ADMINISTRATIVE PROCEEDING
FILE NO. 3-4166

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
WILLARD G. BERGE (VANDE VEGTE, INC.)	:
	:

INITIAL DECISION

Washington, D.C.
June 23, 1975

David J. Markun
Administrative Law Judge

ADMINISTRATIVE PROCEEDING
FILE NO. 3-4166

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	
WILLARD G. BERGE (VANDE VEGTE, INC.)	INITIAL DECISION

APPEARANCES: William M. Hegan, Assistant Regional Administrator, Chicago Regional Office, and William G. Kelly and Janet S. Schiff, Attorneys, Chicago Regional Office, for the Division of Enforcement.

Robert A. Minish and Gary R. Macomber of Popham, Haik, Schnobrich, Kaufman & Doty, Ltd., Minneapolis, Minnesota, for Respondent Willard G. Berge.

BEFORE: David J. Markun, Administrative Law Judge.

THE PROCEEDING

This public proceeding was instituted by an order of the Commission dated February 2, 1973, ("Order") pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine among other things whether Vande Vegte, Inc., a Minneapolis, Minnesota broker-dealer, Richard F. Vande Vegte ("Richard Vande Vegte"), its president and director, Willard G. Berge ("Berge"), and seven other individuals committed various charged violations of the registration requirements of Sub-sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act") and of the antifraud provisions of Sub-section 17(a) of the Securities Act during the period from about September, 1970 to about February, 1973 in connection with the sale of two classes of alleged securities issued by New Life Trust, Inc., ("NLT") an Arizona corporation, in connection with an NLT land development in Arizona[1/], and to determine the remedial action, if any, that might be appropriate in the public interest.

The Commission's "MINUTE ORDER" of February 20, 1974, consolidated this proceeding for the limited purpose of conducting hearings as respects certain designated common questions of fact with two other proceedings, i.e. Nos. 3-4347 and 3-4373. Accordingly, a consolidated hearing was held in Phoenix, Arizona, in June, 1974, on matters concerning: "1. The safety and security of an investment in the securities of NLT; 2. The

1/ On the basis of settlement offers, the Commission has issued findings and orders imposing remedial sanctions as respects all respondents in this proceeding other than Respondent Berge: Exchange Act Releases Nos. 34-10514, 34-10878, 34-10879, 34-11118. Accordingly, this initial decision has no application to such respondents, although some of them will be mentioned herein because of their involvement with matters respecting Respondent Berge.

financial condition of NLT; and 3. The value of the land allegedly securing an investment in the securities of NLT." Thereafter, the remainder of the hearings in this proceeding were held on July 27, 1974, in St. Paul, Minnesota.[2/] Proposed findings of fact, conclusions of law, and supporting briefs were filed by counsel for the parties pursuant to 17CFR §201.16 of the Commission's Rules of Practice.

The findings and conclusions herein are based upon the record and upon observation of the demeanor of the various witnesses. Preponderance of the evidence is the standard of proof applied.

FINDINGS OF FACT AND LAW

Respondent Berge

Respondent Willard G. Berge ("Berge"), 60, a resident of Minneapolis, Minnesota, was registered by the National Association of Securities Dealers, Inc. ("NASD") as a registered representative with Waddell and Reed, a registered broker-dealer, from 1959 through 1970, after which he was registered by the NASD with Offerman & Co., another registered broker-dealer, with whom he is presently employed.

Beginning on or about October 1, 1970 and continuing until about August 1, 1972, Berge also engaged in selling two classes of NLT instruments (found hereinafter to have been securities requiring registration under the Securities Act) on a commission basis on behalf of Vande Vegte, Inc., a Minnesota corporation. Vande Vegte, Inc. was registered

2/ The record of this proceeding includes Transcript pp. C-1 through C-1224, Division Exhibits 1 through 106, and Kirsch, Chandler Exhibits A through M, all as developed at the consolidated hearing in Phoenix, and Transcript pp. 1 through 222 and Division Exhibits 200 through 226r, as developed at the hearing in St. Paul.

with the Commission under the Exchange Act during the period November 13, 1971 through February 3, 1973, but prior to such beginning date it was not so registered even though it had begun selling the NLT securities in or about September 1970, shortly after the firm was organized.

Berge first met Richard Vande Vegte, president and majority owner of Vande Vegte, Inc., in 1957 in Spencer, Iowa, at a time when Richard Vande Vegte was a Division Manager of Waddell and Reed and Berge was engaged in selling livestock feed. Richard Vande Vegte was instrumental in Berge's becoming a registered representative with Waddell and Reed in 1959. Berge served under Richard Vande Vegte with Waddell and Reed in successive assignments with that firm in Aurora, Illinois and, beginning in 1969, in Minneapolis, Minnesota. In the latter part of 1970, Berge accepted Richard Vande Vegte's offer to sell the NLT securities on behalf of Vande Vegte, Inc. Meanwhile, Berge continued his employment as a registered representative with Waddell and Reed until the end of 1970 and thereafter commenced his employment as a registered representative with Offerman & Co.

