ADMINISTRATIVE PROCEEDING
FILE NO. 3-4390

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

A. J. WHITE & CO.
ALLAN J. WHITE
JAMES A. NOON
RICHARD J. McDERMOTT

(File No. 8-11962)

INITIAL DECISION

Washington, D.C.
January 21, 1975

Irving Schiller
Administrative Law Judge

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APPEARANCES: Willis Riccio and Catherine Keane of the Boston Regional Office of the Commission for the Division of Enforcement

J. Joseph Nugent of Nugent & Nugent for A. J. White & Co., Allan J. White and James A. Noon

Edward C. Jaegerman for Richard J. McDermott

BEFORE: Irving Schiller, Administrative Law Judge

These proceedings were instituted by an order of the Securities and Exchange Commission ("Commission"), dated October 30, 1973 ("Order"), pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether, as alleged by the Division of Enforcement ("Division"), A. J. White & Co. ("registrant") wilfully violated and respondents Allan J. White ("White"), James A. Noon ("Noon") and Richard J. McDermott ("McDermott") (sometimes hereinafter referred to collectively as individual respondents) wilfully aided and abetted violations of specified provisions of the Securities Act of 1933 ("Securities Act") and of the Exchange Act and rules thereunder, and whether remedial action is appropriate in the public interest pursuant to the aforementioned provisions of the Exchange Act.

The Order alleges in substance that registrant wilfully violated and the three individual respondents wilfully aided and abetted violations of the following Sections of the Exchange Act and rules thereunder, 17(a) and Rule 17a-3; 10(b) and Rule 10b-5; 7(c)(1) and 11(d)(1) and Sections 17(a) and 5(b) of the Securities Act. The foregoing charges relate to alleged violations committed during the period from about January 20, 1971 to January 26, 1971, during which period registrant acted as underwriter in connection with a public offering of securities by Develco Inc. ("Develco"). The Order also alleges that White and Noon pleaded guilty in the United States District Court for the District of Rhode Island to a charge of violating Section 17(a) of the Exchange Act and Rule 17(a)(3) (17 C.F.R. 240.17a-3). The Order states that each guilty plea was "in connection with the offer and sale

of the common stock of Develco Inc."[1] The Order also notes that in August 1966 the Commission found Noon to have wilfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in the sale of Roto-American Corporation common stock. Noon was suspended from association with any broker-dealer for a period of one year.

At the commencement of the hearing the Order was amended to allege that McDermott was an officer of registrant from September 1970 to May 1971. The amendment further alleges that McDermott consented, without admitting or denying the allegations of a complaint filed by the Commission in the United States District Court, District of Massachusetts, to an injunction against further violations of Sections 5 and 17 of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Securities and Exchange Commission v. Synergistics Inc., et al., Civil Action No. 71-1586-J. (D.C. Mass 1971).[2]

After appropriate notice hearings were held before the undersigned at which all respondents were represented by counsel. However, after four days of hearing Noon failed to attend on the fifth day and thereafter claiming he was "physically and psychologically" unable to continue to be present and he could not "afford any more time taken from work."[3]

1/ Noon was sentenced to one year imprisonment execution of which was suspended and he was placed on probation for one year. White was also sentenced to one year imprisonment and the record discloses that an original two year probation was reduced to one year. Following the closing of the record in these proceedings and the filing of briefs counsel for White advised that he has filed a motion to vacate White's guilty plea.

2/ The final judgment relating to McDermott was dated September 17, 1971.

3/ The record discloses that Noon discharged his attorney at that time. However, several days later Noon submitted a letter requesting leave to (continued)

Noon did not testify orally but sought to establish his defense by means of his own affidavit. Objections by the Division to the receipt in evidence of the affidavit were sustanined and by order dated May 6, 1974 the Commission ruled that the undersigned did not commit reversible error in refusing to receive the said affidavit in evidence. Proposed findings of fact and conclusions of law and briefs were filed by the Division, registrant, White and McDermott. No such findings or brief were filed on behalf of Noon.

The following findings and conclusions are based upon the preponderance of the evidence, as determined from the record, the documents and exhibits therein and upon observation of the witnesses.

The Respondents

Registrant, a Rhode Island corporation, organized in May 1964 has been registered with the Commission pursuant to Section 15(b) of the Exchange Act since 1964. During the period from approximately October 1970 through June 1971 registrant employed seventeen persons at leas ten of whom were registered representatives. It maintained its principal place of business in Providence, Rhode Island and had branch offices in Newton, Massachusetts and Meridan, Connecticut. Registrant was a member of the National Association of Securities Dealers ("NASD")[4/], the Boston Stock Exchange, National Stock Exchange and was an associate member of the Baltimore-Washington Stock Exchange. Registrant engaged

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3/ (continued)
permit his counsel to "generally protect his interest in this matter for the remainder of the hearing." Counsel stated on the record he would contine to represent Noon.

4/ The record discloses that in August 1973 registrant tendered its resignation to the NASD.

in retail sales of listed and unlisted securities, acted as principal underwriter and participated in underwritings of securities.

White was president and a director of registrant since its inception. He was primarily responsible for all aspects of registrant's operations and acted as the trader for the firm. All employees were under his supervision. White testified he had an accounting background and was familiar with the various requirements with respect to the proper accounting procedures necessary for maintenance of books and records of broker-dealers.

Noon entered the securities business in 1965. He became associated with registrant in 1969. From some time in 1970 until September 1971 when he left registrant Noon managed two or three underwritings under the general supervision of White. He became vice-president and a shareholder of registrant in February 1971.

McDermott entered the securities business in 1961 and was manager of a brokerage firm until approximately February 1963. From August 1963 to about September 1968 he was employed as a registered representative at four different brokerage firms, was a financial consultant for two years thereafter and became associated with registrant in September 1970. When registrant established a branch office in Newton, Massachusetts, McDermott was manager of the office and in daily communication with and reported directly to White. In February 1971 he was made vice-president and became a shareholder of registrant He left registrant in May 1971.

Respondents' Activities in Connection with the Develco Offering

All of the alleged violations with which registrant is charged and the aiding and abetting of such violations with which White, Noon and McDermott are charged arise out of the activities of the individual respondents during the period registrant acted as underwriter with respect to the public offering of the common stock of Develco. The activities referred to took place within a period of about a week preceding the date the Develco offering was to be completed. A perusal of the events which occurred during this comparatively short period of time is essential to an understanding of the manner in which the violations were committed and the part the individual respondents played therein.

Develco was incorporated under the laws of Nevada in 1969 to engage in all phases of the real estate development business. In early 1970 Develco was primarily engaged in rehabilitating low income housing in Woonsocket, Rhode Island. In late 1969 or early 1970 the three principals of Develco, William S. Dogan ("Dogan"), president, Robert H. Branchaud ("Branchaud") chairman of the board and treasurer, and Robert C. Cournoyer ("Cournoyer") vice-president approached White and reguested him to obtain financing for the company. White suggested they first raise additional capital. They returned three months later, told White additional funds had been obtained and stated they wanted public financing.[5/] In May 1970 Develco filed a registration with the Commission

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5/ The record discloses that White referred the principals of Develco to his so-called SEC attorney who was retained to prepare the necessary documents for filing a registration statement with the Commission.

relating to a public offering of 110,000 shares of its .01 par value common stock at $3.50 per share.[6] The prospectus which was a part of the registration statement stated on its facing page that registrant, as underwriter, agreed to offer the Develco stock on a "best efforts 65,000 shares or none basis" and that this "means that if 65,000 shares offered hereby are not sold within 60 business days . . . no shares will be sold and all funds collected from subscribers will be promptly refunded to them . . ." The underwriting commissions and additional compensation to be paid to the registrant were also set forth in the prospectus.[7]

The record discloses that the offering commenced on October 28, 1970. Under the terms of the public offering the minimum 65,000 shares of Develco stock had to be sold by January 25, 1971. Between the period October 28, 1970 and approximately January 18 or 20, 1971 registrant sold approximately 32,000 shares of Develco. During this same period White discussed the progress of the offering on several occasions with Noon and McDermott at meetings held at registrant's main office, at the Newton branch office, and at other places. Toward the middle of January White, as his testimony reveals, was aware of the fact that "a dilemma had begun to set in" and he told Noon and

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6/ File No. 2-37328.

7/ The underwriting agreement provided that registrant was to receive a commission of $.50 per share and additional compensation in the form of five year warrants at $.01 per warrant to purchase at $3.85 per share up to 11,000 shares; a fee of $2,500 payable to registrant as financial consultant and other concessions such as a six-year right to designate a member of the Board of Directors, a two-year preferential right for future public financing, indemnification and if the offering was successful, registrant would be retained as financial consultant for one year at a fee of $2,500.

McDermott he feared that the offering might not be completed January 25, 1971. On or about January 18, 1971 when it became obvious to White that the offering was sticky, he determined to meet with the principals of Develco for the ostensible purpose of discussing the possiblity of aborting the offering. The meeting, attended by the three Develco principals, White and Noon took place at registrant's office on either January 18 or 20, 1971.

