ADMINISTRATIVE PROCEEDING
FILE NO. 3-4373

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
ROBERT E. FEENEY HARVEY L. VELGERSDYK JOHN R. PATTERSON
(KIRSCH, CHANDLER, FEENEY & CO., INCORPORATED)

INITIAL DECISION

Washington, D.C.
June 23, 1975

David J. Markun
Administrative Law Judge

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

Respondents Robert E. Feeney, Harvey L. Velgersdyk, and John R. Patterson, pro sese.

BEFORE: David J. Markun, Administrative Law Judge.

THE PROCEEDING

This public proceeding was instituted by an order of the Commission dated October 16, 1973 ("Order") pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine among other things whether Kirsch, Chandler, Feeney & Co., Incorporated ("Kirsch, Chandler" or "Registrant"), an Iowa broker-dealer with its principal place of business in Des Moines, Iowa, Respondents Robert E. Feeney ("Feeney"), Harvey L. Velgersdyk ("Velgersdyk"), John R. Patterson ("Patterson"), and 13 other named individuals associated with the Registrant during the relevant period, committed various charged violations of the registration requirements of Subsections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act") and of the antifraud provisions of Subsection 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder during the period from about September 1971 to about October 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.[1a/]

1/ Various respondents are also charged in the Order with Subsection 5(a) and 5(c) violations in connection with the offer and sale of promissory notes of other issuers in connection with other land developments.

1a/ 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 Respondents Feeney, Velgersdyk, and Patterson: Exchange Act Releases Nos. 34-10704, 34-11120, 34-11416. 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 Respondents Feeney, Velgersdyk, and Patterson.

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. 3-4166 and 3-4347. 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 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 in October, 1974 in Des Moines, Iowa.[2/] Proposed findings of fact, conclusions of law, and supporting briefs[2a/] were filed by 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

The Respondents

Respondent Feeney, 47, was a director, vice president, and owner of 15,000 shares of the common stock of Registrant (14% of the 105,000 shares

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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 1073, together with Division Exhibits 301 through 350y, ALJ Exhibits A through F, Respondents Exhibits A through E (submitted jointly), Feeney Exhibits A through H, Velgersdyk Exhibits A through M5, and Patterson Exhibits A through D, all as developed at the hearings in Des Moines.

2a/ Respondents did not present a supporting brief as such; however, legal argument was interwoven with their proposed findings of fact and conclusions of law, which they submitted in a document that was partly joint and partly several.

outstanding) during the relevant period. During this time he served as branch manager of Registrant's Dubuque, Iowa office, which employed four full-time and two part-time registered representatives. Feeney was licensed by the National Association of Securities Dealers, Inc. ("NASD") as a registered representative with Waddell & Reed in September, 1965, when he first entered the securities industry, and was licensed by the NASD as a registered principal with the Registrant in November, 1971. A resident of Dubuque, Iowa, Feeney is currently employed as a registered representative with All American Management Company, a broker-dealer located in Chicago, Illinois.

Respondent Velgersdyk, 41, was a director, vice president, and owner of 10,000 shares of the common stock of Registrant (9.52% of the 105,000 shares outstanding) during the relevant period. During this time he served as branch manager of Registrant's Inwood, Iowa office, which employed three full-time and two part-time registered representatives. Velgersdyk was licensed by the NASD as a registered representative with Waddell & Reed in October, 1967, when he first entered the securities industry, and was licensed by the NASD as a registered principal with the Registrant in November, 1971. A resident of Inwood, Iowa, Velgersdyk has been employed since December, 1973, as a registered representative with Offerman & Co., a broker-dealer located in Minneapolis, Minnesota.

Respondent Patterson, 52, was a director, vice president, and owner of 10,000 shares of the common stock of Registrant (9.52% of the 105,000 shares outstanding) during the relevant period. During this time he served as branch manager of Registrant's Davenport, Iowa office, which employed ten registered representatives. Patterson was licensed by the NASD as a registered representative with Waddell & Reed in July, 1963, when he first

entered the securities industry, and was licensed by the NASD as a registered principal with the Registrant in November, 1971. A resident of Davenport, Iowa, Patterson is presently employed as a registered representative for General United Services, Inc., a broker-dealer located in Des Moines, Iowa.

