ADMINISTRATIVE PROCEEDING
FILE NO. 3-4368

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
JAMES J. CHICA CARROL P. TEIG PETER R. SUPER (FIRST MINNEAPOLIS INVESTMENT CORP., 8-15965)	:

INITIAL DECISION

Washington, D.C.
December 26, 1974

Warren E. Blair
Chief Administrative Law Judge

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(FIRST MINNEAPOLIS INVESTMENT CORP., 8-15965)	:	
	:	

APPEARANCES: William D. Goldsberry and Joan M. Fleming, of the Chicago Regional Office of the Commission, for the Division of Enforcement.

Roger H. Frommelt, of Katz, Taube, Lange & Frommelt, for James J. Chica.

Frank R. Berman, of Berman and Lazarus, for Carrol P. Teig and Peter R. Super.

BEFORE: Warren E. Blair, Chief Administrative Law Judge

These public proceedings were instituted pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") and Section 10(b) of the Securities Investor Protection Act of 1970 ("SIPA") by order of the Commission dated October 2, 1973, later amended by order dated December 4, 1973. The order as amended ("Order") directed that a determination be made whether the respondents named therein [1/] had engaged in the misconduct alleged by the Division of Enforcement, and what, if any, remedial action pursuant to the Exchange Act and SIPA is appropriate in the public interest.

In substance, the Division alleges that respondents James J. Chica and Carrol P. Teig wilfully aided and abetted First Minneapolis Investment Corp. ("registrant") in wilful violations of Sections 15(b), 15(c)(3) of the Exchange Act and Rules 15b3-1 and 15c3-1 thereunder in that (1) they failed promptly to file amendments to registrant's Form BD to prevent that Form BD from becoming inaccurate and incomplete, and (2) that registrant effected securities transactions while not in compliance with the provisions of Rule 15c3-1 ("Net Capital Rule"). The Division further alleges (1) that Chica and Teig wilfully aided and abetted registrant's wilful violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) and Rule 10b-5 thereunder by fraudulently inducing

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1/ First Minneapolis Investment Corp. and Wilfred H. Williams were also named as respondents. On May 14, 1974 the Commission issued its Findings and Order imposing remedial sanctions against those respondents. Securities Exchange Act Release No. 10796 (1974). Findings herein are made only as to the remaining respondents, James J. Chica, Carrol P. Teig, and Peter R. Super and are not binding upon First Minneapolis Investment Corp. or Wilfred H. Williams. Hereinafter, unless otherwise indicated, "respondent(s)" is not a reference to either the latter corporation or individual.

transactions with registrant without disclosing registrant's insolvency and inability to meet its debts as they matured and (2) that Chica wilfully aided and abetted registrant's wilful violations of Section 7(c)(1) of the Exchange Act and Regulation T promulgated by the Board of Governors of the Federal Reserve System by directly and indirectly extending, maintaining, and arranging for credit in contravention of that regulation. Additionally the Division charges that Chica and Teig failed reasonably to supervise within the meaning of Section 15(b)(5)(E) of the Exchange Act. As to respondent Peter R. Super, neither wilful violation nor wilful aiding and abetting of violation of the securities laws was charged. However, it was alleged (1) that he had been an officer and director of registrant and owns 16.7% of registrant's stock, (2) that a trustee for liquidation of registrant had been appointed on March 2, 1973 pursuant to the provisions of SIPA, and, by implication, (3) that the public interest required remedial action against him pursuant to Section 10(b) of SIPA. 2/

Respondents appeared through counsel who participated throughout the hearing, but counsel for Chica withdrew from further representation of Chica before filing proposed findings, conclusions and a brief in support on his behalf. Timely filings of proposed findings, conclusions, and

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2/ In part, Section 10(b) of SIPA provides:

> The Commission may by order bar or suspend for any period, any officer, director, general partner, owner of 10 per centum or more of the voting securities, or controlling person of any broker or dealer for whom a trustee has been appointed pursuant to this [Act] from being or becoming associated with a broker or dealer, if after appropriate notice and opportunity for hearing, the Commission shall determine such bar or suspension to be in the public interest.

briefs were made by the parties, including Chica, whose filing was pro se.[3/]

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

Respondents

Chica joined registrant in March, 1972 and served as registrant's president from March 24, 1972 until January 15, 1973, when he resigned that position and became registrant's vice-president, serving in that office until March 2, 1973. He also served as a director of registrant from June 1, 1972 to February 23, 1973 and owns approximately 18.8% of registrant's outstanding stock.