What transpired at this meeting furnishes the key as to the origins of the violations since it evidences the scheme which was devised to give the appearance that on the final offering date bona fide sales were made to complete the offering. White testified he informed Dogan, Branchaud and Cournoyer that the underwriting was $90,000 short of completion and that "it looked like it was going to be a very difficult amount to attain and that it might be necessary to abort the issue." However, Dogan, Branchaud and Cournoyer all testified that White told them the offering was short only $20,000 and asked them if they knew anyone who would be interested in buying Develco stock. When they responded in the negative stating that anyone they thought might want to buy Develco stock had by that time already bought it, they were asked by either Noon or White if they knew anyone who wanted to buy the stock but did not have cash readily available. To this suggestion they said "there were several people of this nature" and stated they believed that two employees of Develco who "would have liked to have bought the stock if they had cash readily available."

It was then suggested by either Noon or White that if arrangements could be made with the Industrial Nationa Bank of Rhode Island ("Industrial Bank") for the Develco principals to borrow the money from the bank they could in turn make such funds available to the two employees. It was explained that such plan would make up the $20,000 deficit and close out the issue. Obviously anxious to obtain the proceeds of the offering the company officials accepted the suggestion. Noon thereupon left the meeting stating he would call the bank to check on the credit of the three Develco principals. He returned and stated that Branchaud and Cournoyer could each borrow $9,000 from the bank but that Dogan could not. 8/

The record supports the finding that during the ensuing conversation it was clearly understood by those present that as a result of the telephone call by Noon arrangements had been made for the bank to loan Branchaud and Cournoyer $9,000 each, that the proceeds of such loans would be made available to the two Develco employees for the purchase of Develco stock with the borrowed funds and that when the bank notes became due sufficient stock would be sold by the employees to repay the loans. Noon told the three principals to go to the East Providence branch of the bank and see Michael Glover ("Glover"). 9/ Following Noon's instructions the three Develco principals went to Glover's office where according to their testimony everything was "all set". Glover handed Branchaud and Cournoyer loan applications already

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8/ Cournoyer testified that when Noon returned to the meeting and stated that Branchaud and Cournoyer could borrow money from the bank he also stated that Dougan had too many outstanding loans and could not borrow any money.

9/ When the Develco principals suggested they go to the Woonsocket branch of the bank where they were known, Noon told them it would be "easier" if they went to see Mike Glover.

prepared and told them to simply fill them out. Neither Branchaud nor Cournoyer knew what to insert in the space requesting information as to the purpose of the loan. When they sought Glover's advice they were told to write "personal loan." They then returned to the Develco office, spoke with two of their employees Lillian Wante ("Wante") and Roger Brissette ("Brissette") and asked them if they would buy stock in Develco if money were loaned to them. When the employees agreed Dogan telephone White and gave him the names of Wante and Brissette as the persons who would be the purchasers of the Develco stock. Wante and Brissette both testified they were approached by Dogan and Branchaud who offered to loan them money if they would buy Develco stock. They both consented and within a day or two were given cashier's checks endorsed by Branchaud and Cournoyer which they used to purchase bank checks payable to A. J. White. They gave the bank checks to their employers to pay for the Develco stock. They further testified they understood when money was made available to purchase the stock that Branchaud and Cournoyer had borrowed the money and that when the latter's notes became due the stock would be sold. As noted below this is exactly what happened.

It is clear from the record that when White informed the Develco principals at the January 1971 meeting that only about $20,000 was necessary to complete the offering he knew or had reason to believe that in addition to the 5,000 shares involved in the Wante and Brissette transactions, arrangements had been made for the sale of the remaining 28,000 shares necessary to complete the minimum 65,000 shares. Support for such finding is based upon two inescapable facts. First, White's

own testimony that though he called the January meeting with the Develco principals ostensibly to discuss aborting the Develco offering, he determined not to do so after the arrangements had been made as described above for the sale of about $20,000 of Develco stock to Wante and Brisette. Second, Develco's president Dogan testified after the offering commenced in October 1970 he was periodically informed of the amounts of money deposited in the Develco escrow account for the sale of the stock and that shortly before the January meeting he was aware that about $100,000 was still needed to complete the offering. His further unrefuted testimony is that he accepted the $20,000 figure at the meeting when White and Noon told the three principals at the January meeting that "their investors would come in at the last minute, because they were sophisticated investors and that they would be investing their money just prior to the final closing." Dogan's testimony is credited.[10/] The documentary evidence supports his testimony since it clearly demonstrates that slightly in excess of 50% of the minimum 65,000 Develco shares were recorded on registrant's books as having been purchased on the final date of the offering.

The record reflects the manner in which this was accomplished. Prior to May 1970, the date the Develco registration statement was filed with the Commission, Noon and White informed Glover that registrant would be the underwriter of the Develco stock. Thereafter Noon discussed

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10/ Since White did not abort the offering his testimony, in light of all the circumstances, that he informed the Develco principals that the offering was $90,000 short can not be credited. The testimony of the Develco principals that they were told the offering needed only $20,000 to be completed appears more logical and is accepted.

with Glover the fact that there was to be a minimum amount of shares that had to be sold and the possibility that the Industrial Bank could act as escrow agent.[11/] From time to time after the registration statement became effective Noon discussed the progress of the offering with Glover. Prior to the date when the minimum 65,000 shares had to be sold Noon apparently realizing that the minimum offering might not be sold within the specified period, met with Glover to discuss whether an arrangement could be made to borrow funds from the bank which could be used to purchase the Develco stock. Such an arrangement was, in fact, made between Noon and Glover, it being understood between them that ten percent of the amount of the loans, after deducting the interest, would be made available of which five percent would go to the borrower, to wit, the person who was presumably making the loan, the other five percent would be split between Noon and Glover.

The record clearly shows and the documentary evidence supports the finding that under the arrangement between Noon and Glover it was explicitly understood that the persons who were to borrow the money from the bank would not receive the proceeds of such loans nor purchase the stock but that the proceeds of the loans would be made available for the purchase of Develco stock by others.[12/] Glover also

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11/ The Develco registration statement filed May 7, 1970 contains a copy of the underwriting agreement in which the Bank is named escrow agent and a copy of the Escrow Agreement. The preliminary prospectus filed as part of the statement reflects that the Bank was to maintain an escrow account (Registration Statement #2-37328; Exhibits 1(a) and 1(c)).

12/ Glover testified as to the foregoing arrangement and his testimony is unrefuted. He also testified that on other occasions he had followed a similar practice of arranging for loans by persons who never received the proceeds but which funds were utilized to purchase stock through registrant.

understood the persons who were presumably borrowing the money would not be required to pay off the loan but that the Develco stock would be sold and the proceeds used to repay the loans.

Thus, in essence, the plan to finance the purchase of the Develco stock as envisioned by Noon and Glover had four operational stages. First, Glover would furnish the names of the individuals who would be utilized to borrow the money, second the names of other persons would be furnished by Noon which persons would appear as purchasers of the Develco stock payment for which would be made with borrowed funds, third the Develco stock so purchased would be sold at or prior to time the original borrower's notes became due and fourth the borrower would get five percent of the loans and Noon and Glover would split five percent. In accordance with the foregoing understanding Glover proceeded to carry out the initial phase of the plan by arranging bank loans in varying amounts to ten persons, some of whose names were furnished by Noon, the others by Glover. Most or all of these persons were members of an organization known as the Warwick Jaycees ("Jaycees") of which Glover was president and Noon a member. The net amount of the loans totalled approximately $70,000.[13/]

To carry out the next phase of the plan Noon furnished Glover with a list of six names which Glover used as ostensible purchasers of

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13/ The gross amount of the loans was $71,730 from which the interest was first deducted leaving approximately $70,000 as the net amount available which was to be utilized ultimately in connection with the purchase of Develco stock. Five of such loans were made on January 22 and the remaining five on January 25, 1971.

six Cashier's Checks from the Industrial Bank. Each of the said checks was made payable to "A.J. White & Co., Develco Escrow Account;" each was dated January 25, 1971, each set forth the name of the purported purchaser of the check and all the checks aggregating the $70,000, which were the funds borrowed by the ten persons noted above were in fact, deposited to the Develco escrow account on January 25, 1971 the date by which the minimum shares were to be sold. On the aforesaid date the second phase of the financing plan noted above was completed. The record discloses that these six persons whose names appeared on the cashier's checks also appeared on the books and records of registrant as purchasers of Develco stock. 14/ The record further supports the finding that payment for the shares of Develco stock by six persons was not made from their personal funds but was made from the fund of $70,000 created by the loans from the Industrial Bank to the ten persons mentioned earlier.

The following Table I graphically depicts the names recorded in registrant's books and records as purported purchasers of Develco stock on January 25, 1971, the last day of the Develco offering and the number of shares each supposedly purchased. The Table also reflects the sources of the funds used to pay for the said stock.