Within the relevant period Respondents Feeney, Velgersdyk, and Patterson sold to numerous public investors on behalf of the Registrant two classes of unregistered NLT instruments, found hereinafter to have been securities requiring registration under the Securities Act. During the period from October 1971 until July 1972 Registrant, registered as a broker-dealer with the Commission since September 7, 1971, sold approximately $3 million worth of the NLT instruments, employing some 60 to 80 registered representatives at numerous offices. Sales of the NLT instruments during the mentioned period generated over half of Registrant's business. Respondents Feeney, Velgersdyk, and Patterson also offered and sold during the relevant period unregistered promissory notes of other issuers that should have been registered, as found hereinbelow.

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 the Respondents 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

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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

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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 on the question whether a lot purchase at El Camino[9/] 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

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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, however, 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 within the relevant period Feeney and salesmen in his branch office sold both NLT assignments and NLT notes. Feeney received 10% of the total commission[18/] on sales made by him personally and a 5% "override" on the 5% commission earned by a registered representative in his branch office on a sale made by the salesman. Feeney personally sold to public investors approximately $65,000 worth of the NLT assignments and the NLT notes and, in addition, Feeney personally sold to public investors about $45,000 worth of the promissory notes of three other land development entities, i.e. Corona de Tucson ("Corona"), Arizona-Florida Equities Corporation ("Equities"), and Marketing Specialists, Inc. ("Marketing"). Registrant's Dubuque branch office, including sales by Feeney, sold approximately $400,000 worth of the securities of NLT, Corona, Equities, and Marketing. There was no registration statement in effect or on file with the Commission under the Securities Act with respect to the promissory notes of Corona, Equities, or Marketing. For reasons discussed above in connection with the NLT notes, the promissory notes of the other three entities likewise were securities required to be registered under the Securities Act.

18/ NLT paid a 20% commission to the broker-dealer — Vande Vegte, Inc., of Minneapolis, Minnesota — which retained 4% on sales handled by the Registrant. The Registrant in turn retained 6% of the overall commission, leaving 10% to be earned either by a branch manager, on sales made by him personally, or to be split equally between the branch manager and the registered representative as to sales made by a registered representative.

Velgersdyk personally sold to public investors approximately $160,000 worth of the NLT assignments and NLT notes and about $48,000 worth of the Corona and the Equities promissory notes. His commission rates were the same as Feeney's. The Inwood branch office, including sales by Velgersdyk, sold about $300,000 worth of the securities of NLT, Corona, and Equities.

Patterson personally sold to public investors approximately $30,000 worth of the NLT assignments and NLT notes and approximately $20,000 worth of the promissory notes of Corona, Equities, and Marketing. The Davenport branch office, including sales by Patterson, sold approximately $150,000 worth of the securities of NLT, Corona, Equities, and Marketing.

Respondents do not directly contend that they did not violate Subsections 5(a) and 5(c) of the Securities Act. [19/] In their proposed

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19/ 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 —
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> (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, ..."

conclusions of law they assert that the ". . . culpability of the respondents in connection with the sale of the mortgage and contract assignments without registration with the SEC in violation of Sec. 5(a) and (c) of the Securities Act of 1933 is diminished by virtue of the mitigating circumstances under which such was done."

The "mitigating circumstances" to which Respondents allude are their professed reliance upon assurances given them by Arthur J. Kirsch, a director and president of Registrant, that the NLT assignments and NLT notes did not require registration under the Securities Act, and, to a lesser degree, similar assurances from Roderic W. Chandler, a director and executive vice president of Registrant, and from Richard F. Vande Vegte,[20/] president of Vande Vegte, Inc., a Minneapolis, Minnesota broker-dealer through whom NLT was merchandising its NLT assignments and NLT notes. While such representations were indeed made to Respondents, their positions were such, and the overall circumstances were such, that Respondents were clearly not entitled to rely upon them.