Teig and a friend organized registrant in 1970 as a subsidiary of Financial Concepts, Inc., a company engaged in the business of selling life insurance. Teig was president and treasurer of registrant from June 18, 1970 until March 24, 1972 and thereafter served as registrant's vice-president and secretary until February 12, 1973. Teig also was a director of registrant from June 18, 1970 until February 12, 1973.

Super became a vice-president of registrant on June 1, 1972 and continued in that position until February 23, 1973. He also acted as one of registrant's directors during the two-week period of February 12 to 23, 1973, and owns approximately 16.7% of registrant's stock. While active

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3/ Successive filings of proposed findings, conclusions, and briefs having been specified at the conclusion of the hearing, it was incumbent upon respondents under Rule 16(e) of the Rules of Practice to indicate which of the numbered paragraphs of the Division's numbered proposals were undisputed. Respondents failed to so specify, and the Division requested that all of its findings be adopted. Although the failure of respondents to comply with Rule 16(e) is without excuse, the difficulties occasioned by that deficiency are not of a degree to warrant granting the Division's request.

with registrant, Super was a trader for registrant's account as well as a salesman handling retail customers.

Registrant

Registrant, a Minnesota corporation, became registered as a broker-dealer on August 4, 1970 under the name Financial Concepts Securities which was changed to First Minneapolis Investment Corp. in May, 1972. Registrant was formed for the purpose of selling mutual fund shares, but around March, 1972 began to engage in a general securities business. Financial difficulties encountered by registrant led to an application by the Securities Investor Protection Corporation ("SIPC") being filed on March 2, 1973 in the United States District Court for the District of Minnesota for the appointment of a trustee pursuant to Section 5(b)(3) of SIPA to liquidate registrant's business. 4/ The trustee appointed in consequence of that application filed a final report and account on July 16, 1974 in which he stated that $89,474.85 was requested and received from SIPC and that he anticipated that all or substantially all of the SIPC advance would be expended in the course of registrant's liquidation.

Violations

Rule 15b3-1

Rule 15b3-1 under the Exchange Act requires, inter alia, that a registered broker-dealer "promptly file an amendment on Form BD correcting" information in its application for registration as a broker-dealer or in

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4/ SEC v. First Minneapolis Investment Corp., Civ. Action No. 4-73 Civ. 125 (D. Minn. March 2, 1973).

any amendment thereto when any of the information set forth in its application or previous amendment becomes inaccurate. The record reflects that information contained in registrant's original application for registration and the amendments subsequently filed thereto was or had become inaccurate in several respects and that registrant did not file the needed correcting information.

At the time of its application for registration as a broker-dealer, registrant indicated in response to question 22 of Form BD that its principal type of business, which accounted for or was expected to account for not less than 10% of its annual gross income, was that of a mutual fund retailer. While that response was true at the time of the filing of the Form BD on July 15, 1970, the information became inaccurate about a month or so after March, 1972. Thereafter registrant began to do a general securities business, over 10% of its gross income in 1972 being attributable to revenues produced by trading profits and commissions on over-the-counter transactions and less than 10% being derived from mutual fund sales. An amendment reflecting the changes in the character of registrant's business should have been, but was not promptly filed.

It further appears that registrant failed at the time of filing its Form BD application to identify its directors and thereafter failed to correct that omission or to disclose changes in its directorships that occurred following its registration. Additionally, no amendment was filed to disclose that David G. Morse had become a vice-president of registrant in November, 1972. Registrant's omissions concerning the identity of its

officers and directors were clearly in contravention of the requirements of Rule 15b3-1.

Respondents Chica and Teig contend that all of the information allegedly lacking had been provided to the Commission, and that if the information was not provided by registrant, the failures cannot be attributed to them. No record citation or legal argument has been submitted by Chica or Teig in support of those positions and it is concluded that they are in error in both respects. There is no evidence in the record contradicting the Commission's official files relating to registrant's application for registration as a broker-dealer and those files do not contain the information that the record in these proceedings indicates should have been filed. If the argument is that the Commission through its staff otherwise had the information, Chica and Teig are in no better position, for compliance with Section 15(b)(3) and Rule 15b3-1 can be achieved only through proper filings on Form BD. Whether the Division was or was not misled by registrant's filing omissions is entirely irrelevant. "The application for registration is a basic and vital part in our administration of the provisions of the Act respecting brokers and dealers. It is essential in the public interest and for the protection of investors that the information required by the application form be supplied completely and accurately. The availability elsewhere of required information cannot excuse the failure to present it in the application." 5/

5/ Mayflower Associates, Inc., 38 S.E.C. 110, 112 (1957). See also, A. Wasserman & Co., 38 S.E.C. 579, 581 (1958).