14/ The undisputed evidence in the record discloses than none of the six persons appeared at the bank to actually purchase the cashier's checks on which his name appeared.

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Table I

Purported Purchasers	Date of Purchase	No. of Shares	Cost of Purchase	Source of Funds
Flynn, Julianne	1-25-71	3,400	$ 11,900.00	Industrial Nat'l. Bank (Arranged by Noon & Glover)
Levin, Barry	1-25-71	4,000	14,000.00	Industrial Nat'l. Bank (Arranged by Noon & Glover)
Laura, James	1-25-71	2,500	8,750.00	Industrial Nat'l. Bank (Arranged by Noon & Glover)
Rees, Daniel	1-25-71	3,800	13,300.00	Industrial Nat'l. Bank (Arranged by Noon & Glover)
Lecht, Daniel	1-25-71	4,000	14,000.00	Industrial Nat'l. Bank (Arranged by Noon & Glover)
Kane, John	1-25-71	2,300	8,050.00	Industrial Nat'l. Bank (Arranged by Noon & Glover)
Wante, Lillian	1-25-71	2,500	8,750.00	Branchaud (Develco Principal)
Brissette, Roger	1-25-71	2,500	8,750.00	Cournoyer (Develco Principal)
Miga, Charles	1-25-71	2,500	8,750.00	Melville
DuMont, Carol	1-25-71	3,000	10,500.00	Benjamin White (A.J. White's father)
Kaplan, Jerome	1-25-71	2,500	8,750.00	Kaplan loan arranged James A. Noon
TOTALS:		33,000	$115,500.00	

*/ Source - Division's Exh. 29.

The undisputed evidence in the record supports the finding that of the six names supplied by Noon three were furnished by McDermott, two were furnished by White and one by Noon himself. White testified that on frequent occasions prior to the cut-off date he discussed the progress of the offering with Noon and McDermott and both were aware that the offering might not be sold by January 25. Although White asserted that within a day or two after the January 20 meeting noted above he was informed by Noon that Noon had arranged a deal with the Jaycees and that they were making $70,000 available for the purchase of the shares necessary to complete the offering, his testimony as to the time he was told of the arrangements with the Jaycees is highly suspect. Since he admittedly came to the January 20 meeting to abort the offering because it was $90,000 short he concededly did not do so after he was satisfied that arrangements had been made for the purchase of about $20,000 of the Develco stock. It is thus logical to believe that on January 20 he knew or certainly had reason to believe that $70,000 would be forthcoming from the Jaycees and his primary concern at the meeting with the Develco principals was raising the remaining $20,000. When it was apparent at the January 20 meeting that the Develco principals would be able to borrow the approximately $20,000 White determined not to abort the offering but to proceed with the arrangements which had been made.

White testified he was fearful that an investment of such a large amount as $70,000 in a speculative security by the Warwick Jaycees would not be in accordance with his understanding of the "know your customer rule" of the National Association of Securities Dealers (NASD) and to avoid any problems with the NASD or any other regulatory body investigating the offering he determined it would look better if some of registrant's customers could be utilized as purchasers. He told Noon and McDermott of his concern stating it would be best if the three of them came up with the names of customers who could be used as purchasers.

As a result of these discussions it is undisputed that McDermott furnished the names of Flynn, who was his mother-in-law, Levin and Laura, both of whom were customers of his. The name Rees was furnished by Noon and the names of Lecht and Kane were supplied by White. As a result each of the said persons appeared on registrant's books and records as purchasers of Develco stock on the cut off date of January 25. The record clearly evidences the finding that none of them paid for the stock from their personal funds but that the $70,000, which was made available throught the loans from the Industrial Bank by members of the Jaycees, was the source of the funds used to pay for their stock.

Of the remaining three persons on Table I supra who appear on registrant's books and records as purchasers on January 25 and not mentioned above, Miga, DuMont and Kaplan were also persons who did not pay for the Develco stock with their personal funds.

The record discloses that a person named Melville borrowed $5,750 from the Industrial Bank and that such funds together with $3,000 in cash were used to pay for the stock placed in Miga's name.[15/]

With respect to DuMont the record discloses that $10,000 of the $10,5000 used as funds for payment for the stock placed in her name was loaned to her by Benjamin White, who was White's father.[16/]

With respect to Kaplan, the last name on Table I supra, the record discloses that Noon approached Kaplan to purchase Develco stock and when Kaplan stated he did not have sufficient funds Noon informed him he could go to the Industrial Bank and obtain a loan. Kaplan borrowed $8,750 from the said bank and used the proceeds to purchase Develco stock.

Finally it is clear from White's own testimony that although he, Noon and McDermott furnished the six names noted above which would be used as purchasers of the Develco stock so that the offering could be completed on January 25, they personally did not give orders to purchase the Develco stock but White personally prepared the order tickets for the purchase of the stock for all six persons.

It was noted earlier that when Noon and Glover discussed the arrangements to borrow money from the Bank it was understood that the borrowers would not be required to repay the loans but that the Develco stock would be sold and the proceeds used to repay the said loans. This phase of the financing plan between Noon and Glover was

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15/ Table I supra.

16/ It appears from the record that Carol DuMont was Benjamin White's secretary and that Benjamin White loaned her $10,000 for her purchase. She apparently used $500 of her own funds.

carried out in accordance with the foregoing understanding and with equal precision. The record discloses and the following Table II graphically depicts that commencing on February 4, 1971, ten days after the alleged completion of the Develco offering, sales were effected by registrant during the periods indicated, on behalf of the purported purchasers. 17/

17/ It is interesting to note that the first sales were made by White on behalf of his customer Lecht.

Table II */

1971 Month Sold	Sold for Account of	No. Shares Sold	
February	Rees	1,400	
February (4)	Lecht	4,000	(total purchased)
February	Kane	2,300	(total purchased)
February	Miga	900	
February	DuMont	1,000	
February	Kaplan	400	
Total		10,000	
March	Flynn	1,000	
March	Wante	200	
March	DuMont	2,000	(balance of purchases)
March	Kaplan	1,600	
Total		4,800	
April	Flynn	2,400	(balance of purchases)
April	Levin	4,000	(total purchased)
April	Laura	2,500	(total purchased)
April	Rees	1,000	
April	Wante	100	
April	Brissette	100	
April	Miga	1,600	(balance of purchases)
Total		11,700	
May	Kaplan	500	(balance of purchases)
July - October	Rees	1,400	(balance of purchases)
	Wante	1,200	
	Brissette	800	
Total		3,400	

*/ Source - Division's Exh. 29.

In connection with the foregoing sales it is undisputed that after January 25, 1971 registrant began making a market in Develco shares. Of the 33,000 shares purportedly purchased by the eleven persons whose names appear in Table II supra, a total of 26,500 shares, or 80% of the shares ostensibly purchased on January 25, 1971 were sold on behalf of all persons by April 23, 1971 or within a period of approximately 64 business days.

The testimony of seven of the alleged purchasers lends credence to the finding that White and Noon had knowledge of and participated in the plan which had been devised to give the appearance that the Develco offering had been completed on January 25 and that McDermott by furnishing the names of three customers also participated in the said plan. In addition the fact that none of the persons used their personal funds to pay for the stock placed in their names, the evidence shows that none of them personally placed orders to purchase or sell the Develco stock. The record supports the finding that the purported purchasers had good reason to believe that if they permitted their names to be used as purchasers they would be held harmless. Some of them admitted they were told they could anticipate profit when the shares were sold. A brief summary of the testimony of five of the so-called purchasers of the Develco stock on January 25, 1971 [18/] will not only serve to clearly demonstrate the manner in which the offering was completed but also illustrate the manner in which the violations were committed.

18/ It should be noted in this connection that the manner in which two additional alleged purchasers viz Wante and Brissette acquired their shares has been detailed earlier.

Kane, who was a customer of White and prepared his personal tax returns testified he was asked by White if he had several thousand dollars to buy a new issue of stock. When Kane said he did not have that kind of money to put into stock White said "Supposing there was available funds for you," to which Kane replied he could not "afford to lose anything . . . . I still didn't want to get into it." White told him not to worry about anything, telling him "I think the stock is going to go and we'll buy it and sell it." This is precisely what happened. Following the conversation 2,300 shares of Develco stock were purchased on January 25, 1971 and placed in Kane's name. Kane himself never placed an order to buy, never paid for the shares nor ever ascertained the source of the funds used for such purpose. White carried out his promise to sell the Develco stock which he had placed in Kane's name. The documentary evidence discloses that sales of Kane's shares commenced on February 16, 1971, thirteen business days after they were purchased. All of the 2,300 were sold by February 24, 1971.

The significant clue to the existence of the entire plan devised to give the appearance that the Develco offering was bona fide completed on January 25, 1971 and the reason the so-called purchasers permitted their names to be used as such is provided by Kane's testimony in which he admitted that after the Develco stock in his name was sold White brought him a check for "9,611.77, representing the proceeds of sale of his stock, which Kane endorsed and returned to White. At the same time White gave him $1,500 and some odd dollars" in $100 bills. Kane testified the cash represented the difference between the purchase price and the sale price of the Develco stock.