Background Facts Respecting New Life Trust, Inc. and Its El Camino del Sol Development

Certain background facts respecting New Life Trust, Inc. ("NLT"),[3] particularly respecting its financial condition during the relevant period, the means it chose for financing its El Camino del Sol[4] ("El Camino") development, and the progress it made in the development need to be set forth in order to put the charges against Respondent Berge into perspective.

NLT was incorporated on October 15, 1969 in Arizona by Cadmus L.G. Goss ("Goss") to carry out the El Camino land development near Dateland, Arizona. NLT's "principal place of business" was in Phoenix, Arizona; its operations were essentially limited to the development of El Camino, the sale of lots therein, and, later, the sale of two classes of instruments designed to get necessary financing for the El Camino development.

The officers, directors, and shareholders of NLT at the time of its incorporation were: Goss, president, a director and 30% shareholder; Valerie Beiber, vice-president, a director, and 35% shareholder; and Truly Branscum, secretary, a director, and 35% owner.[5]

The El Camino development included 12 "Units" totalling some 3,320 acres of undeveloped desert land located in Yuma County, Arizona, lying for the most part north of Interstate Highway No. 8, some 110 miles

---

3/ On May 13, 1971, NLT changed its name to New Life Properties, Inc., but on August 27, 1971, it resumed its original name.

4/ The name translates to "The Pathway of the Sun."

5/ Beiber subsequently sold her shares to Branscum. Goss had known Beiber since about 1965 and was briefly married to her in 1972. Branscum was Goss's adopted daughter and was about 18 or 19 at the time NLT was incorporated.

Goss was graduated from Pennsylvania State University in 1944 with a B.S. in civil engineering. He is registered in Pennsylvania as a professional engineer and as a professional engineer and land surveyor in Michigan and Arizona. He was president and 30-50% owner of Desert Surveyors, Inc., organized and chartered in 1962. From 1962 until the formation of NLT in 1969, Goss also had interests in various land development companies, e.g. Engineering Trust, Citrus City, and Prescott East.

southwest of Phoenix, Arizona, and approximately 49 miles east of Yuma, Arizona. The twelve units are not all contiguous, and therefore do not form parts of a unitary tract. Thus, Units 1, 4, and 5 are each separate tracts, located some 6 to 9 miles to the west of the main tract located in the vicinity of Dateland, Arizona. Unit 12 is located at the extreme eastern boundary of Yuma County, some 10 miles to the east of the main tract near Dateland.

Since NLT's capitalization was negligible, the financing of the land acquisition and development of El Camino was to be done through the establishment of a series of dual beneficiary trusts under which the original land owners took token or modest down payments for their land, with the balance to be paid in equal installments over ten year periods. Under the trust instruments, title to the land was placed in Minnesota Title Company ("MTC"), an Arizona corporation, with the land sellers becoming first beneficiaries under the trust and NLT, the developer, becoming the second beneficiary. All units other than Units 6, 10, and 12, totalling some 520 acres, which Goss purchased for $46,000 cash in March, 1972, were the subject of dual beneficiary trusts.

The 12 units were purchased from various landowners at various times from October 1969 to March 1972, and they attained varying stages of development, if any, during the relevant period.

Units 1, 4, and 5, totalling about 1,160 acres, were purchased by Goss[6/] on or about October 23, 1969 for $287,000 with a $1,000 down payment and the balance payable in annual installments over the next ten years,

---

6/ In this and in other instances in which Goss purchased land personally he thereafter transferred his interests to NLT.

together with interest on the unpaid principal. These units were the subject of dual-beneficiary trust No. 118. By August 6, 1973 approximately $220,028.76 had been paid to the first beneficiary on the principal, with $66,971.24 of the purchase price remaining to be paid. On that date NLT was notified that it was in default of the purchase contract for failing to pay the 1972 taxes and for placing liens against the property without the consent of the first beneficiary.

Units 2 and 3, totalling about 640 acres, were purchased on or about October 23, 1969 for $224,000 with a $1,000 down payment and the balance payable in annual installments over the next 10 years, together with interest on the unpaid balance. Dual beneficiary land trust No. 117 covered these units. By August 14, 1973, approximately $170,231.44 had been paid to the first beneficiary on the principal, with $53,768.56 of the purchase price remaining to be paid. On that date NLT was notified that it was in default of the purchase contract for failing to pay the 1972 taxes and for placing liens against the property without the consent of the first beneficiary.

Units 7, 8, 9, and 11, totalling about 1,000 acres, were purchased by Goss on or about September 9, 1971 for $288,000 with a $25,000 down payment and the balance payable in annual installments over the next 10 years, together with interest on the unpaid balance. These units were covered by land trust No. 415. By October 17, 1973, $51,300 (including the $25,000 down payment) had been paid to the first beneficiary on the principal, with $236,700 of the purchase price remaining to be paid. On that date NLT was notified that it was in default of the purchase contract for

failure to pay the $43,615.09 installment of principal and interest that fell due on September 20, 1973.