While the primary responsibility for filings under Rule 15b3-1 is placed upon a registrant, officers and directors whose duties include oversight of a corporate registrant's filings assume a vicarious responsibility for their corporation's failure to properly comply with Rule 15b3-1.[6/] Here, during the period when registrant failed to comply with Rule 15b3-1, Chica and Teig held top officer positions and were directors of registrant. It became incumbent upon them in those official capacities to make certain that registrant, which could act only through its corporate officials, complied with regulatory requirements. Accordingly, Chica and Teig must be held accountable for registrant's violations of Rule 15b3-1.

Under the circumstances, it is concluded that registrant, wilfully aided and abetted by Chica and Teig, wilfully violated Section 15(b)(3) of the Exchange Act and Rule 15b3-1 thereunder.

Rule 15c3-1

On October 26, 1972 a compliance examiner on the staff of the Commission's Chicago Regional Office ("CRO") commenced an examination of registrant's books and records which was completed on November 1, 1972. As a result of that examination, the CRO concluded that registrant's computation of its net capital as of September 29, 1972 reflecting compliance with Rule 15c3-1 was erroneous and that registrant was in fact out of compliance with the Net Capital Rule, requiring $2,841.67 additional capital to carry its aggregate indebtedness as of that date.[7/] The CRO summarized

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6/ Aldrich, Scott & Co., Inc., 40 S.E.C. 775 (1961).

7/ Rule 15c3-1 under the Exchange Act prohibits a broker or dealer from permitting his aggregate indebtedness as defined by the rule to exceed 2,000 per centum of his net capital as that term is defined under the rule.

its computation under Rule 15c3-1 as follows:

Aggregate Indebtedness	$ 608,646.82
Capital Required	30,432.34
Net Capital	180,347.57
30% deduction on long and short securities positions	152,756.90
Adjusted Net Capital	$ 27,590.67
Capital Required	30,432.34
Deficiency in Net Capital	$ 2,841.67

According to the CRO, the difference between its computation and that of registrant is attributable to registrant's failure to record a $2,015.84 interest charge on a $266,736 bank loan and to deduct $3,787, which represents 30% of a long securities position carried on its books under the name "William O'Day Error Account." Because O'Day was one of registrant's salesmen and because that account was opened after a refusal of an O'Day customer to pay for ordered stock, the CRO considered that the account was a proprietary account of registrant and that the market value of the long securities position carried in that account was subject to a 30% reduction.

Chica and Teig do not contest the propriety of the CRO adjustment for the unrecorded interest charge of $2,015, but argue that the CRO interpretation of the O'Day Error Account was improper. They claim that the error account was a receivable from O'Day, was to be collected from him, and that no evidence appears to indicate that the funds were not or could not be collected from O'Day.

It is concluded from the evidence relating to the O'Day Error

Account that the CRO treatment of that account was appropriate and that ownership of the securities long in that account had been retained by registrant. The testimony of registrant's operations manager is to the effect that ordinarily when a customer refused to pay for ordered stock the stock was sold out and any loss on the trade billed to the salesman, but that on the trade in question O'Day asked that the stock be put in his error account rather than being sold out because he felt he could sell it later. This testimony clearly indicates that there was no intent to transfer ownership of the ordered stock from registrant to O'Day and to look to him for payment, but that the intent was merely to accommodate a salesman for a time in order to allow him to try to sell the stock without a loss for which he would otherwise be charged. Further, had the stock been sold to O'Day registrant would, as also testified by the operations manager, have thereafter been obliged under Regulation T to sell the stock out of the O'Day account. Inasmuch as the stock was not sold out, registrant presumably did not consider that O'Day had purchased that stock nor look upon the O'Day Error Account as an account receivable.

Not only does the record establish that registrant was not in compliance with the Net Capital Rule on September 29, 1972, but also that registrant was out of compliance on January 17, 1973. In the latter instance the computation of registrant's operations manager disclosed that as of January 17, 1973 registrant needed additional capital of $6,106.34 to meet the requirements of Rule 15c3-1.