Reese, who was a customer of Noon testified that in January 1971 Noon said "some words to the effect that money would be placed in my account for the purchase of Develco." Though Reese could not recall whether he agreed to go along with Noon's suggestion he testified that Noon knew he had no ability or intention of paying. Reese stated candidly he never would have gone into the Develco transaction if he knew he had to pay for the stock. Reese never placed an order to buy the stock, had no recollection of the number of shares purchased in his account nor did he personally pay for any Develco stock. Reese never knew and Noon never gave him any reason why Develco stock was placed in his account. Reese did not place any order to sell the Develco stock. After the stock in his account was sold, Noon gave Reese $4,700 which he deposited in his personal account and kept. Reese further testified that the remaining checks he "signed and gave back to Mr. Noon". The record supports the finding that for lending his name to be used as an obstensible purchaser of the Develco stock Noon paid Reese $4,700.

Miga testified he received a call from Noon asking if he would like to buy stock. Miga, who was then earning about $12,000 per year, told Noon he had no cash to pay for any stock. Noon asked him if some stock could be placed in his account. He later found out that about $8,000 worth of stock was placed in his name but he had no idea who paid for it. Noon later informed him the stock was being sold, presented him with two checks which he either endorsed and returned to Noon or cashed and gave the proceeds to Noon. The records discloses that two of registrant's checks drawn on its account at the State Street Bank and Trust Company totalling $15,059.20 payable to Miga were signed by White

as president and endorsed by Miga. Miga further testified he never directly ordered the Develco stock nor did he place any order for the shares to be sold.

Laura, whose name was given to White by McDermott to be used as a purchaser of the Develco stock, testified that in the latter part of December 1970 McDermott told him that a public offering of Develco stock was to be made and asked Laura if he would be interested in buying some of the stock. Laura told McDermott to send him a prospectus when it was ready at which time he would decide. Laura never received a prospectus and never asked to purchase the stock. Laura further testified and his testimony is unrefuted that he first learned he owned Develco stock in April 1971 when he received a confirmation of sale of the said stock. He promptly called his broker McDermott, told him he did not own any Develco stock and wanted to find out "what the story was". McDermott told him that he did not know but would get the information. About a week later McDermott called Laura and told him to come to his office. Laura went to McDermott's office where McDermott told him that he had checked into "that thing with Develco", and that Laura had been used as a nominee. He presented Laura with a check for $18,750 which he said White wanted him "to sign and take and give him back two checks, and he wants you to make them out in my name." When Laura asked for the reason McDermott told him that is the way White wants it done. Laura informed McDermott that he had never paid for the stock and asked who did. McDermott said White had paid for the stock. Laura complained that if he signed the checks as asked he "would wind up with a tax liability" and insisted that he retain a sufficient sum to pay the tax on the transaction.

Laura and McDermott finally agreed that Laura could keep 40% of the profit for taxes. Laura thereupon signed stock powers which McDermott gave him and gave McDermott two of his personal checks payable to McDermott one for $8,000 the other for $6,750 and retained $4,000 which he stated he used to pay his taxes.

The record discloses that the $8,000 check was cashed at the Industrial Bank. The evidence shows that the $6,750 check was deposited in McDermott's wife's bank account at the Newton Waltham Bank and Trust Company. There is no denial that McDermott received $6,750 from the proceeds of the sale of Laura's stock and the record contains no explanation as to the reason McDermott retained such funds.

Levin, an attorney, who is also in the retail furniture business, was another person whose name McDermott gave White to be used as a purchaser of Develco stock. He testified that McDermott called him in December 1970 and asked him if he was interested in buying Develco a new issue which registrant was bringing out. Levin said he was not interested. In the latter part of January McDermott called him again to ascertain his interest in buying Develco and was told by Levin he was still not interested. McDermott then told Levin that registrant was trying to close out an issue and asked if, he could put some shares in Levin's account "as a favor". Levin said "as a favor" he would "take a few shares". He specifically told McDermott that in accordance with his past custom the shares would have to be delivered against payment. Some time in the middle of February Levin told McDermott he never received any confirmation and asked McDermott if he had been given any shares. McDermott said he had been away and had not received notice of

anything but would check with registrant.

Some time in March McDermott informed Levin that he had spoken with registrant, that some shares had been placed in his account, that confirmations would be forthcoming and he "should not to worry about it". Levin again reminded McDermott that the shares purchased for him must be delivered against payment. Levin testified that on April 19, 1971 McDermott phoned him and said that shares had in fact, been placed in his account, that the shares had been sold, that registrant wanted to "clear the transaction" and that McDermott had some documents he was bringing to Levin's house that evening. Levin again told McDermott he never received any confirmation and asked how many shares were in his account. McDermott told him 4,000 shares. Believing the price of the Develco shares was $2.50 a share Levin drew a check for $10,000 and took it home with him.

When McDermott came to Levin's home he gave Levin the original copy of a buy confirmation, two original sell confirmations, a receipt, a copy of the Develco prospectus, some stock powers and a check for $30,000 drawn by registrant payable to Levin. The check represented the sale price of the Develco stock. When he asked McDermott what it was all about he was told that since "the securities had been delivered and completed, he believed it was a nominee transaction for someone." McDermott further stated that registrant had asked him to deliver the check and have the stock powers signed in order to clear the matter. Levin told McDermott that if he signed all the papers he would end up probably having to pay taxes on a profit which was not his and, because of the strangeness of the transaction he wanted proper documentation

that the trade was not his. McDermott promised to obtain the documentation Levin wanted. Levin then calculated the profit on the back of the receipt which McDermott had given him and determined the profit to be $6,400.[19/] Upon the assurances by McDermott that he would receive appropriate documentation that the transaction was not his, Levin signed all the stock powers and gave them to McDermott with his check for $10,000 which he had previously prepared and an additional check for $13,600. McDermott requested that the checks be made payable to him explaining that "his employer wanted it that way." About a week or two later Levin made inquiry of McDermott concerning the documentation promised him and was told that his request had been relayed to White. On or about May 22 Levin received a monthly statement from registrant indicating that $14,000 had been credited to his account in January which had been used to pay for the Develco stock purchased in his name. Levin called McDermott and said he believed the entire matter was irregular. McDermott again promised to check into the matter. On June 2nd or 3rd McDermott informed Levin he had talked to somebody in the Providence office and everything was "okay" and that Levin could "keep it, everything's all right". Levin told McDermott that the monthly statement did not reflect that the Develco transactions was not his and since he had not been furnished with proper documentation he would return the $6,400 he had held back for taxes. On June 4, 1971 Levin wrote White stating that since the Develco transaction "was done without my knowledge of the facts, and without my authority, I am enclosing my check in the amount of $6,400 which represents the balance

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19/ Levin's calculated the profit by substracting the purchase price of $14,000 from the $30,000 representing the proceeds of the sale of the Develco stock and multiplied the difference by 40%.

of the of the funds delivered to me." The evidence amply supports the finding that Levin had been used as a nominee account.

The record supports the finding that McDermott participated in the plan to the extent of providing registrant with names to be used as purported purchasers of Develco stock and the undeniable documentary evidence supports the finding that in at least one instance he received and retained $6,750 as a payoff of his participation.

It is abundantly evident from the record that Flynn, Levin, Laura, Nees, Lecht and Kane were clearly nominee accounts used to mask the fact that the funds used to purchase their stock were furnished by members of the so-called Warwick Jaycees through loans made to them by the Industrial Bank. Similarly, the Wante and Brissette accounts were nominee accounts to mask the fact that funds used to purchase their Develco stock was also furnished by the Industrial Bank by means of loans to two of the Develco principals who in turn made such funds available to Wante and Brissette. The record further established that the source of the funds for purchase of Develco stock by Miga and Kaplan was the Industrial Bank and since there is no evidence either of them placed orders to buy or sell the Develco stock their accounts are also deemed nominee accounts. Since the primary source of the funds for the DuMont account was White's father and there is no evidence she placed orders to buy or sell the Develco stock her account is also deemed a nominee account.

