

**UNITED STATE OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION**

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**In the Matter of** )

**Ellwyn Fischbach** )  
**Rourke M. O'Brien** )  
**David S. Elliott** )  
**Gordon C. Martin** )

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**INITIAL DECISION**

**October 10, 1991  
Washington, D.C.**

**Jerome K. Soffer  
Administrative Law Judge**

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**APPEARANCES:** Lawrence L. Kiser, John Badger Smith and R. Lee Whalen, of the Seattle Regional Office of the Commission, counsel for the Division of Enforcement.

**Ellwyn Fischbach, Rourke M. O'Brien, David S. Elliott and Gordon C. Martin, respondents pro se.**

**BEFORE:** Jerome K. Soffer, Administrative Law Judge

On September 17, 1990, the Commission issued an Order Instituting Public Proceedings ("Order") pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 ("Exchange Act"), naming as respondents Ellwyn Fischbach, Rourke M. O'Brien, David S. Elliott and Gordon C. Martin.

The Order alleges that respondents Fischbach, O'Brien and Elliott willfully violated Section 17(a) of the Securities Act of 1933 ("Securities Act") as well as Section 10(b) of the Exchange Act and Rule 10(b)-5 promulgated thereunder, in the offer and sale, and in connection with the purchase and sale of securities; that they engaged in an excessive number of transactions in light of customer objectives; and that respondents Martin and Elliott, as successive managers, failed reasonably to supervise respondents Fischbach, O'Brien, and Elliott with a view to preventing the above violations.

The Order directed that a public hearing be held before an administrative law judge to determine the truth of the allegations set forth and what, if any, remedial action is appropriate in the public interest for the protection of investors. Hearings were held in Seattle, Washington on February 11 through February 15, 1991.

All of the respondents appeared pro se. Following the close of the hearing, the Division of Enforcement ("Division") filed proposed findings of fact and conclusions of law, together with supporting brief. Respondent O'Brien filed proposed findings of fact, conclusions of law and supporting brief to which the Division replied. The remaining respondents, Fischbach, Elliott, and Martin, chose to make oral statements at the conclusion of the hearing in lieu of written post-hearing pleadings.

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

evidence is the standard of proof that has been applied. 1/

### The Parties

First Affiliated Securities, Inc. ("FAS"), was a registered broker-dealer with headquarters in San Diego, California, and regional offices, among others, in Bellevue and Seattle, Washington (Bellevue being a suburb of the city of Seattle). From March 1986 through October 1987 respondents Fischbach, Elliott and O'Brien together with a sales assistant/operations manager, Marilyn Pabros, operated the Bellevue branch office wherein initially they were the only personnel. These three respondents deemed themselves to be independent contractors rather than employees of FAS. 2/ FAS withdrew its registration with the Commission in 1989 and is not a party to this proceeding which concerns activity only at the Bellevue office.

Fischbach has had extensive experience in the securities business. Elliott has had experience both in commodities as well as the securities markets. O'Brien, who obtained a bachelor's degree in finance from Notre Dame University in 1978, likewise had previous experience in the securities field. 3/ In early 1986, all of these respondents were then

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1/ See *Steadman v. S.E.C.*, 450 U.S. 91 (1981)

2/ Apparently, the various branch offices of FAS were operated by the respective sales persons who were responsible for maintaining their particular office and paying all of the operating expenses. Transactions were cleared through a clearing broker designated by FAS. FAS was responsible to see that the offices were in compliance with pertinent rules and regulations through periodic inspections and the rendering of compliance advice to the respective office managers.

3/ O'Brien was the subject an administrative proceeding (AP-3-6298) brought by the Commission in October, 1983 (Exchange Act Release No. 34-20322) in which he consented to a sanction of a four month suspension from securities activities (S.E.A. Rel. No. 20531, January 3, 1984), based upon

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employed as registered representatives in the Seattle office of another broker-dealer, Dean Witter & Co.

Some time in mid-1986, these three respondents joined together to open the Bellevue Office of FAS as independent contractors with the apparent aim of following an investment philosophy and program expounded by Fischbach based upon his belief that the United States was facing a severe stock market decline to be followed by an economic depression of the magnitude that occurred in October, 1929. FAS assigned respondent Martin, who was then the office manager of the nearby FAS Seattle Office, to assume temporarily the duties of office manager as well of the Bellevue office until such time as Elliott would become duly qualified as a registered principal, which occurred in April of 1987. Elliott then replaced Martin as office manager, who had nothing further to do with the activities of the Bellevue Office.

### The Fischbach Theory

Fischbach had developed a belief, based upon his study of charts, of past and current demographics, and of comparable economic and sociological conditions, that the stock market in 1987, as reflected in the Dow Jones Industrial Average (DJIA), <sup>4/</sup> was facing a decline of similar proportions as the historic one that occurred in October, 1929, (and prior thereto in 1870). He further believed, based upon these same studies, that the 1987

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<sup>3/</sup>(...continued)

findings of violation of the anti-fraud provisions (See 29 S.E.C. Docket, 10 and 861) based, in turn, upon allegations of unauthorized and excessive transactions.

<sup>4/</sup> The DJIA is made up of the market prices of the 30 leading industrial corporations (such as General Electric, American Telephone and Telegraph, Dupont, etc).

market prices of the stock of the corporations making up the DJIA would first rise sharply from an average low index of 2,500 to a peak of as much as 3,800 some time in 1988, at which point the market would decline precipitously into as severe a depression as occurred in the 1930's.

Fortified with this belief, Fischbach felt that investors in the stock market could profit therefrom, by buying and holding "blue chip" stocks 5/ (or their equivalents, U.S. Treasury bills) on the upward move until the DJIA reached its anticipated peak when these stocks would be sold and then, as the market entered its sharp down-side, to use the proceeds from the sale of the blue chip shares in order to actively engage in short selling, a profitable maneuver in a falling market. 6/ He further believed that he would be able to tell from the 1929 situation when the 1988 peak would be reached and the market would begin to decline. Fischbach anticipated that "secondary" stocks (i.e., those of lesser quality than blue chip) would come on just about at the conclusion of the rally. He was earnestly convinced of this scenario and was able to convince O'Brien and Elliott to join with him in leaving the employ of Dean Witter and to open the FAS branch in Bellevue in order to exploit Fischbach's theory. All three of these individuals acted together as a team with

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5/ The term "blue chip" encompasses securities similar to those making up the popular indices such as DJIA and The Standard & Poor's 500, issued by corporations paying dividends regularly, having large capitalization, and listed on the New York Exchange.