The Division also contends that registrant was out of compliance

with the Net Capital Rule on December 26, 1972 but it is concluded that the burden of establishing the truth of that allegation has not been met. Unlike the customary net capital computations which the Division relied upon to prove lack of compliance on September 29, 1972 and January 17, 1973, the Division offered a computation for net capital as of December 26, 1972 premised upon a determination of registrant's adjusted net capital as of December 31, 1972 that had purportedly been adjusted by the CRO to reflect adjusted net capital as of December 26, 1972. Although the method adopted by the CRO to determine registrant's net capital position as of December 26, 1972 is acceptable, the calculations are not.

In reconstructing registrant's net capital position as of December 26, 1972, the CRO concluded that a reduction in registrant's long inventory amounting to $66,940.55 had taken place between December 26 and 31, 1972 and had accordingly improved registrant's net capital position as of December 31 by $20,821.65, representing the 30% deduction on market value that would have been incurred had the long inventory not been reduced. However, it appears that in marking to market registrant's inventory as of December 26, 1972, the CRO accepted the value extensions shown on a computer run covering registrant's December 26 inventory and did not, because of the amount of time required, independently check the accuracy of those extensions.

That the value extensions on the computer run were not reliable reflections of market value is well-shown in the record. The pricing of registrant's Torr Laboratories stock by the CRO at 13 3/4 per share as of December 26, 1972 was based upon the computer run's information that registrant

was carrying its long position of 3,000 shares of that stock at a value of approximately $41,000. On the other hand, it appears that on December 26, 1972 registrant purchased 3,200 shares of that stock at $16 per share, indicating a market value for Torr stock substantially higher than that accorded to it by the CRO. It is concluded therefore that sufficient doubt has been cast upon the validity of the values placed upon registrant's inventory by the CRO to warrant rejection of the CRO computation as proof of registrant's net capital position as of December 26, 1972.

Since registrant has been shown to have been out of compliance with the Net Capital Rule on September 29, 1972 and January 17, 1973 and to have effected transactions when it was not in compliance, it is concluded that registrant wilfully violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder. Being responsible officers directing the operations of registrant at a time that registrant's violations occurred, Chica and Teig are found to have wilfully aided and abetted registrant's net capital violations.

In connection with the net capital violations, Teig complains that the Division failed to undertake repeated warnings which led to the proceedings against Blaise D'Antoni & Associates, Inc.,[8/] and suggests that the Division's charge is "simply an allegation made as an afterthought in litigation." Those views are entirely devoid of substance or merit. On the first point the record conclusively establishes

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8/ Blaise D'Antoni & Associates, Inc., v. SEC. 289 F.2d 276 (5th Cir. 1961), affm'g 39 SEC 835 (1960).

registrant's net capital violations, and as to the second, the fact that on other occasions a registrant has received a number of warnings from the Commission staff does not make it mandatory that warnings be given to other registrants before the Division may seek administrative remedies in connection with its enforcement responsibilities. Nor does the absence of actual knowledge that business is being conducted while out of compliance with the net capital rule excuse a violation. There is an obligation upon the broker-dealer and its principal officers to be certain that the firm's net capital meets the financial standards adopted by the Commission for the protection of investors at any time that business with the public takes place. They engage in business otherwise at their peril.

Section 17(a) of the Securities Act

Rule 10b-5

In connection with the clearing of its trades, registrant entered into an agreement with a bank in Minneapolis to use the clearing system operated by the bank. The arrangement called for registrant to deposit with the clearing house before noon of a day all securities it was having delivered out that day and for the clearing house to receive securities for registrant from other brokers, advising registrant at or about noon of the same day whether a debit or credit balance existed in registrant's account. In the event of a debit balance, registrant was obliged to eliminate it by sending funds to the clearing house the same day. A failure to pay the debit balance as required was to be deemed a dishonor on registrant's part and cause the clearing house to return securities

received for registrant to the originating brokers.

It is undisputed that on Friday, January 12, 1973, registrant was unable to pay for securities having a contract price of $93,619.75 which were to be delivered to registrant through the clearing system and that on the following Monday, January 15, 1973, registrant was unable to pay the clearing house for securities having a contract price of $151,043.05.[9/] In each instance the clearing house returned the unpaid-for securities to the selling brokers. On Tuesday, January 16, 1973, registrant was again able to make payments on deliveries by obtaining an overnight loan from the bank which was repaid the next day. Although unable to pay for securities being delivered to it, registrant continued to effect securities transactions on a daily basis without disclosing to its customers that it was unable to pay for securities being delivered.