It has already been noted that McDermott received $6,750 for his

participation in the plan to furnish names as purported purchasers of Develco stock. The record discloses and indeed White admitted under oath that several months after the underwriting he received $5,000 from the Warwick Jaycees. This was accomplished by applying the $5,000 in reduction of a loan he had outstanding at the Industrial Bank. In addition White also admitted th received an additional $1,000 in cash from Noon. The record also reflects that Noon received additional compensation for his participation in the plan and that his compensation was either in the form of reduction of a loan at the Industrial Bank or cash. For example Miga testified that Noon brought him two checks representing the proceeds of sale of the Develco stock in his name which he either endorsed and returned to Noon or cashed and gave Noon the cash. The record does not disclose what Noon did with the checks, if he received them, or the cash.[20/]

Alleged Violations - Section 5(b)

As noted above the Order charges that registrant wilfully violated and White, Noon and McDermott wilfully aided and abetted the violation of Section 5(b) of the Securities Act. Subsection (2) of that Section, in essence, makes it unlaw for any person, directly or indirectly to cause to be carried through the mails or interstate commerce "any such security . . . unless accompanied or preceded by a prospectus which meets the requirements of Subsection (a) of Section 10". The

20/ In this connection it has been noted earlier that Noon had an understanding with Glover the branch manager of the Industrial Bank at East Providence that the Bank would act as escrow agent for the Develco underwriting and that the bank would loan money to be used to purchase the Develco stock. Under the arrangement 10% of the amount loaned was to be divided between the borrowers who were to receive 5% and Glover and Noon split the remaining 5%. Glover testified that some of the proceeds of the sales were applied to Noon's outstanding loan at the Bank.

latter section requires the prospectus to contain the information contained in the registration statement. It is elemental that a Section 10 prospectus must accurately reflect among other things not only the information relating to the issuer but the term of the underwriting. The Develco prospectus, which the record shows was mailed to purchasers, stated that the registrant, as the underwriter, agreed to offer the Develco shares on a "best efforts 65,000 shares or none" basis and that if the minimum shares were not sold during the period specified "no shares will be sold and all funds collected from subscribers will be promptly refunded to them without interest." Additionally the prospectus disclosed that the underwriting commission to be received by registrant if the minimum 65,000 shares were sold would be $32,000.[21/]

The record clearly demonstrates that when the registration statement became effective the offering was not on a "best efforts 65,000 shares or none basis." Between October 28, 1970, the date of the Commission order declaring the Develco registration statement effective and January 18 or 20, 1971 registrant had sold only 32,000 shares, or less than half the minimum shares required to be sold. As a result of the plan concocted by White and Noon and aided by McDermott it was made to appear that 33,000 shares were sold on January 25, 1971 the last day of the offering. The details as to the manner in which this was accomplished are detailed above and need not be repeated here. Suffice it to say that the sales on January 25, 1971 made by means of the Develco prospectus

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21/ The prospectus also disclosed that the underwriter was to receive warrants, a consultant fee and other concessions (see footnote 7 supra).

dated October 28, 1970 were not a bona fide sales and the offering was not completed on such date.

The record discloses that the so-called purchasers on January 25, 1971 themselves never placed any orders to buy or sell the Develco stock, nor did they believe they would be required to pay for the shares placed in their names. This conclusion is substantiated by the evidence which shows that commencing within one week after January 25, 1971 White sold all of one of his customers shares and within three months sold 26,500 shares on behalf of all eleven persons. This amounted to 80% of the number of shares placed in the names of such persons.

The eleven persons who appear as purchasers on January 25, 1971 were nothing more than nominee accounts, six of which had a total of $70,000 obtained from loans made by the Warwick Jaycees applied in payment for stock placed in their names. The funds for payment of shares of four other nominee accounts also originated as loans from the same bank. The source of the eleventh purported purchaser was White's father. These material facts relating to plans for the alleged sales of in excess of half of the minimum shares of Develco stock were not disclosed in the prospectus although known to registrant White and Noon. Although there is no clear evidence McDermott knew of the bank borrowings the record discloses that he was aware that the Develco issue had become "sticky" and at White's request furnished him with the names of customers who could be used to complete the offering.

It is concluded that to the extent that the prospectus used in the public offering of Develco stock failed to disclose that the persons whose names registrant used as ostensible purchasers of the Develco stock were nominees and that the funds used to pay for their shares came from loans made at the Industrial Bank as a result of arrangements between Noon and the said Bank, such prospectus failed to meet the requirements of Section 10(a) of the Securities Act.

Moreover, the statement in the said prospectus that the offering was on a "best efforts 65,000 shares or none" did not accurately reflect the basis upon which the offering was completed. The more accurate description should have been that the offering was on a best efforts basis. Since the purported purchasers on January 25, 1971 were nominees it is evident that a bona fide offering had not been completed and that the funds theretofore collected should, under the terms of the underwriting agreement, have been returned to the persons from whom they had been received. None of such funds were returned. The prospectus, to the extent it contained the phrase "best efforts 65,000 shares or none", failed to meet the requirements of Section 10(a) since it is evident that at the time the registration statement became effective the facts relating to best efforts basis of the offering were known to registrant, White and Noon and to a limited extent McDermott.[22/]

The prospectus was also deficient in that it failed to disclose accurately the compensation which White, Noon and McDermott received

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22/ The limited extent of McDermott's knowledge refers to his furnishing of the three names to complete the Develco offering.

for their efforts in connection with completion of the offering. The evidence discloses that shortly prior to the completion date of the Develco underwriting Noon had made arrangements with Glover for the borrowing of $70,000 needed to complete the offering and that of the gross amount borrowed a fund of 10% was created of which the alleged borrowers were to receive 5% and the remaining 5% was to be divided between Glover and Noon. Although Glover was unable to state the exact amount of money he received he testified he did receive money and that Noon's money was either applied in reduction of his loan or the money was used to purchase other securities.

White testified several months after the completion of the offering he received $5,000 from the Warwick Jaycees which was applied to reduce his bank loan at the Industrial Bank and $1,000 in cash. Glover also testified that White was aware of the arrangements between himself and Noon. The evidence also shows that McDermott received $6,750 for his participation in the plan.

It is concluded that the money received by White, Noon and McDermott constituted additional compensation not disclosed in the prospectus. There is no evidence that the Develco registration statement was ever amended to reflect the above-mentioned additional compensation. The failure to disclose the compensation received by White, Noon and McDermott in the Develco prospectus constituted another instance in which the prospectus failed to meet the requirements of Section 10(a) of the Securities Act. Since it has been found that the prospectus did not meet the

requirements of Section 10(a) of the Securities Act, it follows that registrant wilfully violated Section 5(b) of the said Act. The record also supports the finding that, White, Noon and McDermott wilfully aided and abetted registrant's violations.

Registrant and White urge that there is no proof that any "post offering profits of sales proceeds found their way into the pockets of respondents" and hence the prospectus was not misleading. The contention is specious. The record clearly evidences payoffs to White. Noon and McDermott for their participation in the plan carried out to give the appearance that Develco offering had been completed. They also urge that there is no proof that the statement "65,000 shares or none" was pertinent information "whose omission was necessary to the protection of the investing public." The argument is wholly without merit. Disclosure of the underwriting arrangements in one of the essential requirements of a registration statement and prospectus. The evidence shows that White and Noon knew of the arrangements with Glover concerning the loans and the manner in which the Develco offering was allegedly completed yet no attempt was made to disclose the facts accurately in the prospectus. An underwriter has a duty to the investing public to exercise a degree of care reasonable under the circumstances to assure substantial accuracy of representations made in the prospectus. Charles E. Bailey, et al., 35 S.E.C. 33, 41 (1953). Additionally an underwriter has "a special duty to ascertain and disclose the true facts not only at and during the initial offering but also in the period thereafter when it was conducting an active retail sales campaign." Heft, Hahn & Infante, Inc., 41 S.E.C. 379, 383 (1963). In the instant case

registrant had a duty to disclose accurately the manner in which the offering was completed. In this duty registrant failed. It was misleading to investors to have them believe their investment would be returned if 65,000 shares were not sold when, in fact, registrant had devised a scheme to arrange for a fraudulent loans and created nominee accounts to give the appearance that the offering had been completed so that investors would not have to be repaid their investment. The loans are characterized as fraudulent since the evidence shows the borrower never received the proceeds of the loans but rather they were made available to six persons unknown to the borrower and used to pay for stock by persons who never knew the source of the payment for the shares placed in their names.

Registrant and White also urge there is no substantial evidence to sustain a finding that registrant was wilfully deceptive. The argument is rejected. The evidence overwhelmingly demonstrates the deception by registrant as the underwriter in the offer, sale and delivery of the Develco stock under a prospectus which failed to meet the requirements of Section 10(a) of the Securities Act. Moreover, the Commission and the cours have consistently held that a finding of willfullness under Section 15(b) of the Exchange Act need not be based on a finding of intention to violate the law. It is sufficient that a person charged with the duty knows what he is doing. Tager v. SEC., 344 F.2d 5, 8, (C.A. 2, 1965).

McDermott in essence argues that the disclosure in the prospectus regarding the 65,000 shares or more basis was correct since a bona fide offering was made for the minimum number of shares and the funds were transmitted to the issuer. The argument relating to the bona fides of the offering is unacceptable since it is not supported by the record. The manner in which the nominee account were created to give the appearance that a bona fide public offering was completed negates any argument that a bona fide offering was, in fact, made. As to the transmission of the funds to the issuer the argument appears to have no relevance to the misleading disclosures in the prospectus as noted above. Apart from the fact that the Order does not charge that funds received by registrant, as underwriter, were not transmitted to the issuer, the delivery of funds to the issuer itself has no bearing on whether the representations in the prospectus were accurately stated or whether it omitted to state the arrangements made to complete the alleged public offerings or whether the underwriting commissions were accurately stated.

