, as he admitted in his testimony, [5/] to assure that Hanson would deliver unrestricted Grandma Lee's stock to Becker. Most telling regarding the importance of Kane's role is Becker's payment to Kane of $7,000 to $8,000 in commissions [6/] in connection with the transactions in question. It cannot be assumed that a mere order-taker, the role that Kane attempts to portray for himself in this matter, would be compensated to any such extent.

Kane therefore cannot avoid responsibility for his activities in generating Becker's interest in Grandma Lee's and materially contributing to the Section 5 violations that resulted. His culpability is firmly established by his role as a necessary participant, one which was a substantial factor in the carrying out of Becker's decision to make a "buy" recommendation on Grandma Lee's stock and to purchase Grandma

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5/ Tr. 528, 535-39.

6/ Kane's characterization of the payment he received from Becker. Tr. 524-25. Whether Becker acted as both principal and agent in connection with the Hanson transactions, as argued by the Division, or only as principal, as contended by Kane, is immaterial.

Lee's stock from Hanson for resale to its customers and other broker-dealers. 7/ The character and scope of Kane's participation and those transactions belie Kane's claim that his participation was no more than incidental.

Kane's attempt to find comfort in the testimony that experts gave regarding the soundness of Becker's compliance procedures and Kane's liability is of no avail. Whatever the weaknesses in Becker's internal procedures, Kane cannot shield himself with Becker's shortcomings. He knew independently of anything set forth in Becker's compliance manual that he had the duty to make adequate inquiry into whether Hanson would be delivering unregistered control stock to Becker.

That Kane was well aware of his obligation to make inquiry is evidenced not only by his own acknowledgment of that duty in the course of his testimony, but also by his further testimony about the inquiry that he did make of Hanson regarding the identity of the sellers of the 150,000 shares of Grandma Lee's stock. The key failure was not that Becker's compliance manual may have been flawed, but that Kane's inquiry fell short of what was required under the law and under the circumstances. Whether Hanson did or did not identify himself as one of the sellers during his telephone conversations with Kane is not

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7/ Cf. S.E.C. v. Murphy, 626 F.2d 633 (9th Cir. 1980); Wasson v. S.E.C., 558 F.2d 879, 885-87 (8th Cir. 1977).

determinative of Kane's culpability. For if Kane's version were to be accepted, his inquiry would not have been adequate. He would not be entitled to rest his inquiry into the source of the sizeable 150,000 share block of Grandma Lee's stock with a self-serving dissembling answer by Hanson, known to Kane to be an officer of Grandma Lee's. Nor would Kane's asserted confidence in Hanson justify accepting at face-value an oral representation by Hanson that the sellers of the 150,000 shares were not officers, directors, insiders, or control persons. As the Commission made clear on the subject:

> A dealer who offers to sell, or is asked to sell a substantial amount of securities must take whatever steps are necessary to be sure that this is a transaction not involving an issuer, person in a control relationship with an issuer or an underwriter. For this purpose, it is not sufficient for him merely to accept "self-serving statements of his sellers and their counsel without reasonably exploring the possibility of contrary facts."
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> . . .
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> The problem becomes particularly acute where substantial amounts of a previously little known security appear in the trading markets within a fairly short period of time and without the benefit of registration under the Securities Act of 1933. In such situations, it must be assumed that these securities emanate from the issuer or from persons controlling the issuer, unless some other source is known and the fact that the certificates may be registered in the names of various individuals could merely indicate that those responsible for the distribution are attempting to cover their tracks. 8/

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8/ Securities Act of 1933 Release No. 4445 (February 2, 1962), at 2.

Kane's further contention that the testimony of the two securities industry experts exonerates him cannot be accepted. The testimony of the Division's expert which referred to certain deficiencies in Becker's compliance procedures would have a mitigating effect were Kane a trainee having only that manual for guidance. But Kane, who had twelve years experience as a registered representative prior to joining Becker and who acknowledged that he was fairly sophisticated in securities matters, cannot credibly complain that deficiencies in Becker's manual led him into his plight. Quite to the contrary, for it appears in the record that he recognized his responsibilities to make inquiry of Hanson and to assure that Becker received good delivery of 150,000 shares of Grandma Lee's stock.