Units 6, 10, and 12, totalling 520 acres, as already noted above, were purchased outright by Goss for $46,000. These units were covered by trust No. 617, a single beneficiary trust.

The trust agreements provided that after a specified sum had been paid to the first beneficiary for a particular lot or parcel (the so-called "release price"), the trustee could convey title thereto to NLT or its designee so that title could be conveyed free of any claim by the first beneficiary.

The trust agreements authorized sales to be made to lot purchasers either for cash or partly for cash (generally a 10% down payment) and the balance on a deferred-payment basis, (generally 7 years with interest at 7 or 7½%) and specified the percentages of proceeds that would be paid, respectively, to the real estate broker as his commission (20%), to the first beneficiary, and to the second beneficiary.

Pursuant to directions from the second beneficiary, NLT, to the trustee, MTC, impound accounts were set up out of a percentage of funds inuring to NLT pursuant to certain of the trust agreements for use in NLT's performance of the contemplated improvements in the El Camino development, i.e. platting, digging of water wells and installation of water pipes, and gravel grading of roads and streets. However, these impound accounts were set up unilaterally by NLT, presumably to enhance the saleability of lots, and did not represent a binding obligation either to the trustee or to the first beneficiary.

The El Camino acreage, acquired at an average cost of some $263 per acre, was platted into some 3,000 to 4,000 lots of varying sizes, of which Goss estimated that between 500 to 1,500 [7/] were sold to individual lot purchasers between the Fall of 1969 and the Summer of 1973. Generally the lots sold were priced in the neighborhood of $3,000 to $4,000, the prices having been established initially at from 75 to 80% of what comparably sized lots were selling for in other Arizona developments [8/], and, after some sales had been made in El Camino, such sales were themselves used as establishing the going market price.

NLT had "cash flow" problems, or a lack of working capital, from the outset. A financial statement prepared internally by NLT's comptroller as of November 18, 1969 (Ex. 2) showed total assets of $879,424.40 and total liabilities of $517,500.00. Of the total assets shown, only $1,000 represented cash. The remaining assets consisted of $6,000 worth of "Developmental Equipment (graders, etc.)" and unimproved acreage together with 57 lots valued at $2,000 each and 454 lots valued at $900 each. These lots were evidently valued above their purchase price on the basis of their having been platted and that Desert Surveyors, Inc., a company controlled by Goss, had apparently

---

7/ From the record as a whole it is concluded that the total of lots sold on which appreciable payments were made was closer to 500 than to 1,500. The sales occurred primarily if not entirely within units 1 through 5.

8/ The record does not contain satisfactory proof that El Camino was comparable to such other developments in the respects that determine land values, e.g. location, water supply, topography, etc., nor does it contain proof that it was not.

done $6,500 worth of improvement work, as shown in the "accounts payable." This was an arbitrary and unwarranted appreciation of lands that were as yet essentially unimproved and as to which there had as yet been no sales experience. The capital surplus of $331,924.00 was therefore misleading and illusory, a conclusion confirmed by the fact that the process of arriving at it was not carried forward into subsequent financial statements, which were prepared by outside certified public accountants. The as of 11-18-69 financial statement on its face suggests that the lots were arbitrarily valued at excessively high figures, since the statement does not reflect capitalized improvements that would warrant a jump in value from the per acre purchase prices, shown as $247.41 and $443.75, to $2,000.00 and $900 per lot. Apart from this suspicious circumstance, the financial statement showed clearly that if NLT was to find the money for making necessary improvements at El Camino it would have to do so through sales of lots, since, as already noted, there was essentially no operating capital available since the shareholders had invested only nominal amounts.

A copy of the as of 11-18-69 financial statement of NLT, along with copies of dual-beneficiary trust agreements Nos. 117 and 118 and of various other items required to be filed pursuant to the Interstate Land Sales Full Disclosure Act "Interstate Land Sales Act" (15 U.S.C. §1701 et seq.) and Arizona law were filed by NLT with the Department of Housing and Urban Development ("HUD"), Office of Interstate Land Sales Registration and with the Arizona State Real Estate Department as public documents, available to anyone from the date of filing.

Only about 10 to 20 of the lots sold in the El Camino development were sold to purchasers in Arizona. The remainder were sold to buyers in numerous other states through a small NLT sales crew or through "contract-sales crews". Buyers had one year in which to view the property and rescind the contract, if they so elected. Since by far most purchasers bought on the deferred-payment option, whereas sales personnel became entitled to their 20% commission on the full purchase price at the time of the execution of the purchase agreement, a negative cash flow problem developed for NLT from the beginning.