Violations of Record-Keeping Requirements

As noted earlier the Order charges that registrant wilfully violated and the individual named respondents wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17(a)-3 thereunder. The Order further specifies the particular books and records which it is alleged registrant falsified. Essentially the Division contends that all of registrant's books and records reflecting both the purported purchases of Develco stock by the eleven persons listed in Table I supra and the purported sales by such persons of the said stock were inaccurate since none of such persons furnished their own funds in payment of the said stock placed in their names nor did they personally enter orders to buy or sell the said stock. The evidence unequivocally supports the finding that the funds for payment of the Develco stock in the names of Flynn, Levin, Laura, Nees, Lecht and Kane came from loans made by other persons at the Industrial Bank totalling $70,000 and that the names of the aforesaid six persons were typed on six separate bank checks totalling the same amount and deposited in the Develco escrow account for the payment of shares placed in the above mentioned names. The evidence further shows that none of the six persons personally placed orders to purchase or sell the Develco stock. Thus order tickets purporting to reflect that these six persons purchased or sold Develco stock were to say the least inaccurate, if not falsified. The customer's ledger, cash and cash receipts and confirmations purporting to show the six

persons as purchasers and sellers were also inaccurate. It is clear from the evidence that the proceeds of sale of the Develco stock were not retained by these persons and registrant's records such as the disbursement account and the blotters purporting to reflect that they received the proceeds of sale were also inaccurate. 23/

Similarly the source of payment for the Develco stock in the names of Wante and Brisette was not accurately reflected on registrant's books. In these instances the record supports the finding that registrant's customer's ledger, cash and cash receipts, disbursement accounts, buy and sell order tickets 24/ and confirmations were inaccurate. The evidence further shows that the aforementioned records reflecting the transactions in the names of Miga, DuMont and Kaplan failed to accurately disclose the true facts and were inaccurate.

Registrant and White contend that to sustain a finding of violation of the record-keeping requirements it must be premised on a finding that the purchases and sales were a sham and that registrant's books and records "are ipso facto false" and conceal the fact that the Develco offering was not completed according to its terms. This is precisely the findings which have been made and which the record amply supports. The purchases and sales which registrant's books and records show as transactions by the persons in Table I supra were a sham and do conceal the manner in which the Develco offering was truly completed.

23/ White testified that although the confirmation of purchase and other records reflected delivery of the Develco stock to customers the shares to the six nominees referred to in the text were in fact actually delivered to White for his two customers, to Noon for his customers and to McDermott for his three customers.

24/ White testified he placed the orders to buy and sell after talking with Dogan, one of the Develco principals. Wante and Brisette who were recorded as the actual customers gave no orders to White.

Registrant and White concede that the only irregularity is the failure of the customers account cards to reflect any indication that the Develco stock certificates were delivered to customers which they characterize as an "immaterial bookkeeping oversight." All the concession demonstrates is registrant's and White's lack of understanding of the requirement to keep accurate books and records. It will be recalled that Levin testified he never received any confirmation of his alleged January 25, 1971 purchase or confirmation of his sales until they were brought to him by McDermott in April 1971.

A preponderance of the evidence supports the finding that registrant wilfully violated Section 17(a) and Rule 17a-3 thereunder and that White wilfully aided and abetted such violation. The record however does not clearly establish that Noon or McDermott aided or abetted registrant's violation. The evidence indicates that White exercised primary responsibility for registrant's operations including the keeping of his books and records. There is no proof that either Noon or mcDermott had any responsibility for or any involvement in the manner in which registrant's books and records were kept or maintained. While there is evidence that McDermott and Noon aided and abetted in the scheme to complete the offering on January 25, 1971 and that McDermott several months later at White's request brought documents to Levin which White wanted completed to "clear up the transaction," such

conduct is not tantamount to aiding and abetting registrant's violation of the record keeping requirements. Thus, for example there is no proof that McDermott or Noon prepared order tickets or confirmations or assisted in their preparation. Moreover, the evidence shows that although McDermott was in charge of registrant's branch office in Newton, Massachusetts the books and records of registrant's operations were maintained in the main office in Providence under White's supervision.

Violations of Sections 7 and 11 of the Exchange Act

The Order alleges that registrant wilfully violated Section 7(c)(1) of the Exchange Act and that the individual respondents wilfully aided and abetted such violations. In essence the pertinent provisions of that Section make it unlawful for any broker or dealer to extend credit or arrange for the extension of credit for any customer on any security in contravention of the rules and regulations which the Board of Governors of the Federal Reserve System ("Board") shall prescribe under subsections (a) and (b) of Section 7. The Order further alleges that registrant directly and indirectly extended and maintained credit and arranged for the maintenance of credit to and for customers on Develco stock in contravention of Sections 3 and 4 of Regulation T adopted by the Board pursuant to Section 7.

It should be noted at the outset that Regulation T adopted by the Board pursuant to Section 7 fixes a maximum loan value for registered securities which it changes from time to time. Under Section 3(b) of Regulation T applicable to general accounts, credit could not be extended on unlisted and non-exempt securities, Hooper and Company 35 S.E.C. 294, 302 (1958). There is no evidence in the record that Develco's securities

were listed on any exchange. Accordingly, registrant could not lend or indeed arrange for the extension of credit for a purchaser for any amount on Develco's unregistered stock. Sutro Bros. & Co. 41 S.E.C. 443, 446 (1963). In the instant case the question to be resolved is whether registrant, within the meaning of Regulation T arranged for the maintenance of credit for customers to purchase Develco stock.

The evidence shown that when White and Noon met with the principals of Develco and informed them that the offering was short of completion by about $20,000,either Noon or White suggested that loans could be arranged through the Industrial Bank which could be used to purchase Develco stock. In fact Noon left the meeting to telephone the said Bank to ascertain how much each of the three principals could borrow to be used to purchase the Develco stock. He returned to the meeting and informed the Develco principals that Branchaud and Cournoyer could borrow up to $10,000 each but that Dogan could not. He then informed the three principals to go to the aforesaid bank and see Glover who would take care of the matter. Loans were in fact made to Branchaud and Cournoyer who in turn made the money available to Wante and Brissette for the purchase of Develco stock.

This evidence alone supports the finding that registrant, a member of a national securities exchange, arranged for the extension and maintenance of credit for the purchase of Develco stock in contravention of Regulation T promulgated by the Board and that such arrangement was wilfull violation of Section 7(c)(1) of the Exchange Act. The evidence also establishes that White and Noon aided and abetted such violation.

Additionally, the evidence also shows that between January 20 and 25, 1971 Noon made arrangements with Glover for loans to be made by the Industrial Bank which were to be used and were, in fact, used to purchase the Develco stock by Flynn, Levin, Laura, Rees, Lecht and Kane. As a part of that arrangement it was also understood that the Develco stock would be sold to repay the loans. The evidence is clear, as demonstrated in Table II supra, that the said stock was sold and the proceeds of sales used to repay the said loans.

The manner in which the funds from loans were made available to Wante and Brisette to buy Develco stock and the loans in which Noon and Glover are a paradigm of "arranging" as that term is used in Section 7(c) of the Exchange Act. The record thus supports the finding that registrant arranged for the extension and maintenance of credit for the purchase of Develco stock in contravention of Regulation T promulgated by the Board and that such arrangement was in violation of Section 7(c)(1) of the Exchange Act. The evidence also establishes that White knew or must have known of Noon's arrangements and his activities in connection with completion of the underwriting as noted above mandates a finding he aided and abetted registrant's violation. Noon's aiding and abetting registrant's violation is overwhelmingly established.

Registrant and White question the Commission's jurisdiction to proceed on the basis of an alleged violation of Section 7(c) of the Exchange Act apparently relying on Remar v. Clayton Securities Corp. 81 F. Supp. 1014 (D. Mass. 1949) and Cooper v. Union Bank, 354 F. Supp. 669 (D. Calif. 1973). The argument is without merit and reliance upon

the cited cases is misplaced. The Courts have held that the enforcement of the regulation of the Board has been assigned to this Commission and that the Commission may bring action to enjoin violations of the Act or transmit evidence of violations for institution of criminal proceedings: Serzysko v. Chase Manhattan Bank, 290 F. Supp. 74, 77 (S.D. New York 1968). Since enforcement of Regulation T is vested in the Commission it thus has jurisdiction to institute administrative proceedings as well as seek an injunction or proceed crimally. The cases cited by respondents hold that although the Exchange Act does not expressly provide for civil liability for violation of Section 7 the courts have recognized the existence of implied rights of action for violations of the Act including Section 7.

The evidence as to McDermott's aiding and abetting registrant's violation was furnished by White who testified that at the time McDermott furnished the three names to be used as nominees he was aware that funds would be available for the purchase of the stock by the persons whose names he furnished. Since there is no denial of these facts by McDermott, who did not testify at the hearing, White's testimony on this score is unrefuted and must be credited. The record thus supports the finding that McDermott aided and abetted registrant's violation of Section 7 as charged.