Respondents Chica and Teig attempt to dismiss the circumstances surrounding registrant's failure to pick up the delivered securities on the basis of the head cashier's testimony that the failures were attributable to oversights. While that explanation tends to mitigate registrant's conduct, it does not excuse the wilful violation of the anti-fraud provisions of the securities acts. As contended by the Division, a broker-dealer impliedly represents that he is able to meet his obligations as they mature and it is fraudulent for him to accept customer's funds or securities at a time when he is financially unable to meet his obligations as they arise and to consummate transactions in the usual manner in

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9/ The Division also adverts to other times that registrant was unable to pay for delivered securities but the time period alleged in the Order does not encompass those instances. In consequence, evidence of registrant's other failures to pay for securities will be considered only in connection with the public interest issue.

accordance with trade custom.[10/] It is concluded therefore that registrant, wilfully aided and abetted by Chica and Teig who were directing registrant's operations, wilfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Regulation T

In the course of the CRO examination of 800 of registrant's customer accounts in October, 1972, five instances occurring in August and September, 1972 were found where registrant failed to promptly cancel or liquidate transactions in the special cash accounts of five individual customers who did not make full payment within seven business days as required by Regulation T promulgated by the Board of Governors of the Federal Reserve System pursuant to Section 7 of the Exchange Act. These accounts, in amounts ranging from $282.50 to $1,625.50, were delinquent in payment for periods of one to 11 days. Additionally, the record establishes that in November and December, 1972 registrant sold stock to three customers at prices ranging from $15,000 to $150,000 on terms of delivery of the stock against payment. As to these three, Regulation T required registrant no later than 35 days after the date of the customers' purchases to promptly cancel or otherwise liquidate the transactions unless an extension of time was granted. Registrant neither took action to cancel or liquidate the transactions nor obtained an extension of time.

Respondent Chica does not question the occurrence of registrant's

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10/ Weston and Company, Inc., Securities Exchange Act Release No. 9312 (1971); Ferris & Co., 39 S.E.C. 116 (1959).

Regulation T violations, but asserts that responsibility for those violations belongs to registrant's executive vice-president whose primary duty was to assure that registrant's operations were in compliance with applicable rules and regulations. While that assertion is true to a limited extent, it fails to take into consideration that the record also reflects respondent's knowledge regarding the affairs of registrant which when linked with his official responsibilities for the direction of registrant's operations makes him accountable for the Regulation T violations.

Under the circumstances, it is concluded that registrant, wilfully aided and abetted by Chica, wilfully violated Section 7(c)(1) of the Exchange Act and Regulation T promulgated thereunder.

Failure to Supervise

The Division argues that Chica and Teig failed reasonably to supervise with a view to preventing the alleged violations by persons who were subject to their supervision and who committed such violations. 11/ The Division's position is found to be unacceptable.

To impose derivative responsibility for a failure to supervise, there must be a "failure to learn of improprieties when diligent application of supervisory procedures would have uncovered them." 12/ Here, Chica and Teig were principal actors whose conduct resulted in registrant's violations of the securities laws, rules, and regulations. Although it might be argued in this case that Chica and Teig failed to supervise each

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11/ Under Section 15(b)(5)(E) of the Exchange Act, failure to reasonably supervise a person subject to supervision who commits violations of the Securities Act or Exchange Act or the rules and regulations thereunder is a basis for remedial action against the offending supervisor.

12/ Anthony J. Amato, Securities Exchange Act Release No. 10265 (1973).

other, it is concluded that the intent of the statutory proscription against failure to supervise was not to reach those committing or aiding and abetting the commission of the very violations underlying the alleged failure to supervise. Accordingly, the Division's charge of failure to supervise is found to be unsupported by the record.

Section 10(b) of SIPA

The nature and extent of registrant's violations, aided and abetted by Chica and Teig, argue strongly for a bar or suspension of those respondents pursuant to Section 10(b) of SIPA. Neither Chica nor Teig has evidenced a capacity to direct or manage the affairs of a broker-dealer in compliance with regulatory standards and both are accountable for registrant's financial straits which led to the intercession of SIPC in registrant's affairs for the protection of customers.