Another problem that plagued NLT throughout the course of its efforts to develop NLT was the number and aggregate total of delinquencies experienced under the lot-purchase contracts, which are summarized in the record as follows:

DATE	TOTAL NUMBER OF LAND CONTRACTS OUTSTANDING	NUMBER OF CONTRACT DELINQUENCIES	TOTAL OUTSTANDING PRINCIPAL BALANCE	TOTAL CURRENT PRIN. & INTEREST DUE FROM DELINQUENCIES
12/31/70	115	34	$340,642.29	$7,782.76
12/31/71	311	157	$1,104,065.52	$51,895.72
12/31/72	396	211	$1,352,652.08	$341,649.19
12/31/73	342	189	$644,646.04	$142,173.73

NLT was insolvent as of March 31, 1970, according to an unaudited statement of its financial condition prepared by a certified public accountant and transmitted to NLT on July 6, 1970. The statement showed total assets of $750,361.92 and total liabilities of $758,179.48, or a

negative stockholders' equity of $7,817.56. The statement was filed with HUD.

NLT was still insolvent as of December 31, 1970, according to an unaudited statement of its financial condition prepared by the same CPA that prepared the as of March 31, 1970 statement. This as of December 31, 1970 statement, prepared August 4, 1971 (Ex. 69), showed total assets of $981,387.37 and total liabilities of $992,536.89. A revised statement as of the 12-31-70 date, prepared September 2, 1971 (Ex. 70), which was also an unaudited statement, showed total assets of $983,768.18 and total liabilities of $992,536.89. These statements, Exhibits 69 and 70, were not filed with HUD, but an earlier as of 12-31-70 statement, prepared May 12, 1971, (Ex. 6) was filed with HUD. Exhibit 6 showed NLT as solvent, with total assets of $814,013.89 and retained earnings of $113,301.88. However, Exhibit 6 was suspect on its face because it included as current assets "Inventory-Land Held For Development & Sale", at $473,399.46 and an item "Installment Contracts Receivable (To be collected over the Next Seven Years)" at $247,549.02. As indicated in Exhibits 79 and 80, land held for development and sale should not have been listed as a current asset at all, and only a proportional estimated amount of the Installment Contracts Receivable should have been listed as a current asset.

In addition to data reflecting its financial condition, NLT between December 1969 and June 1972 filed various required reports and information

bearing materially[9/] on the question whether a lot purchase at El Camino or the purchase of an NLT security (to be discussed further herein) was a prudent or desirable investment.

These publicly available reports disclosed, inter alia, that up to May of 1972 no homes had been built at El Camino[10/]; no fire protection existed for the development (a voluntary fire department was contemplated once the development was sufficiently peopled to warrant it); no water system was established at the development[11/]; the nearest community shopping center was some 50 miles from certain units of El Camino, the nearest high school some 47 miles away, and the nearest grammar school some 8 miles

---

9/ For cases defining "material" facts within the meaning of the securities laws see: Affiliated Ute Citizens v. U.S. 406 U.S. 128, 154 (1972); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 385 (1970); Chasins v. Smith Barney & Co., 438 F. 2d 1167, 1171 (C.A. 2, 1971); Gilbert v. Nixon, 429 F. 2d 348, 356 (C.A. 10, 1970); Securities and Exchange Commission v. Great American Industries, Inc., 407 F. 2d 453, 459-60 (C.A. 2, 1968) (en banc), certiorari denied, 395 U.S. 920 (1969); Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F. 2d 833, 849 (C.A. 2d, en banc, 1968).

10/ Subsequently 4 mobile homes were located on the land.

11/ Subsequently, water was supplied by two wells approximately 550 feet deep, located on units 2 and 3. The water supply contained excessive fluorides, sulfates, chlorides and total dissolved salts that had to be removed through treatment before being potable. Fluoride content was tested at El Camino as late as August, 1973 by the Arizona State Department of Health, and the test still indicated excessive fluorides. Testimony was introduced at the consolidated hearing indicating that the excessive fluoride content in the water is harmful to children's teeth, pitting them and turning them brown.

distant; no recreational facilities were scheduled or planned for development; no central sewage disposal was established or planned by NLT; no garbage disposal service was established; roads and streets had not been completed for public use;[12/] the nearest physician was located in Wellton, Arizona, and the nearest hospital in Yuma; and title to the land in El Camino was in MTC under Trust agreements that, at least as to Units 1 through 5, restricted the power of NLT to convey, mortgage or encumber the property as against the rights of the first beneficiaries except under specified circumstances.

The Division introduced testimony to the effect that the appraised values of the lots being sold by NLT during the relevant period were far below the prices being asked and received by NLT, ranging generally from about 1/10 to 1/4 or 1/3 of NLT's selling prices. These appraisals were related in part to what NLT had paid for the acreage and in part to prices for roughly comparable land in the County and other Arizona areas. Lots in Unit 2 were appraised by one witness for years 1971 through 1973 at higher figures, e.g. $1,250 - $1,800, varying by lot size, reflecting NLT's sales of the lots at higher figures. Whatever may have been or may be the true "value" of the El Camino lots, it was abundantly clear during the relevant period that the lots would not attain and retain the values at which NLT was selling them unless the El Camino development was successful and became fully or substantially

12/ By the time of the consolidated hearing grading of various roads and streets had been completed, but no maintenance on them was being performed by the County since the development lacked sufficient population to warrant it. County maintenance would have consisted of blading and watering the roads.

developed.[13] And whether or not that would happen depended in large part upon the resources and financial condition of NLT.