Respondents were all directors, officers, and not insubstantial owners of the Registrant. They were also registered principals of the firm. They should have recognized that the NLT assignments and NLT notes were securities that were required to be registered under

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20/ At various times Respondents communicated directly with Richard Vande Vegte to obtain information respecting NLT and its securities, without dealing through the Registrant's home office in Des Moines, Iowa. This was done with the sanction of the home office.

the Securities Act for the reasons discussed above at pp. 18-19. Certainly they should have been aware that the burden of proving an exemption from the registration requirements lies upon him who claims it.[21] Messrs. Kirsch, Chandler, and Richard Vande Vegte were no more (and no less) competent to determine the question of the need for registration of the NLT instruments than were the Respondents. In these circumstances, the very least that Respondents should have demanded of Kirsch was a written opinion from a qualified attorney at law indicating that the NLT instruments did not require registration under the Securities Act.[22] The record does not indicate that Respondents ever made any such request or demand. Accordingly, it is concluded that Respondents Feeney, Velgersdyk, and Patterson wilfuly[23] aided and abetted wilful violations by the Registrant of Subsections 5(a) and 5(c) of the Securities Act in the offer and sale of NLT assignments and NLT notes.

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

22/ There is hearsay testimony in the record that a lower-echelon official of the Commission, whose identity was never adequately established, was supposed to have advised Registrant that the NLT instruments did not require registration. If Respondents sought to rely on such a determination, they should have demanded to see something in writing from a responsible Commission official. Purported representations by officials of the State of Minnesota and the State of Iowa that registration was not required would be irrelevant since such determinations would not affect determinations under the Securities Act.

23/ 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).

Antifraud Violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder

Section IID of the Order alleges that Respondents Feeney, Velgersdyk, and Patterson, among others, wilfuly violated and wilfuly aided and abetted violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder[24/] by, among other things, in connection with their selling of NLT securities, making materially false or misleading statements to purchasers concerning the (1) safety and security of an investment in the NLT securities, (2) the financial condition of NLT, and (3) the value of the land allegedly securing the NLT securities.

At the Des Moines hearings the Division called two customer witnesses respecting each of the three Respondents as regards representations concerning NLT securities purportedly made by Respondents to the customer witnesses.

24/ 15 USC 77q(a); 15 USC 78j(b); 17CFR §240.10b-5. Rule 10b-5 provides as follows:

> Rule 10b-5. Employment of Manipulative and Deceptive Devices.
>
> It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange
>
> (1) to employ any device, scheme, or artifice to defraud
>
> (2) to make any untrue statement of a material fact or to omit 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 act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

Feeney sold a $5,000 NLT note to Gerald Grew[25/] in May, 1972. He also sold a $3,000 NLT note to Charles Aird in May, 1972.

The record shows that to one or both of such purchasers, Feeney made, inter alia, representations to the following general effect:

(a) that the NLT note was a good investment for a retired couple;

(b) that it was "safe" or "completely safe";

(c) that if default occurred the investor would have a first mortgage on the land and thus become owner of the land.

Velgersdyk sold to Jean Gilbert[26/] and her husband Merle a $2,500 NLT note in March, 1972 and a $1,000 NLT note in April, 1972. In April, 1972, one of Velgersdyk's salesmen sold a $10,000 NLT note to Anna Dykstra[27/] and her husband David. In connection with this purchase, the salesman called in Velgersdyk, who had known the Dykstras over a period of many years, to help make the sale. Later, in May, 1972, the salesman sold the Dykstras a $2,000 NLT note.

25/ Grew, 73, has been retired since 1965, at which time he and his wife had about $9,000 in investments. The couple lives on his monthly retirement income of some $550.

26/ Mrs. Gilbert, 57, is a homemaker. Her husband, 61, is employed as an engineman on the Milwaukee Railroad. At the time of their first NLT purchase they had about $4,000 in a savings account and some $5,000 invested in mutual funds, and their monthly income was $900. They also had a substantial equity in their home.

27/ Mrs. Dykstra, 71, has been a homemaker for the last 33 years and has not worked outside her home during that period. Her husband, 89, has been retired since 1943 and has suffered several strokes over the last nine years. At the time of the NLT purchases, which were financed by cashing in their $12,000 investment in mutual funds, their only other "savings" were a $4,000 savings account, and their monthly income except for that derived from the savings account and the mutual funds was $80 to $90.