It is suggested by Chica and Teig that Edward J. Leonard, the registrant's executive vice-president from June 5, 1972 to February 2, 1973, should bear the onus for registrant's offenses because they relied upon him in the areas of registrant's compliance with financial and other regulatory requirements.[13/] The record makes clear, however, that Leonard's efforts to discharge his responsibilities were largely frustrated and ignored by Chica and Teig. Indeed in October, 1972, Leonard went so far in self-protection as to obtain a signed acknowledgement from Chica and Teig that they "accept responsibility for the firm's compliance with all net capital

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13/ Respondent also complain that the Division made no allegations against Leonard, and assert that the Division has engaged in "uneven enforcement." The record does not support that accusation.

rules and regulations."[14/]

A different problem is presented in the case of Super, who was not charged by the Division with committing or aiding and abetting any offense. As to Super, the Division relies upon his participation in the affairs of registrant, which went steadily downhill, to support its contention that he should be suspended from any association with a broker-dealer for one year and barred from association in a supervisory capacity. Super, in addition to disclaiming responsibility for registrant's violations and other shortcomings on which SIPC based its action, seeks dismissal of the proceeding insofar as it affects him on the ground that he was not given the notice required under Section 10(b) of SIPA prior to the hearing.

It appears that sufficient involvement by Super in the events that led to the appointment of a SIPC trustee for registrant has been shown to warrant sanctions had such conduct been properly alleged. But since it was not, the proceedings must be dismissed as to Super because of the inadequacy of the notice he received. The notice standards argued for by the Division, factually limited to no more than allegations of association with a broker-dealer for whom a SIPC trustee has been appointed, fall considerably short of the fairness required of a notice.

Prior to the commencement of the hearing, Teig and Super moved for a more definite statement of the facts alleged by the Division in Section II of the Order. In response the Division asserted that Super had no standing to make such motion because he was not charged with the violations

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14/ Div. Ex. 1.

set forth in Section II of the Order, but offered nonetheless to provide all respondents with specific facts and details with respect to the allegations before a ruling on the motion. Finding that before his consideration all respondents had been furnished with such supplementary information as was necessary, the motion judge denied the motion for more definite statement. At the commencement of the hearing Super pointed out that he had no notice of any charges against him and moved that the proceedings be dismissed or that the Division charge him. The Division replied that "there is no substance for charges against Mr. Super," 15/ but argued that he was alleged to be a vice-president of registrant, and a shareholder and director, and that under paragraph B of Section III of the Order he had been included in the question of what, if any, remedial action is appropriate in the public interest pursuant to Section 10(b) of SIPA. After a denial of the motion without prejudice on the grounds that it was premature in the light of Rule 11(e) of the Rules of Practice, 16/ the

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15/ Tr., June 4, 1974, at 12.

16/ Rule 11(e), provides:

> . . . all applications, motions and objections made during a proceeding prior to the filing of an initial decision therein . . . shall be made to or referred to and decided by the hearing officer, except that an application or motion which requires a ruling which would dispose of the proceeding in whole or in part shall be made to the hearing officer after the conclusion of the division's case or after the conclusion of the hearing . . . .

hearing proceeded. At the conclusion of the Division's case in chief, Super renewed his motion to dismiss which was denied without prejudice on the procedural ground that it had not been submitted in writing with opportunity afforded the Division to reply.[17/] Super then presented his defense[18/] without prejudice to his claim that he had not been accorded notice and opportunity for hearing within the meaning of Section 10(b) of SIPA.[19/]

The notice and opportunity for hearing specified in Section 10(b) of SIPA is also required by the provisions of 5 U.S.C. §554 on administrative procedure relating to adjudications.[20/] But in neither statute is

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17/ Rule 11(e) also provides:

> . . . Except where the hearing officer prescribes or permits a different procedure, any application or motion shall be in writing and shall be accompanied by a written brief of the points and authorities relied upon in support of the same and any party may file an answer within 5 days after service upon him of such motion or application . . . .

18/ Following the testimony of the first witness on behalf of Super, the Division suggested that Super was entitled to an adjournment to prepare his defense, if needed, and stated that the Division would have no objection to such adjournment. Super declined the opportunity, taking the position that an adjournment would not be of benefit because he was still unaware of the precise allegations being made against him with respect to the public interest and that he was proceeding on the basis of doing the best he could in his defense without prejudice to his position that proper notice had not been given in the Order.