NLT and its El Camino development faced plenty of competition for land sales, not only in Arizona but in Florida and elsewhere.

Thus, the Division introduced evidence at the consolidated hearing indicating that as of 1970 the population capacity of subdivisions in non-metropolitan counties of Arizona as figured in a study by Arizona State officials was 1,659,500. The 1970 population for those counties was 452,336. The study projected a rural population for the year 2000 at 346,500, leaving an estimated excess of population capacity of 1,313,000 for Arizona's non-metropolitan counties.

In an effort to improve its precarious financial condition NLT, commencing in the Spring of 1970, through broker-dealers, began to sell to public investors assignments of its interests in land purchase contracts entered into with lot buyers in the El Camino development ("NLT assignments").[14]

13/ A land-appraisal expert called at the consolidated hearing by various respondents no longer in this proceeding testified to the effect that if all the lots in El Camino had been sold and the utilities put in, a one acre lot might well have been worth $4,000 to the buyer, for value is in the "eyes of the beholder."

14/ Under an NLT assignment NLT, the assignor, assigned to the assignee, in return for a lump sum payment by the assignee, all of the assignor's rights to receive monthly payments from the original lot purchaser and, in the event the original lot purchaser should default on his payments, there was also assigned to the assignee the assignor's right to consider the lot purchase contract in default and to take possession of and title to the lots. In actual practice, nowever, when lot purchasers defaulted on their payments, NLT generally continued making payments to the NLT assignment purchaser without notifying him of the default, or substituted another lot purchase contract for the one originally assigned.

Commencing in the Fall of 1970, NLT, through broker-dealers, began selling to public investors NLT's own promissory notes, purportedly secured by mortgages on land in the El Camino development ("NLT notes").[15/]

Goss furnished broker-dealers selling NLT assignments and NLT notes the same kinds of promotional materials that were being used by the salesmen selling El Camino lot purchase contracts.

Double and in some cases triple "mortgaging" occurred on some 400 to 600 lots. This resulted from the fact that as lots were sold to individual buyers or mortgaged to secure an NLT note, Goss evidently ran out of platted lots to encumber. Since the NLT notes were theoretically secured by a mortgage on land worth three to four times the amount of the note, Goss saw nothing wrong with "securing" 2 or at times 3 NLT notes by a purported mortgage on the same lot, and he directed his office personnel to act accordingly. When broker-dealers discovered this double or triple mortgaging, it somewhat chilled their enthusiasm for handling the NLT instruments.

As of October 31, 1972, NLT was indebted to NLT assignment purchasers and NLT note purchasers in the amount of $4,941,600.34.

NLT's sales of NLT assignments and NLT notes did not solve its financial problems.

15/ NLT notes were issued, generally in multiples of $1,000 for cash payments by the note purchaser in exchange for which the note purchaser acquired the right to monthly payments of interest at the rate of 1% per month and a final payment of the monthly interest and the entire principal. The term of the note was generally 3 years. The note purchaser received as security for the payment of the NLT note a realty mortgage executed by NLT on a lot or lots in El Camino appearing on its face to be a first mortgage. The note provided that in the event of default the noteholder's sole remedy "shall be a foreclosure of the security or any part thereof."

Goss estimated that 800 to 1,500 notes were sold for an aggregate amount of $3 to 5 million.

Thus, the record establishes that NLT was in financial straights as of October 31, 1971, in that its current liabilities of $264,681.03 exceeded its current assets of $257,121.56, leaving a working capital deficit of $7,559.47. Of total assets of $1,858,865, only $42,488.84 represented cash. Net income for the ten months ending October 31, 1971, was $29,360.66, resulting in a retained earnings figure of $17,591. As of October 31, 1971, uncollateralized loans were due from Michael Goss (Goss's son)[16/] in the amount of $51,000 and from Goss, Valerie Beiber and Truly Branscum in the amount of $69,000.

As of October 31, 1972, NLT was insolvent, with total liabilities of $5,620,647.89 and total assets of $4,355,355.50. Of the total assets, cash on hand was $212,182.77.[17/] For the year ending October 31, 1972, NLT's net operating loss totalled $1,166,438.57. The October 31, 1972 balance sheet of NLT showed a retained earnings deficit of $101,853.82 as of October 31, 1971 and a cumulative retained earnings loss of $1,268,292.39 as of 10-31-72.

