ADMINISTRATIVE PROCEEDING
FILE NO. 3-6142

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :

PAGEL, INC. :
(File No. 8-16764) :
JACK W. PAGEL :
DUANE A. MARKUS :

FILED
AUG 29 1983
SECURITIES & EXCHANGE COMMISSION

INITIAL DECISION

Washington, D.C.
August 29, 1983

Ralph Hunter Tracy
Administrative Law Judge

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APPEARANCES:

Peter Schaeffer and Edward G. Kohler, attorneys, Chicago Regional Office, for the Division of Enforcement

Laurence R. Waldoch, William T. Dolan, Timothy H. Butler for Pagel, Inc. and Jack W. Pagel

Jan Stuurmans for Duane A. Markus

BEFORE:

Ralph Hunter Tracy
Administrative Law Judge

In accordance with a Securities and Exchange Commission Order (Order) dated June 9, 1982, a public proceeding was instituted pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 (Exchange Act), to determine whether the respondents named herein committed various charged violations of the Exchange Act and the Securities Act of 1933 (Securities Act), and regulations thereunder, as alleged by the Division of Enforcement (Division), and the remedial action, if any, that might be appropriate in the public interest.

The Order alleges, in substance, that Pagel, Inc. (Registrant), Jack W. Pagel (Pagel), and Duane A. Markus (Markus) wilfully violated and wilfully aided and abetted violations of Sections 17(a)(1)(2) and (3) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5, 10b-6, and 15c1-8 thereunder. The Order charges, also, that Registrant wilfully violated and Pagel and Markus wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder.

The evidentiary hearing was held in Minneapolis, Minnesota from December 13 through December 21, 1982. All of the respondents were represented by counsel, and proposed findings of fact and conclusions of law, and supporting briefs, were filed by the respondents and the Division.

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

FINDINGS OF FACT AND LAW

Respondents

Pagel, Inc. (Registrant), a Minnesota corporation with its principal place of business at 625 Marquette Avenue, Minneapolis, Minnesota, is currently registered with the Commission pursuant to Section 15(b) of the Exchange Act and has been so registered at all times herein. Registrant is also a member of the National Association of Securities Dealers (NASD).

Jack W. Pagel (Pagel) was born in Minneapolis, Minnesota on October 29, 1942. He graduated from high school in 1961 and attended the University of Minnesota but did not receive a degree. From January 1963 to October 1968 he was president of Pagel's Inc. Sanitary Supplies. From October 1968 to July 1974 he was a registered representative with Craig-Hallum, Inc., a broker-dealer. Since July 1974 he has been president and sole stockholder of Registrant.

Duane A. Markus was born in Minneapolis, Minnesota on April 29, 1942. He received a BS degree from the University of Minnesota in 1965. He was a teacher in local schools from September 1964 until June 1969. From September 1969 to October 1975 he was a registered representative with Dain, Kalman & Quail, a broker-dealer. From October 1975 to January 1977 he was a registered representative with White Weld & Co., a broker-dealer. Since January 1977 he has been with Registrant in the capacity of executive vice-president.

Background

All of the respondents in this proceeding are charged with man-

ipulation of the market price of the stock of FilmTec Corporation (FilmTec) in connection with an offering of FilmTec common stock, of which Registrant was the underwriter.

FilmTec was incorporated on September 15, 1977 as a Delaware corporation with its principal place of business in Minnetonka, Minnesota. It is primarily engaged in the manufacture of membrane filters for use in water purification programs. The technology is used for the conversion of salt water into fresh water and also to remove any dissolved solvents from water for such purposes as the preparation of pure water for use in hospitals and laboratories, and for industrial use in the electronics industry.

When FilmTec was first organized, ten founders contributed $125,000.00 and received 375,000 shares of stock. On June 7, 1978, there was a private placement of 375,000 shares at $.67 a share. Of this private placement, 180,000 shares were offered through Registrant, for which it received aggregate commissions of $6,000.00. On December 20, 1978, 120,000 shares of common stock were purchased by Northwest Growth Funds, Inc., a small business investment company, at $1.67 a share or a total of $200,000.00. The number of shares has been adjusted to include a 3-for-2 stock split on February 13, 1979.