6/ Selling short is an investment strategy based upon the expectation of a declining stock price whereby the stock is sold, although not then owned by the seller, with the expectation of covering the short later with shares bought at the anticipated lower price. The strategy is considered to be of a high risk, since if the stock rises in price the cost of covering the short grows in a theoretically limitless fashion.

Fischbach being the acknowledged and obvious leader of the group.

### The Seminars

When the three respondents 7/ left Dean Witter, they took with them those of their accounts who elected to join in the Fischbach program. Additionally, the respondents met with people individually or in small groups where Fischbach assisted by the other two respondents would present a detailed explanation of his theories together with an exhibition of charts and graphs, in an effort to convince customers of the validity of the Fischbach theory and of the potential to profit from his prognostications. Respondents deny soliciting for outside clients, relying instead upon "networking" and socializing among friends and relatives of their own or of existing clients.

In order to carry the program to more people, it was decided for Fischbach to present his views to large groups in seminars to be organized by O'Brien. These seminars were conducted at public meeting places and at private organizations to audiences of from 50 to 100 people, and lasting from three to four hours each. Despite Fischbach's assertions that he intended these seminars to merely update what he had previously told his existing customers privately, and that he varied the content of his lectures to meet changing conditions, the overwhelming consensus among those who attended more than one seminar was that the basic concept of the theories and program as presented by Fischbach did not change from one seminar to another in any significant way. 8/

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7/ The term "three respondents" will be used to comprise Fischbach, O'Brien and Elliott, since Martin was not involved as they were in promoting trading.

8/ Upon being advised by the FAS compliance examiner that each speaking engagement must be approved in advance and an appropriate form completed, respondents prepared a report for a Fischbach seminar on

(continued...)

8/(...continued)

February 3 and February 4, 1987, containing an outline of the speech, as follows:

" 1. An examination of the consuming, saving, sexual, political and musical behavior characteristic of the three main demographic groups 0-25 years, 25-55 years and 55+.

2. The effect of each group on the economy and the culture when they exert numerical, political, media and marketing power.

3. An examination of the birthrate trends in the free world.

4. How the distribution of the three groups effects (sic) the inflation/deflation cycles.

5. Where this evidence indicates we now are.

6. The comparison of this present demographic cycle with past cycles, 1920's, 1870's etc.

7. What strategy of investing such a similarity suggests one currently engages in.

8. The conclusion: 1) liquidity is the pre-eminent factor to consider. 2) the likelihood of onset depression. 3) the likelihood of a pre-depression syndrome stock market rally of 1928-29 proportions fueled by the a) unprofitability of alternate investments b) the Fed. monetary attempt to stimulate an already over-borrowed consumer and capital spending corporate environment.

Note: I draw from: 1) Federal Reserve data  
2) Census bureau data  
3) works of Galbraith, Modigliani & Kaufman, etc.

I claim no credentials, preferring that the data I present be examined on its own without references to my verbal skills or personal success.

There are no specific recommendations beyond the following:

If bonds - U.S. T-Bills

If stocks - liquid, highly capitalized blue chip type companies with predictable earnings and dividends, i.e. Dow Jones type."

(continued...)



The number of seminars that were given by Fischbach is not clear, O'Brien claiming they totaled as many as thirty and Fischbach claiming that they were much fewer in number. From the record established herein, it is clear that at least six such seminars were held during the period between February 3 and March 3, 1987. There may also have been some going back to 1986, but these were not documented or specified. Fischbach continued to advance his theories and philosophy to smaller groups who sought him out following his lectures.

There is nothing in the record to contradict Fischbach's allegations that he never advocated the purchase or sale of any particular securities at any of his seminars. The same is not true with respect to his contentions that he did not use these seminars as a means for developing new accounts. For example, in his seminar of February 19, 1987, which was tape recorded and then transcribed (Exhibit 10), he invited his audience on at least four occasions to see him privately at his office to further discuss the outlines of his theories and to provide answers to any questions they may have had (at pages 129, 132 and (twice) 134 of Exhibit 10). Again, at his seminar given on March 3, 1987 the transcript (Exhibit 9c) has him inviting the audience, near the end of his remarks (at page 50)- "If you want to reach me, I'm going to leave you some cards up here".

Again, in September and October of 1986, Fischbach wrote to a number of attendees at a seminar inviting them "to explore the possibility of becoming a client" by calling him at his office, and reminding them that "somewhere a clock is ticking". (Exhibit 39).

Listening to a tape recording of one of his typical seminars (Exhibits 9a and 9b)

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8/(...continued)

This was the only seminar ever outlined by Fischbach, but it was deemed to be representative of the others.

reveals a presentation by Fischbach that was dramatic, persuasive and entertaining and could well account for the belief engendered by his office associates and their customers in the philosophy and predicted series of events as outlined by him.

### The Fraud Charges

The main portion of the activities in the Bellevue office was to promote the Fischbach philosophy and for their customers to carry it out. For this reason, for example, Fischbach sought from FAS the right to block trade in order, ostensibly, to be able to move efficiently and quickly in and out of positions that were being taken for the several hundred customers of the Bellevue branch in the same securities at about the same time. 9/

Some twelve public witnesses, who had been customers of the Bellevue branch during the relevant period herein, testified at the behest of the Division. Most of them had some experience in varying degrees in stock trading and were familiar with such strategies as buying on margin and selling short. Almost all of them attended one or more of Fischbach's seminars and had an understanding of the program. They were either prior customers of the three respondents at Dean Witter, or were new customers who were induced to open an account at the Bellevue branch as a result of attending the seminars.

Most of the testifying customers understood Fischbach's program as outlined, basically involving the purchase and holding of blue chip type stocks during the upward phase of the DJIA, selling them when they reached their peak as determined by Fischbach, and then to engage profitably during the declining period of the market crash by a series of short sales, again as determined by Fischbach as the expert. They expected their

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9/ Otherwise, he would have to issue individual trade tickets for each account, over a period of time, resulting in uneven prices among the customers.

accounts to be following this program. In fact, customers who did not want to adhere to the program were discouraged from opening accounts.

These customers had understood that all of the buying or selling transactions were to be determined by Fischbach, Elliott and O'Brien virtually on a discretionary basis. 10/ Customers never offered or suggested any trades on their own behalf.