16/ Michael Goss held the position of office manager at NLT from the period covering 1970 to 1972, having commenced his employment at the age of 14. He was not formally graduated from high school but did receive a "general education" diploma. He did not receive a salary from NLT, but did receive compensation from Desert Surveyors, Inc. a company controlled by Goss.

17/ Data for the financial condition of NLT as of 10-31-72 and 10-31-71 are based upon unaudited reports prepared by CPAs for NLT.

As of October 31, 1972, the total loans receivable was $671,816.19, of which $139,858.89 was due from Michael Goss and $435,170.90 was due from stockholders.

NLT was adjudicated bankrupt on November 27, 1973. As of January 23, 1974, the receiver was operating without cash funds. At the time of the bankruptcy NLT's assets were: (1) the inventory of land of the various units; (2) land contracts receivable of $375,000; (3) some defunct machinery; (4) a few buildings near Dateland worth approximately $12,000; and (5) loans receivable from shareholders of NLT, the Goss family, and others, of $671,816.19.

At the time of the consolidated hearing the attorney for the receiver testified that in his opinion there would be no recovery or distribution for public investors. No offers to purchase NLT's assets had been received.

The record establishes that neither the NLT assignments nor the NLT notes were registered as securities under the Securities Act, yet both should have been so registered since they are both clearly "securities" not shown to fall within any exemption.

Section 2(1) of the Securities Act (15 U.S.C. §77b(1)) defines "security" in pertinent part as follows:

> "The term 'security' means any note, . . . evidence of indebtedness, . . . investment contract . . . or . . . guarantee . . . of the foregoing."

NLT's lot purchase agreements clearly created evidences of indebtedness and likewise, the NLT assignments conveying its interest were by definition securities. See United States v. Austin, 462 F. 2d 724, (C.A. 10, 1972) cert. den. 409 U.S. 1048, wherein the court stated, at p. 736:

> "The term 'evidence of indebtedness' is not limited to a promissory note or other simple acknowledgement of a debt owing and is held to include all contractual obligations to pay in the future for consideration presently received."

As to the NLT notes, they, likewise, are by definition securities. United States v. Austin, supra; Tcherepnin v. Knight, 389 U.S. 332, 339 (1967); Securities and Exchange Commission v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943). To the extent that the NLT assignments and NLT notes provided El Camino lands as their ultimate or contingent "security" or "value" for the assignee's or noteholder's investment, they also may be regarded as investment contracts within the flexible definition of investment contracts, since the value of such land as security depended upon the efforts and success of NLT in making a success of the El Camino development. Cf. S.E.C. v. Koscot Interplanetary, Inc., et al., 497 F. 2d 473, 485-6, (C.A. 5, 1974).

Violations of Registration Requirements of Subsections 5(a) and 5(c) of the Securities Act

The record establishes that during the period from about October 1, 1970 until about August 1, 1972, Respondent Berge sold in excess of $200,000 worth of NLT assignments and NLT notes to between 50 to 100 customers through Vande Vegte, Inc. Berge's portion of the commission on such sales was 10%. Berge does not dispute that the NLT assignments and NLT notes were securities that should have been registered under Section 5 of the Securities Act[18/] and he concedes, as the record shows, that no registration statement regarding such NLT securities was filed or in effect during the relevant period. Berge contends, however, that his violations of Subsections 5(a) and 5(c) of the Securities Act were

18/ 15 U.S.C. §77e. Section 5 provides in pertinent part as follows:

"SEC. 5. (a) unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly —

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

* * *

"(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, ... "

not wilful because he relied upon the representations of Richard Vande Vegte, his long time associate and close friend, that the NLT assignments and the NLT notes did not have to be registered. [19/] While in an appropriate case an employee might be entitled to rely upon his employer's conclusions that a particular instrument does not require registration, [20/] the facts here do not present such a case. Berge had been in the securities business since 1959 and should have recognized that the NLT instruments on their face fit the definition of securities. Moreover, he should have recognized that the burden of proving an exemption from the registration requirements is upon him who claims it. [21/] In such circumstances he should have demanded from Richard Vande Vegte, as a minimum, an attorney's written opinion indicating the NLT instruments did not require registration. The record does not indicate that Berge made any such request. Nor did

19/ All that is required to support a finding of wilfulness is proof that a respondent acted intentionally in the sense that he was aware of what he was doing and either consciously, or in careless disregard of his obligations, knowingly engaged in the activities which are found to be illegal. Hanly v. Securities and Exchange Commission, 415 F.2d 589, 595-6 (C.A. 2, 1969); Nees v. Securities and Exchange Commission, 414 F.2d 211, 221 (C.A. 2, 1969); Dlugash v. Securities and Exchange Commission, 373 F.2d 107, 109-10 (C.A. 2, 1967); Tager v. Securities and Exchange Commission, 344 F.2d 5, 8 (C.A. 2, 1965).

20/ Cf. Cortland Investing Corporation, et al., 44 S.E.C. 45, 51 (1969).