There is no dispute that the Develco offering involved the distribution of a new security. Having found that registrant arranged for the extension of credit for a customer it would follow that registrant

also wilfully violated Section 11(d)(1) of the Exchange Act which in substance as pertinent here, makes it unlawful for registrant to arrange for the extension of credit for a customer which was part of a new issue in the distribution of which registrant participated as underwriter of the Develco stock with 30 days prior to such arrangement. White, Noon and McDermott wilfully aided and abetted in registrant's violation of Section 11(d)(1) of the Exchange Act.

Violations of the Anti-Fraud Provisions of the Acts

The Order charges that registrant wilfully violated and White, Noon and McDermott wilfully aided and abetted the anti-fraud provisions of the Acts, to wit, Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Specifically, the charges are that in connection with the sale of the Develco stock respondents employed devices, schemes and artifices to defraud, obtained money by means of untrue statements of material facts and omissions to state material fact and engaged in a course of conduct which operated and would operate as a fraud and deceit upon purchasers and prospective purchasers. The misleading statements and material omissions related to registrant's failure to complete the Develco offering on a "best efforts 65,000 shares or none" basis and the failure to disclose the size of the underwriting commission received in light of the additional compensation received by White, Noon and McDermott in the form of "kick-backs". It is also charged that respondents engaged in acts, practices and a course of business which operated and would operate as

a fraud and deceit upon any person in order to conceal the fact that the Develco offering was not completed by its offering date and had arranged fraudulent loans from the Industrial Bank, the proceeds of which were disbursed to registrant's escrow account and earmarked for six "straw customers" of registrant.

Whit respect to the charge of making untrue statements of material facts and omitting to state material facts it will be recalled that the Develco prospectus stated that the offering was on a "best efforts 65,000 shares or none"basis and that during the period from the end of October 1970 to within a week prior to the date the offering was to be completed (January 25, 1971) registrant had sold less than half of the minimum 65,000 shares. The manner in which registrant purportedly completed the offering has been detailed above and need not be repeated. It is evident however, that absent the fraudulent loans arranged through the Industrial Bank and the establishment of the six nominee accounts which received the proceeds of the loans all of which gave the appearance of a successful offering, the investors would have been entitled to the return of their investment and no underwriting fees would have been available to registrant. As a result of the scheme devised and carried out by registrant, the terms of the offering were in effect changed from a required minimum to an ordinary best efforts undertaking. In this connection it should be noted that as a part of the scheme it was intended that the shares of at least the six nominees, payment for which came from the Warwick Jaycees, would be sold to repay the fraudulent loans. As reflected in Table II supra this part of the scheme was well executed.

Thus, the statements in the prospectus regarding "best efforts" were untrue and the said prospectus, was never amended to reflect the manner in which the offering was completed although the facts were known to registrant at the time the registration statement became effective. Similarly, the prospectus set forth the underwriting commissions to be paid to registrant. The evidence shows that in addition to the compensation received as reflected in the prospectus White, Noon and McDermott received "kick-backs". White admitted under oath that the individual respondents had an understanding that if there were to be any profits from the proceeds of the sale of the stock from the six nominee accounts "they would be split." While it is true that until the stock was sold the amount of such profits could not be determined the failure to disclose these facts constituted a material omission in violation of the anti-fraud provisions. The registration statement or prospectus was never amended to show what White characterized as his "windfall profits", or that Noon and McDermott would or could receive additional compensation.

The record further supports the finding that respondents engaged in a course of conduct which operated as a fraud or deciet upon any person by concealing the arrangements for the fraudulent loans from the Industrial Bank and the creation of the nominee accounts. During the hearings White attempted to justify the scheme whereby loans were made by the Industrial Bank to the Warwick Jaycees, the proceeds of which were used to pay for the stock of the six nominees (Flynn, Levin Laura, Rees, Lecht and Kane) upon the grounds that he was attempting to

abide by the "know your customer rule" of the NASD. White believed that a $70,000 investment by the Warwick Jaycees, which he thought "was a club of some kind that had money available to invest" might be questioned by the NASD. To avoid any such problem he concluded that to comply with the said rule he would arrange to have the shares purchased by persons who were already customers of registrant and use the Jaycees money as payment rather than have the Jaycees make the purchase. With this in mind he asked Noon and McDermott to suggest names to be used as purchasers. The so-called justification is compellingly unpersuasive. The scheme which was contrived was, simply stated, a cover up device designed to accomplish several things. It would give the appearance that a bona fide offering of Develco stock had been completed; it would avoid having to abort the offering and return investors funds; it would give the appearance the stock was acquired by regular customers as an investment medium, and it would mask the fact that he intended quickly to sell the stock, pay back the loans and reap whatever profits became available from the proceeds of sale. The record amply supports the findings that registrant employed a fraudulent scheme or device and obtained money by means of untrue statements and material omission as charged and it engaged in acts, practices and a course of business which would and did operate as a fraud and deceit upon purchasers and prospective purchasers to conceal the manner in which the nominees acquired their shares. Registrant thereby wilfully violated the above mentioned anti-fraud provisions of the Securities Acts and White, Noon and McDermott wilfully aided and abetted such violations.

Public Interest

The remaining question is what, if any sanction is appropriate in the public interest as to each of the respondents. In this connection it should be noted that White and Noon, in the United States Court for the District of Rhode Island, each pleaded guilty to one count of a 10 count indictment. On July 31, 1973 the said Court, upon White's pleas of guilty to a charge of wilfully violating Section 17(a) of the Exchange Act and Rule 17a-3 thereunder by failing to make, keep and preserve books and other records prescribed under the above mentioned Rule sentenced him to a 1 year suspended sentence, fined him $8,500 and he was placed on probation for 2 years.[25/] On September 23, 1973 Noon pleaded guilty in the same Court to a charge similar to White's and was given a 1 year suspended sentence and probation for 1 year. The indictment related to the offer and sale of the Develco stock. Under Section 15(b) of the Exchange Act such convictions afford a basis for the imposition of a sanction, if found to be in the public interest.

Registrant and White urge that none of the violations alleged were wilfull, that there must be some showing of injury to shareholders and the public interest does not require the imposition of a sanction "for what can be more than extreme technical violations." None of the purported defenses are sufficient to exculpate registrant from the serious and substantive violations found or from the finding that White aided and abetted such violations.

25/ Counsel for White advised by letter dated September 23, 1974 that he filed a motion to vacate his client's pleas of guilty.

With respect to wilfullness the Commission and the Courts have held that a finding of wilfullness is supported by proof that an act was intentionally committed in the sense that a respondent was aware of what he was doing and either consciously, or in a careless disregard of his obligations, knowingly engaged in the activities which are found to be illegal. Nees v. Securities and Exchange Commission, 373 2d 211, 221 (9th Cir. 1969) Tager v. Securities and Exchange Commission 344 F 2d, 5, 8 (2d Cir. 1965). The evidence clearly shows registrant's acts were wilfull and White certainly was aware of what he was doing.

White admitted full responsibility for registrant's operations, knew one week before the Develco offering was to be completed that less than half of the 65,000 shares were sold and that unless some means were devised to complete the offering it would have to be aborted with the resultant loss of underwriting fees. He testified that when he knew arrangements had been made with the Develco principals to borrow $20,000 for the purchase of stock by two employees of Develco,he discussed with Noon and McDermott the matter of obtaining the names of customers of that the $70,000 from the Warwick Jaycees could be used to purchase shares of Develco. The plan for the financing of the purchases by the six nominee accounts, two of which names were furnished by White himself was knowingly carried out by White.

In light of White's testimony that he exercised control over all of registrant's operations it is difficult to believe his argument that he had no knowledge of Noon's arrangements with Glover for the furnishing of funds to be used by the nominees. It is more reasonable

to believe that White many not have known the names of the borrowers but he must have been assured that Noon was attending to whatever mechanical details were necessary to make certain the $70,000 was in the Develco escrow account at the appropriate time. Moreover, the documentary evidence relating to the sales on behalf of the six nominees negates his professed lack of knowledge. It is evident that it was a part of the plan that the Develco stock would be sold out of the said nominees' accounts to repay the loans for, within a week following the alleged completion of the offering, White started selling the Develco stock out of the accounts of the six nominees, the first sale being for his own customer Lecht. The proceeds of such sales he knew or must have known were applied to repayment of the loans. The fallacious rationale given by White for the utilization of the nominee account to wit the so-called "know your customer rule" has been commented upon earlier.