FilmTec entered into a firm underwriting agreement with Registrant to offer to the public 320,000 shares of $.10 par value common stock at a price of $3.25 per share. The offering was made pursuant to Regulation A, and Registrant was granted an option to

purchase an additional 32,000 shares at the same price per share as the initial 320,000 shares. This option, which expired in 30 days, was to be exercised only to cover over-allotments in the sale of the initial 320,000 shares. In addition, Registrant received a warrant to purchase 32,000 shares, exercisable at prices increasing by 7 percent of the public offering price each year until expiration in 1984. The warrant was not exercisable until 13 months after the effective date of the offering.

FilmTec filed a notification on Form 1-A under Regulation A on February 21, 1979, and it became effective on March 26, 1979 when the offering began. On March 29, 1979, Registrant exercised its over-allotment option for 32,000 shares, thus bringing the total number of shares offered to 352,000. The offering was completed on March 29, 1979 and after-market trading began on March 30, 1979. At the time of the offering there were 870,000 shares of FilmTec common stock outstanding, but these shares were restricted and not eligible for public sale. Therefore, the float (or shares available for public sale) was limited to the 352,000 shares in the offering. Registrant alloted only 34,800 shares to five other brokers and retained the balance of 317,200 shares for itself.

Anti-Fraud Provisions

The Order alleges that from March 30, 1979 to at least April 6,1979, Registrant, Pagel, and Markus wilfully violated Section 10(b) of the Exchange Act and Rule 10b-6 thereunder while participating in the distribution of the common stock of FilmTec. Rule 10b-6 (17 CFR 240 10b-6) provides, in pertinent

part as follows:

> (a) It shall constitute a "manipulative or deceptive device or contrivance" as used in Section 10(b) of the act for any person,
>
> (1) who is an underwriter or prospective underwriter in a particular distribution of securities, or . . .
>
> (3) who is a broker, dealer, or other person who has agreed to participate or is participating in such a distribution, directly or indirectly . . . either alone or with one or more other persons, to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution . . . or to attempt to induce any person to purchase any such security . . . until after he has completed his participation in such distribution . . .

Although the entire FilmTec offering of 352,000 shares was purportedly sold by March 29, 1979, the record discloses that at least 62,705, or 18 percent, of these shares were placed in nominee accounts for the benefit of Pagel, Markus, and Frank Canfield, a friend and customer of Pagel's. Of these, 45,300 shares were purchased on March 29 at the offering price of $3.25 and resold at a profit in the after-market. In addition, at least 17,405 shares were purchased in further nominee transactions on March 30, 1979. For the most part these shares were paid for from the proceeds of their after-market sales. Either Pagel or Markus was the registered representative for each nominee account. The accounts and nominee shares are summarized as follows:

Nominee Account	Registered Representative	Date 3-29-79	Date 3-30-79
Gunderson	Markus	4,000	5,650
Dubie	Markus	1,000	2,000
Roberts	Pagel	14,000	
Titcomb	Pagel	3,000	9,755
Hartupee	Pagel	6,000	
Lee	Pagel	10,050	
Williams	Pagel	7,250	
		45,300	17,405

Registrant's records show Markus as the registered representative for the account of J.R. Dubie. The account records the purchase of 1,000 shares of FilmTec at the offering on March 29,1979 at $3.25 and 2,000 shares on March 30, 1979 at $4.625. These 3,000 shares were sold at $8.60 on May 11, 1979 for $25,799.00, and Dubie received a Registrant check for that amount, which was used as part payment for a cashier's check in the amount of $29,000.00, payable to Markus and endorsed by him. Dubie refused to testify concerning this transaction, claiming his Fifth Amendment privilege. Markus also claimed the Fifth Amendment privilege and refused to testify throughout the hearing.