Although nothing was said at the seminars concerning a possible departure from the program outlined, the three respondents began to engage in a series of short sales for their customers commencing about March 27, 1987 (after the last seminar) which were covered by purchases in early May. A second round of short selling for many accounts began in mid-May, most of which were covered by early June. All of these transactions were consummated into a rising market. Admittedly, these were not the short sales contemplated by the Fischbach program which was to be invoked in a declining market. Rather, they represented an attempt by the three respondents to do a little separate trading in order to take advantage of what they had perceived to be a temporary "correction" unrelated to the program. 11/

Moreover, the respondents, during June and July of 1987, purchased for their clients stock in companies that were not of DJIA-type blue chip quality (so-called secondary stocks) including warrants. Admittedly, these transactions were likewise not embraced

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10/ Some time in the summer of 1987 the respondents sent to each of their customers a letter requesting the execution of written discretionary authority, alleging a need to improve their timing and to take advantage of block trading. It would seem that respondents were merely trying to overcome their failure to have their discretionary authority in writing as required by the NASD's Rules of Fair Practice, Article III Section 15(b). Some, but not all, of the accounts complied with this request.

11/ As to be expected of short selling into a rising market, most of the short sales turned out to be losers.

within the Fischbach program. 12/

All of the customer-witnesses substantially agree as to the content of the seminars and their similarity, their belief in the predictions by Fischbach and his trading plan, and the extent to which they were influenced to open or to continue an account with the Bellevue branch of FAS in order to follow the Fischbach theories and practices outlined.

The three respondents, using their de facto control over the transactions in the respective customers' accounts, made numerous purchases on margin, although margin transactions were not specified as part of the Fischbach program. In virtually all of these instances, the customer-witnesses discussed the transactions including margin purchases with one or more of the respondents, sometimes prior and other times subsequent to the event, such as, following the receipt of confirmations or monthly account statements. In almost all instances, the customer-witnesses, went along with the actions of the respondents outside of the Fischbach plan, including the use of margin, the purchase of secondary securities, and the short sales in a rising market.

L.E.A., one of the customers offering testimony, was a client of Fischbach and O'Brien. The very first transactions in his account occurred about one month after it was opened embracing five short sales. He agreed to go along, as he did with all of the transactions made thereafter. Other than covering these shorts, the next transactions did

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12/ The extent of trading in secondary stocks is not clear. The Division claims that its analysis of 85 accounts shows that secondary stocks or warrants represented 10% or more of their portfolios and that for 35 accounts a level of secondary securities equalled or exceeded 40%. However, there are no statistics to show the total number of accounts being serviced by respondents, although there appear to be at least 150. The proof does show that the accounts at the Bellevue office had a majority of blue chip stocks in their portfolios just prior to the October 1987 stock market crash.

not occur in the account until June of 1987 with the purchase of several securities both of the blue chip type and of secondary issues. Purchases continued through July mostly of blue chip type, all of which were held in the account so that by September 27, 1987, it showed holdings of 19 different securities with the total market value of approximately \$455,000, leveraged through margin purchases. At that time, the account was profitable. However, with the historic crash of October 1987 the account suffered severe losses, in large part due to the extensive margin purchases. 13/

T.H.B., a customer of Elliott and Fischbach, after attending two seminars, opened his F.A.S. account with \$20,000 at the same time he opened separate commodities trading account with Elliott with another \$15,000. By September 27, 1987, the equity account was long in some eight securities and his account balance was some \$53,057. As a result of the October 1987 crash, not only was the witness's initial investment wiped out but he wound up owing FAS \$5,000. The witness felt that commissions paid on these transactions seemed rather substantial. His account was losing money even prior to the October, 1987 crash but he was prevailed upon by Fischbach and Elliott to hang on and wait for the Fischbach predictions to come to pass.

N.S.J., a retired optometrist, opened an account in early 1986 with Fischbach. During the first year, most of the stocks acquired for his account appeared to be of good quality. However, when he noted that short selling occurred in March of 1987, which was not in keeping with his investment objectives of holding good grade stocks, he decided to

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13/ September 27, 1987 is the termination date of the proof of transactions adduced in this record. Official notice is being taken that in October, 1987, the stock markets suffered a great decline in price of almost 1,000 points in the DJIA, from which it has since recovered.

cut his (unspecified) losses and to close out the account at FAS in June of 1987. 14/

R.J.B., was a long time customer of O'Brien and a retired college teacher with many years of experience in the stock market. After attending one of the seminars, he agreed to have his account traded in accordance with the Fischbach plan, and for purchases on margin. O'Brien informed the witness of all transactions made for the account. As of September 27, 1987, his portfolio consisted of six securities having a market value of over \$74,000. His account balance was over \$42,000.

M.M., a bank manager opened an account with Fischbach in May of 1986, with an initial investment of \$85,000. During the first few months, based upon recommendations of Fischbach, he made a series of stock purchases of blue chip quality. Following a period of little activity, and commencing in January of 1987 the account became much more active. In June, several short sales appear. By September of 1987, the account consisted of 16 different securities, almost all of blue chip variety, with a market value of over \$223,000, a substantial portion of which was margined.

K.D.M., a general contractor, had been Fischbach's client prior to the transfer of his account to FAS in 1986, by which time the account consisted of some 16 different securities, including two short sales. His account balance was some \$171,000. He attended a Fischbach seminar in February of 1987, although the record does not show whether he attended any prior to opening his account. As far as he was concerned Fischbach had complete discretion in trading for his account, without prior notification including short

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14/ The Division offered the testimony of T.C., Jr., whose only transaction following the opening of his account involved two short sales in March of 1987 and two purchases to cover these sales in May of 1987. He never attended any of the seminars and apparently lost money on these transactions. There appears to be no connection between this testimony and the Fischbach program.

selling and margin purchases, the techniques of which were understood by him. Some of the acquisitions were other than blue chip securities but he continued to trade as before relying upon the Fischbach strategy. By September 27, 1987, the account consisted of some 20 securities, mostly blue chip. As a result of the crash of October 1987, he lost between \$150,000 and \$200,000.

D.W.L., a retired flight test engineer, with past experience in securities investing, opened his account in March of 1986 following a meeting and discussion with O'Brien and Fischbach concerning their investment theories. He also attended one seminar given by Fischbach which basically repeated what was told him individually. As transactions were executed in his account, both buying (usually on margin) and selling, he was not normally advised in advance, although discussions concerning them were had thereafter. He was content that Fischbach or O'Brien were making all trading decisions for the account. The witness felt as if he were dealing with a mutual fund. <sup>15/</sup> By September of 1987, the account showed 11 securities in its portfolio mostly of blue chip quality.