The testimony of the defense expert was contradictory to that of the Division's expert with respect to the adequacy of Becker's compliance manual. In light of that testimony, Kane would have even less reason to complain about the guidance afforded to him by Becker. In addition, according to the defense expert, a "red flag" that should alert a registered representative to a need to make inquiries is his knowledge that the sale involves a substantial amount of an unregistered stock. Here Kane had such knowledge or, if he did not, he should have known of the relatively large amount of Grandma Lee's stock involved and the fact that the stock had not been registered under the Securities Act. With respect to the

defense expert's willingness to accept as true oral representations of the vice-president of a Canadian company that the shares of that company being sold for friends of the corporation were not controlled or restricted securities, such acceptance appears at odds with the view of the Commission [9/] and is therefore rejected.

As persuasively argued by the Division, exemption from registration of the 150,000 shares of Grandma's Lee's was not available under Section 4(1) or Section 4(3) of the Securities Act. Kane does not argue to the contrary but takes the position that Trott, part of Becker's senior management, was as able, if not more so, to determine who the sellers were and that he, Kane, had every reason to rely upon the existence of a Section 4(1) exemption in the light of the active trading in Grandma Lee's stock and its listing upon NASDAQ. But Kane overlooks or chooses to ignore the fact that the burden of establishing the availability of an exemption from the registration provisions of the Securities Act is upon the person claiming the exemption. [10/] Kane has not carried that burden, and reliance upon others in Becker's management or upon trading activity or a listing in the over-the-counter market cannot excuse his participation in the

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9/ Id.

10/ S.E.C. v. Ralston Purina Co., 346 U.S. 119 (1953).

offer and sale of Grandma's Lee's stock in violation of Section 5 of the Securities Act.

Kane's insistence on the insignificance of his role in the distribution of the 150,000 shares of Grandma Lee's stock is carried over in his argument that the facts do not warrant a finding of "wilfulness" in connection with the violation. He submits that Becker's senior management had "blessed" the transaction and that he merely turned in orders reflecting the agreement between Becker and the sellers of the 150,000 shares.

However, "wilfulness" with respect to a violation of Section 5 of the Securities Act does not require an intent to violate the law. It is enough that Kane intentionally committed the acts that made him a participant in the Section 5 violations. 11/ Kane's reliance upon the Commission's reasoning in International Shareholder Services Corp., 12/ and that of a United States Court of Appeals in United States v. Wolfson, 13/ is misplaced. In each of the cited cases the factual situation that was found sufficient to negate "wilfulness" by a broker-dealer is not comparable to that found here.

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11/ Cf. Arthur Lipper & Co. v. S.E.C., 547 F.2d 171, 180 (2d Cir. 1976); Tager v. S.E.C., 344 F.2d 5, 8 (2d Cir. 1965).

12/ 46 S.E.C. 378 (1976).

13/ 405 F.2d 779 (2d Cir. 1968), cert. denied 394 U.S. 946 (1969).

In the former case the Commission found that it was not the act of the broker-dealer that rendered the exemption from registration unavailable, and in the latter case the Court considered the impact of the unawareness of a broker-dealer regarding participation in a distribution of securities. Here, Kane's violative conduct arises out of his substantial participation in transactions that he knew to be a distribution of unregistered securities and for which he knew or should have known that there was no exemption from the registration provisions of the Securities Act. Kane was not victimized by another's conduct nor was he unaware of the fact that the 150,000 shares of Grandma Lee's stock that he was purchasing from Hanson would be unlawfully distributed in the United States by Becker.