To one or both of the above described sets of purchasers, Velgersdyk made, inter alia, representations to the following general effect:

(a) that there was no risk in the NLT investment;

(b) that it was absolutely safe;

(c) that it was a good investment for a retired couple;

(d) that if a default occurred on an NLT note the investor would have a first mortgage and would thus own the lot; and

(e) that the value of the land securing the NLT note was worth 3 times the amount invested in the NLT note.

Patterson sold to Virginia Havill[28/] and her husband Roger a $4,000 NLT note in April, 1972. Patterson sold to Martin Klavenga[29/] and his wife Jenny a $10,000 NLT note, in January, 1972, and $20,000 worth of promissory notes of Corona.

The record shows that to one or both of his customer witnesses, Patterson made, inter alia, representations to the following general effect:

(a) that there was not much risk involved in investing in an NLT note;

28/ Mrs. Havill, 59, was employed as an accounting clerk at $9,000 p.a. at the time of the NLT note purchase and her husband, 63, was employed as a grounds patrolman at $8,000 p.a. The NLT note purchase was financed through partial use of the proceeds they received ($7,500) from sale of a house. At the time their only other securities or savings were $8,000 invested in mutual funds.

29/ Klavenga, 65, is employed as a cabinetmaker and woodworker. He and his wife reside in Fulton, Illinois. Klavenga relied on Patterson to advise him on his investments and relied upon Patterson to keep an up-to-date record of his holdings in various securities.

(b) that there was a shopping center at El Camino, that people were building homes there, and that it was a growing community; and

(c) that investors' money would be used to purchase the type of equipment normally employed in developing raw land.

The record further discloses that Respondents Feeney, Velgersdyk, and Patterson failed to tell their respective customer witnesses 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. 30/

In selling to their customers generally, Respondents Feeney, Velgersdyk, and Patterson utilized materials furnished directly or indirectly by NLT that were essentially the same as the materials utilized in selling lots to lot purchasers. 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

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30/ 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.

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 that 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 NLT management and upon its financial ability 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.

Even as the sales literature failed to advise purchasers of NLT assignments and NLT notes of the above material facts, Respondents Feeney, Velgersdyk, and Patterson likewise failed to inform them.

Respondents make essentially two arguments in seeking to justify their egregious failure to advise purchasers of NLT assignments and NLT notes of a whole series of highly material facts.[31/] Firstly, they urge that they were entitled to rely upon assurances by Kirsch,[32/] who

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31/ See footnote 9 above for cases defining "material" facts.

32/ As in the case of the Subsection 5(a) and 5(c) violations, Respondents also urge they relied upon representations by Chandler and Richard Vande Vegte.

purportedly checked NLT out and pronounced it a "go situation," without furnishing a certified audit of NLT or an analysis of the background and experience of its management personnel in support of his naked conclusion. Secondly, Respondents urge that their failures to furnish financial data should be excused because financial data on NLT were hard to come by. Neither argument holds water, and the two are interrelated.

In making the second argument, Respondents concede, as they do elsewhere in the record, that the financial condition of NLT was a material fact that should have been disclosed, particularly in light of the glowing descriptions of El Camino that were given to purchasers. As to the alleged unavailability of financial information on NLT, there are three factors that negate the argument. Firstly, as found above, financial statements for the earlier portion of the relevant period that raised serious questions as to NLT's viability were in fact publicly available in documents filed with HUD and with Arizona State departments. Secondly, the very facts that NLT had to sell NLT notes bearing a high interest rate of 1% per month and had to pay high brokerage commissions of 20% in order to sell the NLT notes to the public should have been "red flags" warning persons of Respondents' sophistication that a careful look into NLT's financial condition was imperative before embarking upon the sale of its securities. And, lastly, the fact that Goss refused to disclose available financials on NLT covering the latter portions of the relevant period after apparently repeated requests for them from Kirsch and Richard Vande Vegte (a fact known to

Respondents) was in itself a clear signal to Respondents that they should have ceased selling NLT securities until adequate financial data were made available.