Registrant's records show Markus as the registered representative for the account of Michael J. Gunderson. The account records the purchase of 4,000 shares of FilmTec at the offering on March 29, 1979 at $3.25 and 5,650 shares on March 30, 1979 at $4.625 for a total cost for all purchases of $39,132.25. On April 17, 1979, Gunderson received a Registrant check for $33,599.14 as payment for 3,300 shares of FilmTec. This check was used to purchase two cashier's checks, one in the amount of $12,000.00 payable to Ann B. Johnson, the wife of Markus. This cashier's check was endorsed to Pagel, Inc. and deposited in the account of Ann B. Johnson at Registrant. On July 2, 1979, 3,050 FilmTec shares were sold in the Gunderson account for $33,854.00; this amount was paid to Gunderson by Registrant check and used to purchase three cashier's checks, one of which was payable to Markus in the amount of $23,000.00 and endorsed by him.

The remaining 3,300 shares were sold for settlement on October 24, 1979 for $41,183.00, payable to Gunderson by Registrant check. This Registrant check was used to purchase three cashier's checks, one of which was payable to Markus in the amount of $34,985.30. This cashier's check was used by Markus to purchase two other cashier's checks, one of which was payable to Markus in the amount of $21,807.30. The latter cashier's check was in turn used in part payment of three other cashier's checks: one for $5,000.00 and endorsed by Markus; one to Markus for $6,196.36; and the third payable to Dean Witter Reynolds for $25,110.94, which was credited to an account at Dean Witter Reynolds in the name of Markus in payment for $25,000.00 of St. Paul Housing and Redevelopment Bonds (St. Paul Bonds). Gunderson claimed the Fifth Amendment privilege and refused to testify.

Registrant's records show Pagel as the registered representative for an account in the name of David Williams. David Williams was not called as a witness by either the Division or the respondents. The new account card for Williams lists a social security number which is the same as the one listed on the new account of another nominee, Burton E. Lee, who refused to testify on grounds of Fifth Amendment privilege. Pagel also claimed the Fifth Amendment privilege and refused to testify throughout the hearing.

On March 29, 1979, 8,000 shares of FilmTec were purchased in the Williams account for $26,000.00. On April 4, 1979, 7,250 of

these shares were sold at $7.00 a share for a total of $50,749.00. On April 6, 1979 the proceeds were paid by Registrant check to Williams. This check is endorsed by "David Williams" followed by the endorsement "Burton E. Lee." The "David Williams" endorsement is in a different handwriting from the signature "David Williams" on the new account form. On April 6, 1979, two sequentially numbered cashier's checks were purchased; one for $26,000.00 was credited to the Williams account at Registrant in payment for the 8,000 FilmTec shares, and one for $27,187.50, representing the profit on the 7,250 shares, was credited to the account of Jack and Karen Pagel at Registrant.

Pagel was the registered representative for Thomas Titcomb, a long-time friend. Titcomb opened his account at Registrant on March 28, 1979. Pagel told him there was a good potential for FilmTec to go up in the after-market. Before the public offering Frank Canfield asked Titcomb to act as nominee for the purchase of FilmTec shares in the offering, and Titcomb agreed except for 200 shares which he wanted for himself. Although Titcomb ordered more shares, apparently at Canfield's request, he was allotted only 3,200 shares in the offering. On Canfield's instructions he placed another order in the after-market on March 30, 1979 and received 9,755 shares at $4.625. The total purchase price for the 12,955 shares was $55,517.88. On April 6, 1979, 12,755 shares were sold in Titcomb's account for $106,503.25. The remaining 200 shares were retained by Titcomb.

Titcomb testified that on April 6, 1979 he went to the office of Registrant where he gave Pagel his personal check for $55,517.88 in payment for all 12,955 shares of FilmTec in his account. At the same time Pagel handed him a Registrant check, signed by Pagel, for $106,503.25 representing the sale of 12,755 shares of FilmTec. Titcomb immediately took the check to the bank and deposited it in order to cover his personal check. At that time his account had only a few hundred dollars in it. Titcomb also deposited $650.00 to cover payment of his own 200 shares of FilmTec. Accordingly, the total deposit was $107,153.25. Following instructions given him by Canfield, Titcomb wrote a personal check to the bank and used it to acquire two cashier's checks in the respective amounts of $15,126.50 and $36,508.87. These two checks and the payment for the 12,955 shares of FilmTec purchased in the Titcomb account exactly equaled the $107,153.25 deposit made on April 6, 1979.