21/ S.E.C. v. North American Research & Development Corp., 424 F. 2d 63 (C.A. 2, 1970).

he seek the advice of his superiors at Waddell and Reed, by whom he was concurrently employed until the last month of 1970 or of his superiors at Offerman & Co., by whom he was concurrently employed after leaving Waddell and Reed.[22] Accordingly, it is concluded that Berge did wilfuly aid and abet violations by Vande Vegte Inc. of Subsections 5(a) and 5(c) of the Securities Act.

Antifraud Violations of Section 17(a) of the Securities Act

Section IIC of the Order alleges that Respondent Berge, among others, wilfuly violated and wilfuly aided and abetted violations of Section 17(a)[23] of the Securities Act by, among other things, in connection with his selling of NLT securities, making false or misleading statements to purchasers concerning the (1) safety and security of an investment in the NLT securities, (2) the financial

22/ Berge testified that Waddell and Reed had a rule against "outside" employment such as he was engaging in on behalf of Vande Vegte, Inc., which apparently explains the reason for his shift to Offerman & Co.

23/ 15 U.S.C. §77q. Section 17(a) provides as follows:

"FRAUDULENT INTERSTATE TRANSACTIONS

"SEC. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

condition of NLT, and (3) the value of the land allegedly securing the NLT securities.

Two of Berge's customers, Ms. Modesta Wedll and Ms. Joyce Martin, each of whom had purchased one or more of the NLT securities through Berge, testified at the hearing in St. Paul, Minnesota. The record shows that to one or both of such customers, Berge made representations to the following general effect:

(a) That El Camino expected a good future;

(b) That El Camino was being developed and had a good future;

(c) That with respect to NLT assignments, it was unlikely that a lot purchaser would default, but if he did, NLT would resell the lot and the payments to the purchaser of an NLT assignment would continue;

(d) That with respect to NLT notes, if default in payments occurred, the note purchaser as holder of a first mortgage on the land securing the note would become owner of the land;

(e) That Berge had seen the El Camino development and that there would be a waterway built in the future at or near the development, which waterway would furnish recreation and water for irrigation;

(f) That a small shopping center was being or would be constructed; and

(g) That El Camino had potential as agricultural property.

The record further discloses that Berge failed to tell Ms. Wedll or Ms. Martin about the financial condition of NLT, about the availability of HUD reports or Arizona State reports concerning the El Camino

development and NLT, or that the sole recourse of a purchaser of an NLT note in the event of default was to bring foreclosure proceedings, which might be expensive and time consuming, on the mortgage purporting to secure the NLT note.[24/]

In selling to his customers generally, Berge utilized materials furnished by NLT which were the same as the materials utilized in selling lots to lot purchasers. Berge testified that his customers typically took about two hours to examine the documents in his sales folder. These documents presented the prospects for the El Camino development in rather glowing terms and did not present any of the negative aspects. Thus, the sales literature, among other things, touted El Camino as lying ". . . in the heart of the sunny, fertile San Cristabol Valley" and spoke of ". . . the clean, quiet, peaceful atmosphere. . .", represented there was "easy access to recreation areas, fishing, boating, etc. . . ." and said the developer expected ". . . this area to grow very rapidly in population and value." The literature failed to set forth the numerous material, negative facts, as found at pp. 13-4 above, which it would have been necessary to state in order to keep the statements which were made from being misleading. In addition, the sales literature failed to point out the crucial fact that the value of an NLT assignment or NLT note depended in large part upon the

---

24/ Since title to the lands in El Camino was in MTC as trustee, NLT was in reality incapable effectively of mortgaging lands as against the interests of the first beneficiary. The exceptions to this would be as to those lots on which the "release price" had been paid and as to land in Units 6, 10, and 12, which were the subject of a single beneficiary trust.

management and financial ability of NLT to carry out the El Camino development to completion, and failed to point out the delinquencies in lot purchase contracts, the insolvent or precarious financial condition of NLT during the relevant times, the unsecured loans by NLT to "insiders", and similar relevant facts concerning NLT, as found above.

Just as the sales literature failed to advise Berge's purchasers of NLT assignments and NLT notes of the above material facts, Berge likewise failed to inform them.

Berge visited El Camino in August, 1970, on his way back from visiting relatives in California and also visited briefly at the NLT offices in Phoenix, where he was told about a manufacturing plant that was to be built at El Camino and given a brochure about a proposed canal from Yuma to Phoenix that would run somewhere near the development. Berge met Goss at the NLT offices only briefly, and talked to him one other time, later, at a party at Richard Vande Vegte's home.