Ms. G.F.T., opened an account on May 16, 1986 with Fischbach following her attendance at a seminar she was advised to attend by her accountant. Her initial investment in the account comprised some \$330,000 worth of municipal bonds and other securities. She made additional deposits of funds from time to time. All investment decisions were made by Fischbach. Although her understanding was that all investments

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<sup>15/</sup> Other witnesses made the same comparison to investing in a mutual fund, which appear to be not ill-founded. The investors were putting up money and leaving investment decisions to Fischbach, O'Brien and Elliott. They were usually advised after the decisions were made when they received their monthly account statements or confirmation slips. Even Fischbach described himself to his customers both at the public and private seminars as being a "money manager" rather than a securities salesman. Note, also, his desire to trade in blocks of stock.

would be in blue chip stocks, the account also bought "secondary" stocks and engaged in short selling and margin transactions. On the advice of the accountant who first recommended Fischbach that he did not think such transactions suitable, 16/ she transferred her account to another broker on September 17, 1987. At one point she requested Fischbach to cease short selling and margin purchases in her account. Until the crash in October, 1987 her account did not appear to be losing money. When she transferred her business to another broker, her portfolio consisted of some 30 securities, and her account balance exceeded \$411,000.

H.D.C., opened an account early in 1986 at FAS through Elliott as his broker. He attended a Fischbach seminar and was influenced to follow his theory. He understood that Fischbach would be making all investment decisions. Every transaction was discussed with him, either before or after they were made. Where occasional transactions recommended by Fischbach departed from the plan, the witness would acquiesce. By September 25, 1987 the account held 12 securities, including some of secondary quality. Most of his initial investment of \$35,000 was lost in the market crash of October 1987; immediately prior thereto the account was about even.

K.A.T., opened an account at FAS with O'Brien in February of 1986. He had no prior experience in securities investing and relied entirely upon the expertise of O'Brien to suggest trades. It was understood that some of these decisions would include short sales. There were a few occasions when he declined to follow O'Brien's recommendations. Fischbach's theories were explained to him and he understood that O'Brien's recommendations were made in accordance therewith. He also was aware that there were

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16/ In one series of eight short sales, the account suffered losses amounting to over \$40,000 inclusive of commissions and margin interest.



some transactions outside the program that were intended to take advantage of occasional intermediate corrections in the market. K.A.T. felt that there was an excess of activity in his account, especially when he added up commissions paid amounting to \$22,000 in one year as compared with his annual earnings as a salesman of \$24,000. His initial investment in the account was \$88,000. Following the October 1987 crash his account balance was reduced to \$2,000.

### Discussion and Conclusions

Ellwyn Fischbach had concluded, based upon his study of changing demographics, sociological factors, and charts of stock price movements going back to the financial panic of 1870, that some time during the years 1986 to 1988 the equities market in the United States would undergo a precipitous decline in value as represented in the DJIA to be followed by an economic depression of similar proportions to that following the October 1929 crash. He divined that a talented analyst such as himself 17/ could, by following previous moves charted by the DJIA, develop a "map" of an investment strategy that would profit therefrom, based upon his belief that the "market" would follow the pattern as in 1929. The pattern would first go through a series of sharp price rises in "blue-chip" or "Dow Jones" type securities that would reach a peak at about 3,300 to 3,800 in the DJIA and then to drop precipitously to a low of perhaps 400.

The techniques to be employed in carrying out Fischbach's program were to buy "blue chip" stocks, during the upward phase and to hold them until the peak (as determined

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17/ Fischbach thought so much of his talents that he charged his customers a commission rate 50 percent higher than the "standard rate" promulgated by "Merrill Lynch" at least with respect to stock purchases, to compensate himself for his expertise.

by him) was reached, at which point the accumulation would be sold and the resulting cash used to engage in a series of short sales on the downward plunge of the market under the guidance of Fischbach, a self-professed expert in the art of short selling.

Fischbach began to spread his theories around and convinced Elliott and O'Brien, who at the time were all employed as registered representatives at Dean Witter, to join with him in promoting his theories. To this end, they arranged with FAS to open a branch at Bellevue, with Fischbach as the acknowledged leader.

As Fischbach expanded the presentation of his theories, first privately to their customers at Dean, Witter and hence to others, his audience grew which culminated in the series of seminars described heretofore. By September of 1987, there were at least 150 accounts (based upon the schedule in Exhibit 4a), who were being serviced on an almost entirely discretionary basis by the three respondents under Fischbach's leadership. The extent of the activity generated in this trading can be seen from the \$1,352,602 in commissions earned for the 13 months ending December 31, 1987, as detailed hereinafter.

The Order alleges that the three respondents violated the anti-fraud provisions of the securities laws by first promoting Fischbach's investment theories to attract customers, and then to depart therefrom by inducing their customers to engage in transactions, including those on margin and by way of short sales, and in purchasing certain securities, inconsistent with those theories and strategies, and in failing to disclose the risks involved in such transactions. 18/

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18/ Section 17 (a) of the Securities Act makes it unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce, or by the use of the mails, directly or indirectly -- to do any of the following:

(continued...)

The main thrust of the Division's contentions derives from the charge that respondents had departed from the Fischbach program by engaging from late March through May of 1987 in short selling in their customers' accounts in the face of an upward rally in the stock market, and by purchasing stock (including, in some instances, warrants) in so-called "secondary" non blue chip type corporations in June and July, 1987. The Division contends that these transactions, although done with customers' acquiescence, were not envisioned in the program as expounded at the seminars. The allegation that this amounted to fraud derives from the claimed failure to advise those attending the seminars that respondents reserved the right to depart from the program and to move in on stock market "corrections" as and when they deemed it appropriate to do so while waiting for the market to go through its predicted course.

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18/(...continued)

- (1) to employ any device, scheme or artifice to defraud, or
- (2) to obtain money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading, or
- (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 10(b) of the Exchange Act makes it unlawful, in connection with the purchase or sale of any security to use or employ "any manipulative or deceptive device or contrivance in contravention of such rules and regulation as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5 promulgated thereunder, extends, in effect and with a few language changes, the provisions of 17(a) relating to the sales of securities to both the purchase or sale thereof.

As a further specification of fraud, the Division asserts that respondents placed most of their customers in margin trading without informing them of the risks of buying on margin and, further, without revealing at the seminars that Fischbach's theories embraced margin purchases. However, most of the clients appear to have been sufficiently aware, either from their own past experience or by discussions with respondents as to the mechanics of margin trading and acquiesced therein. It has not been shown that they were made aware of the risks involved.

Additionally, it is argued that respondents committed fraud in soliciting written discretionary trading authority as heretofore described in footnote 10 supra without explaining why such authority was being sought. This contention is rejected.