Kane's present counsel has also raised the question of the adequacy of Kane's representation at the hearing, stating "that the interests of Kane and Becker may not have been consistent during the hearing, and raises the implication (given Becker's settlement with the Division) that Kane's position was not fully developed." [Parenthetical phrase in original.] 14/ Kane's counsel acknowledge that former counsel disclosed the possible conflict to Kane and that Kane consented to the dual representation, but suggest that

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14/ Respondent's Post-Hearing Memorandum, February 8, 1985, at 2.

certain matters were not fully explored at the hearing. As examples, reference is made to the absence of testimony by Becker's branch office manager, Kane's immediate supervisor, and to the fact that the circumstances surrounding Becker's cancellation of the Hanson transactions in late December, 1981 and the rebilling in January 1982 were not covered by counsel for respondents.

Kane's present counsel appear to be grasping at straws in their efforts to cast doubt upon Kane's complicity in the Section 5 violation in question. The testimony of Kane's branch manager, though it might have inculpated the witness in the violation, could not materially exculpate Kane. His participation in the Section 5 violation is manifest from the record. As for the cancellation and rebilling of the Hanson transactions, it cannot seriously be contended that the reason for those entries could affect the findings herein in view of the fact that Becker paid and Kane accepted $7,000 to $8,000 for Kane's participation.

PUBLIC INTEREST

In view of respondent's wilful violations, it is necessary to determine the remedial action appropriate in the public interest. In that connection the various mitigating factors submitted by respondent, his background and reputation in his community, and his record in the securities business have been carefully considered.

The Division believes that the public interest requires that Kane be suspended from association with any broker-dealer for a period of six months. In support of that position the Division argues that Kane's actions were deliberate and knowing, that for personal gain he participated in the purchase and sale of a significant amount of unregistered stock, and that he lacked candor and credibility in his testimony. They further argue that the recommended suspension is necessary in order to deter other market professionals from similar conduct and to emphasize the importance of compliance with the registration provisions of the Securities Act.

Kane's position is that in the context of the entire circumstances, including the involvement of Becker's senior management, his activities do not require that sanctions be imposed. In the alternative, Kane believes that if it be determined that a sanction is appropriate, the sanction should be no more than a censure.

Upon careful consideration of the record and the arguments and contentions of the parties, it is concluded that a six-month suspension of Kane from association with any broker-dealer is required in the public interest.

While a suspension of six months may seem harsh in comparison to the censure imposed upon Becker as a result of its offer of settlement, it is nonetheless appropriate in view of Kane's involvement in the violation and his failure to discharge his responsibility for assuring that Becker

would not be receiving and distributing Grandma Lee's control stock. Senior management relied upon Kane to its detriment and to the damage of Becker. Further, in considering the appropriate sanction, account must be taken of the need for a deterrent effect upon other representatives.[15/] Under all the circumstances, a lesser sanction than a six-month suspension is not believed to be sufficient in the public interest. A lesser suspension would not suffice to impress Kane with the seriousness of his offense, one that was instrumental in channeling nearly $2,000,000 of unregistered Grandma Lee's stock into United States markets, nor would it have sufficient deterrent effect upon other registered representatives if they faced temptations similar to those Kane experienced.[16/]

ORDER

Accordingly, IT IS ORDERED that Owen V. Kane be suspended from association with any broker-dealer for a period of six (6) months from the effective date of this order.

Pursuant to Rule 17(f) of the Rules of Practice, this

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15/ Cf. Arthur Lipper Corp. v. S.E.C., 547 F.2d 171, 184-85 (2d Cir. 1976); Arthur Lipper Corporation, Securities Exchange Act Release No. 11773 (October 24, 1975), 8 SEC Docket 273, 281.

16/ All proposed findings and conclusions submitted by the parties have been considered, as have their contentions. To the extent such proposals and contentions are consistent with this initial decision, they are accepted.

initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

Warren E. Blair
Chief Administrative Law Judge

Washington, D.C.
March 22, 1985