Concerning the false and misleading statements made by him to his customers with respect to NLT securities, Berge makes the statement that he did ". . . supply the purchasers with all of the information he had about the NLT investment" and then adds the startling argument that ". . . even if there was additional information that should have been supplied, the purchasers would not have been interested in receiving it." These arguments disclose an abysmal ignorance on Berge's part of his duty to make full disclosure of all material facts under the antifraud provisions of Section 17(a) of the Securities Act. Materiality to an average potential investor, not a particular investor's interest or

disinterest, is the test.[25/]

It should have been manifest to Berge that NLT's financial condition was a highly material fact. In fact it is clear from the record that he realized this, for he testified that Richard Vande Vegte asked NLT for statements of its financial condition but never got any. Yet Berge chose to continue selling NLT securities without demanding certified financial statements on NLT. Evidently the lure of a 10% commission "up front" was too strong to resist. The very fact that NLT had to resort to selling the NLT assignments and the NLT notes, and to pay high commission rates (20% or more) to broker-dealers to do so, should have been a "red flag" to Berge that NLT's true financial condition should have been ascertained before its securities were offered or sold.

Accordingly, it is concluded that in selling NLT assignments and NLT notes Berge wilfuly violated, and wilfuly aided and abetted Vande Vegte, Inc.'s violations of, Section 17(a) of the Securities Act.

Violations of Section 15(a) of the Exchange Act

Section IID of the Order includes a charge, inter alia, that from about September, 1970 to November 12, 1971, Respondent Berge wilfuly aided and abetted violations by Vande Vegte, Inc. of

---

25/ See footnote 9 above.

Section 15(a) of the Exchange Act, which prohibits interstate securities transactions via jurisdictional means by a broker-dealer unless the broker-dealer is registered with the Commission under Section 15(b) of the Exchange Act.[26/]

The record establishes, as found herein, that Berge from October 1, 1970 until November 12, 1971 (and thereafter) sold NLT securities on behalf of Vande Vegte, Inc. Vande Vegte, Inc. did not register as a broker-dealer with the Commission until November 13, 1971. It follows that by such transactions prior to November 13, 1971 Vande Vegte, Inc. wilfuly violated Section 15(a) of the Exchange Act and that Berge wilfuly aided and abetted such violations.

Under all the circumstances, however, it is concluded that, because of the technical nature of Berge's aiding and abetting of violations of Section 15(a), and because it in effect is merely a by-product of his other aiding and abetting or violations of registration and antifraud provisions, it is in the public interest not to impose any sanction against Berge on the basis of his aiding and abetting Section 15(a) violations.

26/ 15 U.S.C. §78o. Section 15(a) provides in pertinent part as follows:

> SEC. 15. (a) (1) No broker or dealer (other than one whose business is exclusively intrastate) shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, unless such broker or dealer is registered in accordance with subsection (b) of this section.

Conclusions

In general summary of the foregoing, it is concluded that within the periods indicated Respondent Berge committed violations[27/] of the following provisions of law in connection with his sale of New Life Trust, Inc. assignments and New Life Trust, Inc. notes, all as more particularly found above:

(1) From about October 1, 1970, to about August 1, 1972, Berge wilfuly aided and abetted Vande Vegte, Inc.'s violations of Subsections 5(a) and 5(c) of the Securities Act;

(2) From about October 1, 1970, to about August 1, 1972, Berge wilfuly violated, and wilfuly aided and abetted Vande Vegte, Inc.'s violations of, Section 17(a) of the Securities Act.

(3) From about October 1, 1970,to November 12, 1971, Berge wilfuly aided and abetted Vande Vegte, Inc.'s violations of Section 15(a) of the Exchange Act.

PUBLIC INTEREST

The registration and the antifraud provisions of the Securities Act are both key elements in the network of protection the Congress has enacted to protect the public investor. Numerous customers sustained losses, which some could ill afford, because of the violations.

27/ The violations found herein all involved use of the mails and other instrumentalities of interstate commerce, e.g. the telephones. NLT securities issued in Arizona were necessarily delivered to purchasers in Minnesota via interstate transportation in the mails or otherwise.

The Division urges that the violations here found warrant revocation with a proviso that the Respondent may after one year apply to the Commission for permission to become associated with a broker-dealer subject to certain prior conditions.

Respondent Berge urges that a censure would sufficiently serve the public interest advancing, among other factors urged in mitigation, his unblemished record to date and the argument that a one year's absence from the securities business would be tantamount to a permanent bar, since it would be difficult for a man of Respondent's age (60) to re-establish his contacts with customers after so long an absence.

Taking into account the gravity of the violations, the factors urged by Respondent in mitigation, and the entire record as a whole, it is concluded that the sanction ordered below both for remedial and deterrent purposes is necessary, appropriate, and adequate in the public interest.

ORDER

Accordingly, IT IS ORDERED that Respondent Willard G. Berge is hereby barred from association with a broker or dealer with the proviso that after a period of 6 months he may apply to become associated with a registered broker or dealer in a non-proprietary, non-supervisory capacity upon a satisfactory showing to the Commission that he will be adequately supervised.

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 (15) 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. 28/

David J. Markun
Administrative Law Judge

Washington, D.C.
June 23, 1975

28/ All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings, conclusions and views stated herein they have been accepted, and to the extent they are inconsistent therewith they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein it is not credited.