Fischbach asserts that he never used the seminars to attract business and that he never suggested at his lectures any specific stock be bought or sold. As seen, he denies giving as many as 30 seminars, and contends that they were much fewer in number, with the first ones held on February 3 and 4, 1987, intended only for his existing private clients as an update of his theories. Although all witnesses agree that his lectures were substantially similar to each other, Fischbach claims to have adjusted his thinking and the strategies expressed therein from one to the other in the light of changing events. Thus, when he placed his customers in a number of short sales in March and April of 1987, and in secondary stocks in June and July, 1987 it was because he claims to have detected parallel market corrections of the same type that had preceded the great crash of 1929. He asserts that while waiting for his basic predictions to come true, it was his strategy to jump in and out when the charts showed market corrections would appear as they did in 1929. While he agrees that he did not convey this at his formal seminars, he did recommend and/or enter into these types of transactions during his private meetings with clients.

The Division argues that entering into these transactions constituted a material departure from the Fischbach plan the three respondents were advocating, and that the failure to advise the investors of the intent to depart therefrom amounted to material fraud in violation of the statutes. 19/

This argument is troubling because it does not appear from this record that the additional transactions complained of constituted a deviation from the Fischbach program. Rather, they appear to be trades made by respondents for their customer accounts separate from and in addition to, the securities purchased under the plan. Looking at the account statements of the customer-witnesses through September 27, 1987, one sees a month-by-month increase in the stocks held in their respective portfolios most of them of the blue chip type. 20/

Moreover, the record does not show that at the time Fischbach was delivering his seminar he or the other respondents had any intention of engaging in short-selling activities (which began a month or more after the last seminar), beyond what was called for in the Fischbach plan or to purchase secondary securities (including warrants) a number of months thereafter. This brings up a necessary ingredient to establish willful fraud, at least in the context of Rule 10b-5 and the first subsection of Section 17(a) of the Securities Law, in that the respondents acted with scienter, defined as "a mental state embracing intent to deceive,

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19/ A fact is "material" where there is a substantial likelihood that a reasonable investor would consider these misrepresentations and omissions important in making their investment decisions. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 837 (1976).

20/ In fact, it was the holding of these securities when the fateful crash of October, 1987 occurred that was for the most part the cause of the extensive losses in their accounts. Even Fischbach was caught in the 1987 crash, so that all his investments were wiped out, he had to file for personal bankruptcy, and wound up owing \$130,000 to the Internal Revenue Service.

manipulate, or defraud". Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193, n.12 (1976). Scierer is established by knowing or intentional conduct. Aaron v. SEC, 446 U.S. 680, 690 (1980). It may also be established by reckless conduct. Nelson v. Serwold, 576 F.2d 1332, 1337-8 (9th Cir.), cert. den., 439, U.S.970 (1978). Courts recognize that absent an admission by defendant, scierer may be inferred from circumstantial evidence which "can be more than sufficient". Herman & McLean v. Huddleston, 459 U.S. 375, 390, n.30 (1983).

The record fails to establish the necessary mental intent on the part of respondents to deceive or defraud their customers by misrepresentation. In truth, the record shows that the clients were always made aware of the transactions on their part entered into by the three respondents, either in advance of or after the fact, and that they acquiesced therein.

Having observed the demeanor of the customers witnesses I am convinced that, in most part, they understood the nature of the transactions being made on their behalf, including the risks thereof. That the customers of respondents were aware of what was happening is shown by the fact that of the twelve customer-witnesses, four who were not satisfied with the trades being made on their behalf (Ms. G.F.T., G.B., T.C.Jr., and N.J.) terminated their respective accounts at F.A.S. between May and September, 1987, prior to the October stock market debacle.

It has not been overlooked that subsections (2) and (3) of Section 17(a), violation of which is also charged, do not require that scierer be shown as an element of the fraud alleged. Aaron v. S.E.C., supra, at page 690. However, the proof of the asserted violations of these sections fails to establish that respondents made material misrepresentations, omitted material information or were engaged in a practice which operated as a fraud or deceit upon purchasers or sellers securities, performed in a order to promote the sale of

"blue chip" securities.

As noted, scienter may also be established by reckless conduct. Respondents would be acting recklessly:

"if they had reasonable ground to believe material facts existed that were misstated or omitted, but nonetheless failed to obtain and disclose such facts although they could have done so without extraordinary effort."

Keirnan v. Homeland, 611 F.2d 785, 788, (9th Cir. 1980).

Here, whatever state of mind existed, the conduct of the respondents was dictated by general predictions by Fischbach in turn based upon personal interpretations of past events as they might indicate future events in a broad way. There is nothing in these prognostications that is of a material factual nature, such as specific matters concerning specific securities, nor is there proof of misstated or withheld facts which respondents failed to obtain and disclose. Hence, there is no recklessness shown.

In sum, the acts complained of as constituting an undisclosed departure from the Fischbach program offered at the seminars, occurring, as heretofore noted, some time after the last seminar, were separate and distinct from the promotion of the plan which appears to have always been in place.

That much being said attention is perforce directed to that part of the Order charging the three respondents with another allegation of fraud, i.e., "churning", and as the same involves scienter from another aspect.

### Churning

The Order additionally charges the three respondents with churning, that is, with recklessly causing their customers' accounts to engage in excessive trading in light of the objectives of these customers.

In order to establish churning, it must appear: (1) that the broker exercised control

over the trading in the account; (2) that the trading in the customer's account was excessive in light of his objectives; and (3) that the broker acted with the intent to defraud (scienter) or with wilful and reckless disregard for the interests of his client. Rolf V. Blythe, Eastman, Dillon & Company, Inc., 424 F.Supp. 1021, 1029-1040 (S.D.N.Y. 1977), 570 F.2d 38 (1978), cert. den., 439 U.S. 1039, and Mihara v. Dean Witter & Co., 619 F.2d 814, 821 (C.A. 9, 1980).

Churning essentially involves improper purpose on the part of the broker to derive profits for himself with little regard for the interests of his customer. Stevens v. Abbott, Proctor & Paine, 288 F.Supp. 836, 845 (E.D. Va. 1968).

(a) - Control

When determining the question of control, evidence that the client routinely followed the recommendations of the broker is an important consideration. Mihara, supra, at page 821. Equally important are considerations of the investor's sophistication in securities transactions and independent evaluations about the handling of the account. Tiernan v. Blythe, Eastman, Dillon & Co., (1983-4 Transfer Binder) Fed. Sec. L. Rep. (CCH). ¶199,517 (C.A. 1, 1983). The latter would include for consideration the customer's age, education, investment and business experience, the relationship between the customer and the broker, regularity of discussions between the customer and the broker and whether trades were authorized or rejected by the customer.

There is no doubt that in the present case, Fischbach, Elliott, and O'Brien were in total control of the accounts. Clients were expected to turn over their money to the Bellevue office for the respondents to manage. Although many of the customers had varying degrees of familiarity with securities transactions, they routinely followed and relied



upon respondents' recommendations, and never suggested trading on their own. In fact, they were not expected or encouraged by respondents to do so.