19/ See note 2, supra.

20/ 5 U.S.C. §554 provides:

> (a) This section applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . .
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> (b) Persons entitled to notice of an agency hearing shall be timely informed of, --
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> . . . .
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> (3) the matters of fact and law asserted.

the scope of that notice spelled out. Determination of the adequacy of the notice has been made on a case by case basis with the touchstone for deciding the issue being, as the Division recognizes, the fairness of the entire procedures, not merely the adequacy of the original notice.[21/] Infirmities in the original notice may be cured during the course of the hearing where a respondent learns from the evidence presented the nature of the claims of the opposing party and has an opportunity to prepare and introduce a defense.[22/] "On the other hand, if an issue was not litigated, and the party proceeded against was not given an opportunity to defend himself, an adverse finding on that issue by the agency does violate due process. [citations omitted]."[23/]

The Division, during the hearing and in its briefs, has persisted in its view that the Order furnished the notice to which Super was entitled but also claims that additional notifications were given to him after the commencement of the hearing. However, a study of those portions of the transcript cited by the Division covering colloquies between counsel and the presiding judge on the notice required under SIPA and the admissibility of evidence on the public interest issue neither suggests that Super or his counsel thereafter could have been expected to have any better idea of the specific nature of the Division's allegations than they had

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21/ 1 Davis, Administrative Law Treatise, §8.04 (1958).

22/ Golden Grain Macaroni Company v. F.T.C., 472 F.2d 882, 885-86 (9th Cir. 1972).

23/ Id.

obtained from reading the order nor indicates that the issue of Super's negligence in the affairs of registrant referred to in the Division's briefs was litigated.

In Jaffe & Company v. S.E.C., the Court in considering the adequacy of the Commission's Order for Proceedings noted:

> As in other similar contexts, a primary purpose of the notice requirement in this case is to permit the respondent a reasonable opportunity to prepare a defense against the theory of liability invoked by those who institute the proceedings against it. A respondent may not reasonably be expected to defend itself against every theory of liability or punishment that might theoretically be extrapolated from a complaint or order if one were to explore every permutation of fact and law there alluded to or asserted. 24/

Although the facts in the Jaffe case may well, as the Division says, be distinguished from those of the present case, the principles enunciated remain applicable. Here, where the Division contented itself with nothing more than an allegation concerning Super's official positions with registrant and vague references at the hearing to his neglect of official responsibilities, it cannot be said that the notice served the purpose of permitting "the respondent a reasonable opportunity to prepare a defense against the theory of liability invoked" by the Division. Properly the Division, in addition to its specific allegations with respect to Super's association with registrant, should have further alleged with some particularity those acts or omissions on Super's part which it believed would demonstrate that a bar or suspension of Super pursuant to Section 10(b) of SIPA would be in the public interest.

24/ 446 F.2d 387, 394 (2d Cir. 1971).

Public Interest

The wilful aiding and abetting of registrant's violations by Chica and Teig are of a character requiring consideration of remedial action in the public interest under Section 15(b) of the Exchange Act and Section 10(b) of SIPA. The Division recommends that each be barred from association with a broker-dealer in a supervisory capacity and suspended from association with a broker-dealer for a period of one year. On the other hand, respondents urge that no sanction be imposed.

Upon careful consideration of the record, including the role of Leonard in registrant's management and the necessity for the intervention of SIPC to protect registrant's customers, it is concluded that the public interest requires that Chica and Teig not be permitted to associate with any broker-dealer in principal or supervisory positions. It appears appropriate, however, to give consideration to allowing them non-supervisory positions with a broker-dealer after one year with respect to Chica, who the record shows to be the primary offender, and after a period of six months as to Teig.[25/]

Accordingly, IT IS ORDERED that James J. Chica and Carrol P. Teig are each barred from association with any broker or dealer, except that

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25/ 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.

after one year from the effective date of this order James J. Chica may, and after six months from the effective date of this order Carrol P. Teig may, each apply to the Commission for permission to become associated with a broker-dealer in a nonproprietary and nonsupervisory position wherein his activities would receive adequate supervision; and

IT IS FURTHER ORDERED that these proceedings are dismissed with respect to Peter R. Super.

This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Rules of Practice.

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

Warren E. Blair
Chief Administrative Law Judge

Washington, D.C.
December 26, 1974