Of utmost significance in weighing White's conduct in light of his responsibility as a broker and an underwriter is the fact that White received approximately $6,000 in what he characterized as "windfall profits" given him by the Warwick Jaycees "in appreciation for you [White's] efforts". Though White testified he did not want any part of the $5,000 applied in reduction of his loan he made no effort to return the money. The conclusion is inescapable that for his participation in the cover-up with respect to the purported completion of the Develco offering White receive a pay-off. His conduct demonstrates

lack of appreciation of his responsibilities as both a broker and dealer or that of an underwriter. White urged at the hearing that he had great faith in Develco and claimed that customers suffered no losses. Neither position is acceptable. The Commission has held that faith in the ultimate success of a business enterprise is not the measure of responsibility under the Federal securities laws. D.F. Birnheimer & Co., Inc., 41 S.E.C. 358, 361 (1963). Nor are losses to customers any such measure. See Bohn-Williams Securities Corp., Securities Exchange Act Release 9327 (September 8, 1971).

The public interest requires the imposition of sanctions for conduct of the nature revealed in these proceeding. The conclusion that a sanction against White is essential in the public interest is reached not upon the basis of White's criminal conviction but his apparent lack of a basic understanding and appreciation of his responsibilites to the publicas well as his customers to inform them truthfully of the manner in which the Develco offering was completed. Instead he engaged upon a course of conduct designed to conceal or at the very least comouflage what actually transpired. In light of the serious nature of the various violations found registrant's registration as a broker-dealer should be revoked. Having found that White wilfully aided and abetted registrant's violations the public interest requires that he be barred from association with a broker-dealer with the proviso that after one year from the effective date of this order he may apply to the Commission, to become associated with a registered broker-dealer in a non-proprietary capacity upon a satisfactory showing to the staff of the Commission that he will be adequately supervised.

The public interest also mandates that a sanction be imposed upon Noon for his participation and involvement in the scheme to finance the purchases by the nominees. Glover testified that early in the fall of 1970 he discussed the Develco matter with Noon in terms of having the Industrial Bank act as escrow agent and later held discussion with Noon about arranging for loans to be made at the said Bank, the proceeds of which could be utilized for the purchase of Develco stock. One of the avowed purposes of the arrangement was a 5% profit to be split between Noon and Glover. As a part of the arrangement both Noon and Glover understood the Develco stock would be sold and the loans repaid thus holding the borrowers harmless. Glover also testified that Noon furnished him with a list of the names of persons who were to be used as purchasers of the Develco stock which he had typed on the cashier's checks deposited in the Develco escrow account. Glover further testified that from time to time Noon gave him checks which were cashed and the funds used to repay the loans. Finally Glover testified that the 5% so-called profit was received when "the entire thing was consummated" and that Noon's profit was applied to his loans at the Bank.[26/]

Prior to concluding whether an appropriate sanction is called for in the public interest, consideration was given to ascertaining whether in light of the Commission's order dated May 6, 1974[27/] Noon's affidavit should be received in evidence and, if so, the probative weight to be

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26/ Although Glover was unable to state that the amount he received was exactly 5% he was positive that he received money under the arrangement he had with Noon.

27/ See page 3 supra.

given to it. Notwithstanding that such procedure would deprive the undersigned of the opportunity of observing respondent Noon's demeanor and his responses to cross examination, matters which the Commission's order states are crucial, it has been determined that with recognition of the self-serving nature of an affidavit submitted by a respondent, it could none the less possibly shed some light upon Noon's conduct in the scheme devised to complete the Develco offering. Hence, consideration will be given to the affidavit as though it had been received in evidence and analyze it in the light of other oral and documentary evidence. 28/

Noon asserts in his affidavit that he was approached by Glover with the proposal that he accumulate monies from members of the Warwick Jaycees for the purpose of investing, at Noon's discretion, in promising securities. Glover on the other hand testified he did not broach the subject of financing the Develco purchases but that he had a discussion with Noon to the effect

> "That perhaps we could arrange some funds for the purchase of the stock through loans from my bank."

Glover further testified that in discussing the loans with Noon the latter was aware that the borrowers would not receive the proceeds but such proceeds would be deposited in the Develco escrow account at the bank to be used to pay for Develco stock purchased by persons other than the borrower. Glover's version of the discussion is credited.

28/ It is emphasized that the procedure adopted in the instant proceeding is not to be deemed a precedent for future proceedings of this nature.

Noon further states that before the offering was to close, Glover advised him he had deposited in the Develco escrow account $70,000 "needed to complete the offering on behalf of the Warwick Jaycees". When White stated the "know your customer" rule "prevented him from doing so" it was transferred to the accounts of seven of registrant's customers with their consent. He admits supervising the bookeeper in breaking down and applying the $70,000. He also admits that sales were made out of the nominee accounts at a profit and that in the case of his customers "most of the profits were returned to Mr. Glover for the benefit of the Warwick Jaycees."

None of the statements by Noon are sufficient to exculpate him from a finding that he wilfully aided and abetted registrant's violations. In fact, his own statements reinforce the findings. Noon admits that the Jaycees wanted to invest their funds in securities at Noon's discretion. Rather than invest their money directly in securities he participated in a plan which permitted other persons or nominees to appear as purchasers under a plan which he knew or must have known would involve the sale of the Develco stock at a profit in which he and the Jaycees would share. Stated differently he participated in the cover up as to who actually supplied the money used to pay for the nominees stock. His statement that the $70,000 was "transferred" to the accounts of seven customers (the record discloses only six were involved) "with their consent" is not credited. None of the nominees who testified stated they consented to the transfer of the Jaycees money to their accounts.

There is nothing in the record to indicate any of the nominees knew the source of the funds used to pay for the stock in their names. Noon admits he handled the proceeds of sales of all the nominees and returned the money to Glover.

Most significant is Noon's statement that "most of the profits were returned to Mr. Glover". Since not all of the profits were given to Glover it is logical to conclude the balance remained with Noon. His conduct like White's cannot be condoned. The record amply supports the findings made earlier that Noon aided and abetted registrant's violations. It is concluded that it is in the public interest that a sanction be imposed upon Noon. Such conclusion is premised on his activities and conduct in connection with the Develco offering. Noon played a vital role in the scheme to obtain loans from the Industrial Bank by persons he knew or must have known would not receive the proceeds of such loans and that such proceeds were to be used for payment of Develco stock to be placed in the names of nominees two of which he himself furnished. He also knew or must have known that it was part of the scheme to sell the nominees' stock to repay the loans and certainly knew of his deal with Glover to "split the profits" of 5%. Although the record does not disclose the exact amount of money applied to Noon's loans at the said Bank, it does reflect from Glover's testimony that some money was so applied. The public interest mandates that Noon be barred from association with a broker-dealer with the proviso that after one year from the effective date of this order he may apply to the Commission to become associated with a registered

broker-dealer in a non-proprietary, non-supervisory capacity upon a satisfactory showing to the staff of the Commission that he will be adequately supervised. The conclusion as the appropriate sanction is premised upon Noon's conduct and participation in the cover-up and concealment of the manner in which the Develco offering was completed and not upon his criminal conviction.

McDermott's participation in at least part of the scheme outlined above is clearly established in the record. The undersigned agrees with the Division's concession that "McDermott's early participation is not as clear." The evidence demonstrates McDermott came into the picture only at the time he was asked to furnish names of customers who could be used as purchasers. There is evidence that McDermott was kept informed of the status of the offering and willingly submitted the names of three persons to be used as nominees. However, the record does not establish by a preponderance of the evidence that he knew of the nature of the plan devised for the financing of the purchases through the Industrial Bank or that he had any knowledge of the arrangements for the financing of the Wante and Brissette shares. It is true that in April after the violation had been committed he assisted White in "clearing up" the Levin transaction and it is reasonable to assume he ascertained at that time what arrangements had been made for financing the purchases. The evidence does not establish that McDermott was as intimately involved in the Develco offering as were White and Noon. However, his participation in the plan cannot be disregarded. Stated differently, McDermott's participation appears to have been limited to the furnishing of three nominees

and not with the entire scheme. For his participation and aiding and abetting in registrant's violations as found, it is in the public interest that McDermott be sanctioned. It is determined that McDermott's conduct affords ample basis for the imposition of a sanction and it is not premised upon the injunction noted in footnote 2 supra. In light of all the circumstances relating to McDermott's participation he should be suspended from association with a broker-dealer for a period of thirty business days. Accordingly,

IT IS ORDERED that the registration of A.J. White & Co. with the Commission is hereby revoked; and respondents Allen J. White and James J. Noon are hereby barred from association with a broker-dealer with the proviso that after one year from the effective date of this order they may apply to the Commission to become registered with a registered broker-dealer in a non-proprietary capacity upon a satisfactory showing to the staff of the Commission that they will be adequately supervised and Richard J. McDermott is hereby suspended from association with a registered broker-dealer for a period of thirty business days from the effective date of this order.

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice, 17 CFR 201.17(f).

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.[29/]

Irving Schiller
Administrative Law Judge

Washington, D.C.
January 21, 1975

29/ To the extent that the proposed findings and conclusions submitted by the parties, and the arguments they make, are in accordance with the views stated herein they are accepted and to the extent they are inconsistent therewith they are rejected.