Control may be either explicit or implicit. Explicit control occurs when the customer overtly grants authority over his or her account to the broker-dealer, usually in a written document. Implicit or de facto control occurs when the broker-dealer does not have specific authorization from the customer to control the account but nevertheless exerts a controlling influence. Implicit control can result when the customer routinely follows the recommendations of the broker, and does not suggest trades to the broker. Mihara, supra, at 821, and Matter of Erdos, 47 S.E.C. 985, 989 (1983), aff'd. 742 F. 2d 507, 508 (9th Cir. 1984).

While respondents did not have written discretionary authority (a lack they belatedly attempted to correct), there is no denying that customers acquiescence amounted to implicit control by those choosing to follow the Fischbach banner not only for transactions within but those without the program.

(b) - Excessive Trading

Whether or not the trading on behalf of their clients by respondents was excessive rests upon the former's trading objectives, the parameters of which in this case include the Fischbach theory of how to survive and profit from the next stock market crash and ensuing depression. Basically, Fischbach's "map" was conservative in nature, that is, to buy blue chip securities and hold them for the pre-crash ride to the top. It was not intended to be a trading account. Nevertheless, respondents did go beyond the plan by engaging in periods of short-selling and of buying non blue chip stocks to take advantage of market corrections as perceived by respondents to have occurred in the period before the 1929 market crash.

One test for excessive trading is the relationship between the account opening

balance and the amounts of markups, commissions and margin charges, and the extent to which the respondents' transactions resulted in depletion of principal. 21/ The Division has not produced any statistics or analysis to support this proof of excessiveness. Instead, it has gathered evidence of another test for excessiveness, namely, turnover ratios, including the so-called "Looper" formula. (Looper and Company, 38 S.E.C. 294, 297 n.6 (1958)). 22/ The turnover ratio reflects the number of times during a given period that the securities in an account are replaced by new securities. 23/

The Division calculated turnover for a sampling of 41 accounts, including 33 accounts which were open and active over the 12-month period between September 26, 1986, and September 25, 1987 and eight accounts which were opened in late 1986 or early 1987 and still active on September 25, 1987.

Turnover ratios for these accounts were calculated three different ways:

a. Turnover of average equity adjusted to add funds temporarily wired out, the ratio

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21/ Matter of Shearson Lehman, Hutton, Inc. et al., Exchange Act Rel. No. 26766 (April 28, 1989), 43 S.E.C. Docket 1322, 1325, citing Hecht v. Harris, Upham & Co., 283 F. Supp. 417 (N.D. Cal. 1968), finding excessive trading where account initially worth over \$530,000 produced commissions, markups and margin interest totaling \$232,000, as compared with Carroll v. Bear, Stearns & Co., 416 F. Supp. 988 (S.D.N.Y. 1976) where no excessive trading was found where the account had an equity of \$900,000 and produced commissions of \$9,000.

22/ The turnover rate is a ratio computed by dividing the aggregate amount of the purchases in an account by the average monthly investment. The average monthly investment is the cumulative total of the net investment in the account at the end of each month, exclusive of loans, divided by the number of months under consideration.

23/ Matter of Shearson Lehman, Hutton, Inc., supra, at pages 1323-1324, wherein a turnover rate of 7.4 -- a rate that would amount to the selling of every stock in the portfolio every seven weeks -- was deemed well above what was deemed in other cases to be excessive, citing Samuel B. Franklin & Co., 42 S.E.C. 325, 327 (1964) (turnover rates of 3.5 and 4.4).

of net purchases to average adjusted equity.

b. Turnover of average investment, the ratio of net purchases to average investment.

c. Turnover of average investment as if the September 26, 1986 equity were the beginning investment.

In the present case, the turnover rate exceeded 6.00 in at least eleven of the 41 sampled accounts (the rate exceeded 20.00 in one account), and in the other 30 it was between 2.99 and 6.00. <sup>24/</sup> Few stocks in these accounts were held over the entire twelve months of the Division's analysis. Many stocks purchased in late 1986 or early 1987 were held less than three months and then sold out just before the March 1987 short sales. The short positions were all held less than three months, and some (particularly the short sales in May 1987) were held less than one month. These short holding periods are also evidence of high turnover. In re J. Logan & Co., 41 S.E.C. 88 (1962), affirmed 325 F.2d 147 (9th Cir. 1963), cert. denied 377 U.S. 937 (1964); In re Behel, Johnson & Co., 26 S.E.C. 163, 167 (1947).

The statistical evidence clearly points to excessive trading which must be measured against the investment objectives of the customers. Mihara, supra, at p.821. These objectives, as has been seen before, embraced a buy and hold of blue chip securities which, if followed by respondents, should have developed a low turnover ratio. But further, the record shows other indicia of churning the customer accounts, as follows:

- (a) Respondents placed a substantial amount of their transactions on margin, although never at the instance of the customers. This is clearly a device to increase the volume of purchases and hence, commissions earned, since margin accounts produce higher volume from the same amount of investment.

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<sup>24/</sup> With respect to the customer-witnesses, the turnover rate ranged from 3.01 in the account of Ms. G.F.T. to 7.54 in the account of T.H.B. (Omitting K.A.T.'s ratio which exceeded 21.98.

- (b) Fischbach, through whom the overwhelming volume of transactions passed, was charging commissions at 150 percent of the standard commission.
- (c) Respondents placed many of their customers in short sale transactions which, in many instances, had to result in a second transaction to cover a short especially in a rising market.
- (d) The volume of commissions earned during the relatively short period the Fischbach plan was developing is substantial and indicates a strong motivation on respondents' part. 25/
- (e) Respondents having expounded and encouraged and then departed from a relatively static (buy blue chip and hold) program.

Under all of the circumstances, there is sufficient proof in addition to the purely statistical to establish that respondents engaged in excessive trading in their customers' accounts. This conclusion is arrived at despite respondents' protestations that they never recommended any security at the seminars, that they on occasion discouraged customers from leaving the program (thereby foregoing commissions on the sell side), and that they always consulted with their clients either before or after with respect to the transactions

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25/ The commissions earned by the three respondents between November 28, 1986 and December 31, 1987, were as follows:

<u>Broker Account</u>	<u>Commissions earned</u>
Fischbach	\$937,668
Fischbach & O'Brien	229,082
Fischbach & Elliott	106,784
O'Brien	64,225
Elliott	<u>14,843</u>
Total	\$1,352,602

entered into on their behalf. 26/

(c) Scienter

Churning essentially involves improper purpose on the part of the broker to derive profits for himself with little regard for the interests of his customer. (Stevens v. Abbott, Proctor and Paine, 288 F. Supp. 836, 845 (E.D. Va. 1968). This case also tells us, at P. 847, that the totality of the circumstances must be examined.