As to Respondents' first argument, they were clearly not entitled to rely on Kirsch's unsupported direction to go ahead and sell in light of their status as directors, officers, and part owners of Registrant, and in light of the factors mentioned just above regarding the non-availability of reliable financial information on NLT. In fact, the record shows that Respondents were well aware that Kirsch had presented no supportable basis for going ahead with the program to sell NLT securities. Thus, Patterson testified that at a meeting on December 15, 1971, of the Registrant's directors to discuss the matter, he, Feeney and Velgersdyk all raised challenging questions about the NLT situation. Yet, for all their challenges to Kirsch, Respondents now say their doubts were satisfied by Kirsch's unsupported assurances and some pictures of El Camino that he showed, which pictures were a long way from depicting a bustling development. Respondents in light of what they knew or should have known were not entitled to rely blindly on Kirsch. Particularly since, as Patterson testified, it was common knowledge in his area that a number of land developments in Arizona and in Florida had "gone sour". Evidently the lure of high commission rates and "overrides" overcame their apparently attenuated resistance.

Accordingly, it is concluded that in selling NLT assignments and NLT notes Respondents Feeney, Velgersdyk, and Patterson wilfuly violated, and wilfuly aided and abetted wilful violations by Registrant of, Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Conclusions

In general summary of the foregoing, it is concluded that within the relevant period Respondents Feeney, Velgersdyk, and Patterson committed violations[33/] of the following provision of law and regulation in connection with their sales of New Life Trust, Inc. assignments and New Life Trust, Inc. notes[34/], all as more particularly found above:

(1) Respondents wilfuly aided and abetted Registrant's violations of the registration requirements of Subsections 5(a) and 5(c) of the Securities Act.

(2) Respondents wilfuly violated, and wilfuly aided and abetted wilful violations by Registrant of, Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

PUBLIC INTEREST

The registration provisions of the Securities Act and the anti-fraud provisions of the Securities Act and the Exchange Act are key elements in the fabric of legislation the Congress has woven to protect public investors in securities. Numerous purchasers sustained losses, which some could ill afford, as a result of the violations here found.

33/ 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 Iowa via interstate transportation in the mails or otherwise.

34/ Violations of Subsections 5(a) and 5(c) of the Securities Act also involved offers and sales of the promissory notes of two or more of the following issuers by each Respondent: Corona; Equities; Marketing.

The Division urges that the public interest requires a permanent bar of each of the Respondents, citing, among other things, their experience in the securities business since the mid 1960s, their sales of NLT instruments to persons for whom the investment was not suitable, and their professed lack of knowledge as to what constituted securities and of the fact that antifraud provisions of the federal securities laws are applicable whether or not instruments require registration under the Securities Act.

Respondents do not address themselves expressly to the question of appropriate sanctions, but their proposed conclusions of law, particularly as to the Subsection 5(a) and 5(c) violations, refer to mitigating circumstances.

The record discloses in mitigation that Respondents have not previously been the subjects of any charges by any regulatory or self regulatory body and that their standings and/or reputations for honesty and good character in their respective communities are good. An addtional factor in mitigation is the fact that, so far as the record indicates, their prior experience while with Waddell & Reed was principally with mutual funds and apparently did not involve, at least in any major way, securities of the kind involved in this proceeding.

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

ORDER

Accordingly, IT IS ORDERED that Respondents Robert E. Feeney, Harvey L. Velgersdyk, and John R. Patterson are hereby barred from association with a broker or dealer with the proviso that after a period of 1 year they 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 they will be adequately supervised. 35/

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice, 17CFR §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. 36/

David J. Markun
Administrative Law Judge

Washington, D.C.
June 23, 1975

35/ It should be noted that a Respondent's application would not automatically be granted; at the same time, it should be noted also that the restrictions imposed by this sanction would not necessarily be permanent. See Fink v. S.E.C., 417 F.2d 1058, 1060 (C.A. 2, 1969); Vanasco v. S.E.C., 395 F.2d 349, 353 (C.A. 2d, 1968).

36/ 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.