While scienter requires an intent to defraud, it is sufficient to show wilful and reckless disregard for the interests of the customers. Here, while inducing numerous customers to open accounts and trade with them under theories expounded by Fischbach, they nevertheless proceeded recklessly - and surely wilfully - to engage in the transactions and excessive trading heretofore described. 27/

Accordingly, it is concluded that the three respondent herein willfully violated Exchange Act Section 10(b) and Rule 10b-5 thereunder by their excessive trading in their customers' accounts.

Failure of Supervision

There is still remains for consideration the allegation in the Order that respondents Martin and Elliott, while acting as successive managers of the Bellevue branch during the relevant period, failed reasonably to supervise the respondents.

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26/ The fact that the customer consulted with the broker or had received confirmation slips and monthly statements was no bar to a claim of churning. Hecht v. Harris, Upham & Co., supra.

27/ It is well established that a finding of willfulness does not require an intent to violate the law; it is sufficient that the one charged with the duty consciously performs the acts constituting the violation. See Tager v. S.E.C., 344 F. 2d 5, 8, (C.A. 2, 1965); and Arthur Lipper & Co. v. S.E.C., 547 F. 2d 171, 180 (1976).

Section 15(b) (4) of the Exchange Act and particularly sub-paragraph (E) thereto, imposes upon a broker-dealer, or any of its associated persons, a duty reasonably to supervise their employees with a view to preventing violations of the securities laws. The Section reads, in part:

(4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing limitations, suspension, or revocation is in the public interest and that such broker or dealer, \* \* \* or any such person associated with such broker or dealer \* \* \*

(E) \* \* \* has failed reasonably to supervise with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such violations, if such other person is subject to his supervision. (Underlining added).

The extent of supervision exercised in connection with the Bellevue branch of FAS appears to have been perfunctory in nature and to have required nothing more than pro forma observance of the requirements with respect thereto.

When the three respondents left Dean Witter to open the Bellevue branch office as independent contractors under what appears to have been a form of franchised operation, FAS, as the nominal employer, needed to have someone in a supervisory relation over the arrangement. Since none of the respondents was then qualified, FAS designated Gordon C. Martin, who was its Seattle office manager, to act temporarily in the same capacity over the nearby Bellevue office until one of the other respondents (in this case Elliott) could qualify as a principal and become office manager. This finally took place at the beginning of April, 1987.

So, from May, 1986 and until April, 1987, Martin was the supervisor over the other three respondents; thereafter Elliott nominally supervised Fischbach and O'Brien.

The supervisory role of FAS was to have its compliance officer visit the Bellevue

branch about once a year, offering such suggestions as the creation of an "advertising file" even though it did no advertising, the need to obtain written approvals of speaking engagements to be placed in the advertising file, and to require that every customer statement show evidence that they were reviewed by the current registered principal.

Martin described his duties as office manager as a weekly visit to the Bellevue office to examine order tickets, to check opening account forms, monthly reports and margin agreements, and to see that moneys were paid and securities delivered promptly.

Elliott claims to have followed the FAS compliance manual which required the office manager to insure that proper documents were obtain on all accounts, such as account opening forms, and that credit rules were observed (something that was usually handled by the home office), to review and initial all transactions in the personal accounts of registered representatives, to review with the representatives all outgoing correspondence, and all monthly statements, to review and initial monthly reports of customer accounts for which there was an unusual level of activity, to approve new accounts and to supervise, monitor and control the activity of employees on a day-to-day basis.

As office manager, Elliott never took it upon his own initiative to contact customers of the other respondents since they were all doing the same program anyway. During the period he served as office manager he was visited once or twice by the FAS compliance officer and on occasion by officials of the Washington State Securities Commission.

Both Martin and Elliott assert that they never received any customer complaints concerning any of the respondents until after the stock market's precipitous decline in October, 1987.

While Elliott functioned as office manager he continued to operate as a registered representative serving his own customers, under his own account and in a joint account with

Fischbach with whom he split commissions. 28/

Proper supervision by a branch manager requires full compliance with the relevant policies and procedures of the broker-dealer as well as attention to events and circumstances that may be evidence of violations. In re Vieira, Exch. Act Rel. No. 26576, 42 S.E.C. Docket 1815, 1821 (Feb. 28, 1989). Customer complaints are one potential source of evidence of wrongdoing, but a branch manager should not rely on the absence of complaints to conclude that nothing is wrong. Churning in particular is often difficult for a customer to detect. See Hecht v. Harris, Uphan & Co., 283 F. Supp. 417, 434 (N.D. Cal. 1968), affirmed as modified 430 F.2d 1202 (9th Cir. 1970);

In the present case, both Martin and Elliott failed to carry out significant parts of the compliance system and failed to act on evidence of possible wrongdoing, i.e., churning of customer accounts.

The problem in determining whether Elliott and Martin failed as supervisors is complicated by the question of who was supervising whom. The significant fact here is that Fischbach was running the show. He made all the decisions ranging from investment strategies to who would be allowed to open a customer account. Elliott and to a lesser extent Martin had agreed to Fischbach making all policy and trading decisions. 29/ The idea of anyone in fact supervising him in any phase of the enterprise is unbelievable.

The evidence shows that Elliott and Martin did nothing to supervise Fischbach,

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28/ For the 13-months period ending December 31, 1987, his individual account earned commissions totaling \$14,843, but his expenses toward running the office amounted to \$18,744. During the same period, his joint commissions with Fischbach were approximately \$106,784 and expenses totaled \$71,382.

29/ Thus, although it was the general policy of FAS not to allow discretionary accounts, an exception was made for the Bellevue office because of its unique trading practices and the fact that Fischbach was the best producer for FAS.



particularly with the aspects of excessive trading, the placing of most of the accounts on margin, the turnover ratios, the monitoring of the short selling and the trading in secondary stocks (including warrants) outside of the Fischbach program. Both Martin and Elliott had to know that the idea of getting away from Dean Witter and to open an independent office was to give the three respondents the freedom to promote the Fischbach theories and to concentrate their activity within the confines of the plan.

Having assumed the function of office manager, Martin and Elliott became charged with the duties that accompanied the title. The evidence shows, however, that they performed only the clerical aspects of the managerial position without performing any substantive, supervisory functions. Elliott in particular was in the anomalous position of supervising Fischbach to whom he was in fact subordinate.

Under all of the circumstances, it is concluded that respondents Elliott and Martin in their role as office manager of the Bellevue office failed reasonably to supervise respondents with a view to preventing the churning violations heretofore found.

#### Public Interest

It having been found that respondents Fischbach, O'Brien and Elliott had engaged in excessive trading in some 41 of the accounts of their clients concerning whom statistics have been produced, and that respondents Elliott and Martin failed reasonably in their supervision of the others, it becomes necessary to consider what sanctions, if any, would be appropriate in the public interest.

In assessing a sanction, due regard must be given to the facts and circumstances of each particular case, since sanctions are not intended to punish a respondent but to protect the public interest from future harm. See Berko v. S.E.C., 316 F.2d, 137, 141 (2d Cir.

1963); Leo Glassman, 46 SEC 209, 211 (1975); Robert F. Lynch, 46 S.E.C. 5, 10 n.17 (1975); and Collins Securities Corp., 46 S.E.C. 20, 42 (1975). Sanctions should also serve as a deterrent to others. Richard C. Spangler, Inc., 46 SEC, 238, 254 n.67 (1976).

In this case, the three respondents embarked upon a course of action designed to influence their present and future customers to entrust their investment dollars to them to pursue Fischbach's plan to avoid the perils of, and to profit handsomely by, an oncoming stock market crash.

Despite respondents' protestations that they were not in this promotion simply to generate commissions, the plan nevertheless resulted in extremely large earnings and in excessive account turnover as determined from the Looper ratios in some 41 customer accounts, 12 of whom testified in the proceeding. 30/

Respondents' assertions that the seminars were not intended to attract customers are difficult to believe even though Fischbach in his lectures never mentioned any specific security. The seminars served as the transmission belt leading from attendance in the audience to contacting the three respondents in order to open an account and participate in Fischbach's plan. In the art of salesmanship there is nothing unusual in the preliminary use of a soft sell or light entertainment to gain the confidence of prospective customers. It is noted that these respondents, in order to further their plan, left the more restrictive confines of Dean Witter to the relatively freer environment of being a licensee or franchisee of FAS in Bellevue. That they were successful in their aim is shown by the large number

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30/ It is observed that a typical proceeding based upon allegations of churning generally involve one or a few investors accounts. Here, we have a large number of accounts joined together under one common scheme handled and led by a few brokers having de facto control. It is not surprising that a few of the clients felt as if they were investing in a mutual fund.

of accounts they accumulated and controlled, and the significant amount of commissions they generated.

Ellwyn Fischbach was the leader of the scheme, both as the developer and presenter of the seminars and as the investment decision-maker in the office. It was generally accepted by the other respondents and their customers that Fischbach was in charge for all purposes and responsible for each investment decision. His role, as outlined above, mandates that he must bear primary responsibility and the greatest sanction. The Division recommends that an appropriate sanction would be one barring him from association with any regulated entity. However, a suspension from association with a broker or dealer for six months would be appropriate. 31/

Rourke O'Brien organized and arranged for as many as thirty seminars. He had a significant number of customer accounts, including those served jointly by himself and Fischbach. These two, plus Elliott, would have frequent discussions as to trading strategies and transactions. The Division seeks a sanction barring O'Brien from association with a regulated entity, with the right to reapply after two years. In assessing an appropriate sanction, consideration has been given to the fact that he had been sanctioned once before. (See P.3 F.N. 3, supra). Accordingly, and in order to achieve the remedy suitable under the circumstances, a sanction suspending O'Brien from association with a broker or dealer for four months is deemed appropriate.

Elliott, whose dealings with customers were much less than those of Fischbach and

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31/ The Division intends the bar to apply to all "regulated entities", namely, brokers, dealers, investment advisers, investment companies and municipal securities dealers. However, this proceeding is brought only under Sections 15(b) and 19(h) of the Exchange Act which embraces brokers and dealers. Since notice has not been given of an intent to include other entities, they cannot be the subject of a sanction.

O'Brien, also assumed the duties of office manager to relieve Martin of the responsibility. However, being in fact subject to Fischbach's running of the show, his functioning as a supervisor was merely pro forma. Besides, he was otherwise busy in his commodities trading activities. The Division recommends that Elliott be barred from association with a regulated entity with the right to reapply after two years. After consideration of all of the circumstances it is concluded that Elliott be suspended from association with a broker or dealer for two months.

Martin was not involved with the Fischbach plan or with the activities in the Bellevue office generated by it, except to the extent of his pro forma ministerial acts in his position of branch manager. The Division concedes that the case against him is light, that his involvement with the scheme was peripheral, and that he did not contribute directly to any wrongdoing.

In carrying out his managerial duties, Martin would visit the Bellevue office about once a week, examine order ticket, check account opening forms and monthly reports, and would also see that margin agreements were on file. He never attended any of the seminars and relied upon the FAS compliance personnel to be on the look-out for violative conduct. To summarize, Martin performed only the clerical aspects of the managerial position without performing any substantive supervisory analysis. Nevertheless, by accepting the position of office manager even on a temporary basis, he then assumed some responsibility for supervising the activities of the Bellevue office.

The Division recommends that Martin be suspended for two months from being associated with a regulated entity in a supervisory capacity. However, a suspension for 30 days from any association with a broker or dealer would adequately serve the need for a sanction.

Based upon all the factors stated, it is concluded that the sanctions hereinafter recommended comport with the requirements that a sanction should not be a punishment, should tend to ensure that the respondent will not repeat such conduct, and should serve as a deterrent to others in the industry who may be inclined to act in a similar fashion. 32/

**ORDER**

Under all of the circumstances herein,

**IT IS ORDERED** that respondent Ellwyn Fischbach be suspended from association with any broker or dealer for six months after the effective date of this Order; and

**IT IS FURTHER ORDERED** that respondent Rourke M. O'Brien be suspended from association with any broker or dealer for four months from the effective date of this Order; and

**IT IS FURTHER ORDERED** that respondent David S. Elliott be suspended from association with any broker or dealer for two months after the effective date of this Order; and

**IT IS FURTHER ORDERED THAT** respondent Gordon C. Martin be suspended from association with any broker or dealer for 30 days following the effective date of this Order.


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32/ In their briefs and arguments, the parties have requested the Administrative Law Judge to make findings of fact and have advanced arguments in support of their respective positions other than those heretofore set forth. All such arguments have been fully considered and the Judge concludes that they are without merit, or that further discussion is unnecessary in view of the findings herein.

**This order shall become effective in accordance with and subject to the provision of Rule 17(f) of the Commission's Rules of Practice.**

**Pursuant to Rule 17(f), this 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.**

Washington, D.C.  
October 10, 1991

  
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Jerome K. Soffer  
Administrative Law Judge