Titcomb testified that he took the two cashier's checks back to Registrant's office; there he either gave them to Pagel or to the cashier in Pagel's presence, with instructions that they be put in Canfield's account.

Of the two cashier's checks the one for $15,126.50, representing the profit on the 3,000 shares purchased in the offering, was credited to the Jack and Karen Pagel account at Registrant, while the one for $36,508.87, representing the profit on the 9,755 shares purchased on March 30, 1979, was credited to the account of Canfield.

Pagel's undisclosed beneficial interest in the Williams and Titcomb accounts resulted in a profit of approximately $42,314.00, which was deposited in the Jack and Karen Pagel account at Registrant. On April 6, 1979, $42,313.50 was withdrawn from this account at Registrant and deposited to a margin account of Jack Pagel at the brokerage firm of A.G. Becker to reduce an existing, properly margined, debit balance.

Scott Roberts is 27 years of age and a self-employed real estate developer. He had been a customer of the Registrant since 1976 and Pagel was his registered representative. He testified that he purchased 1,000 shares of FilmTec in the offering on March 29, 1979. After he had placed his order he received a call from a friend, Frank Canfield, who asked him to purchase for him 14,000 shares in his (Robert's) account. This he agreed to do and telephoned Pagel and ordered another 14,000 shares. He testified that he had no problem getting the shares: "I just asked if I could get them and that was it." No other customer was alloted more shares in the public offering. In fact no member of the selling group was allotted more than 12,500 shares.

The next day, March 30, 1979 Canfield called Roberts early in the morning and told him to sell the 14,000 shares. Roberts called Registrant and placed the sell order.

He did not remember whether he talked to Pagel. The 14,000 shares were sold at $4.375. Later in the day Roberts sold his 1,000 shares at $7.00. On April 6, 1979 Roberts received Registrant's check for $68,248.00 representing $61,249.00 for Canfield's shares and $6,999.00 for his shares. He obtained a cashier's check for $15,750.00 for Canfield. This represented Canfield's profit on the purchase and sale of the 14,000 shares.

Roberts testified that he did not tell Pagel that the 14,000 shares belonged to Canfield until a week or ten days after the sale. He also said that he bought the shares for Canfield simply as a favor for a friend.

As a witness Roberts was nervous and seemed to be telling a cover story. His testimony that he did not tell Pagel about Canfield, that he obtained 14,000 shares on a telephone call with no questions asked, and that he was merely doing Canfield a favor as a nominee is not credible.

Registrant's records show Pagel as the registered representative for the account of Burton E. Lee. The account records the purchase of 10,800 shares of FilmTec in the public offering on March 29, 1979. Only Roberts was alloted more shares. On April 4, 1979, 10,050 shares were sold at $7.00 per share for total proceeds of $70,349.00, which were paid to Burton by Registrant's check. Two cashier's checks were purchased,

one, for $37,687.00, representing Canfield's profits, which was credited to his account at Registrant. The balance was credited to Lee's account at Registrant to pay for the shares. Lee refused to testify on grounds of Fifth Amendment privilege.

William Hartupee has known Pagel for over 20 years, having first met him in high school. He has been employed at the Minneapolis Star and Tribune Company for 14 years. Pagel was his registered representative, and the Hartupee account at Registrant shows the purchase of 7,000 shares of FilmTec at the offering on March 29, 1979. Only Roberts, Lee, and Williams were alloted more shares. On March 30, 1979, for settlement on April 6, 1979, 6,000 shares of FilmTec were sold at $4.375 for a total of $26,249.00. On April 4, 1979, Hartupee received Registrant's check for $26,249.00 and used it to purchase two cashier's checks, one for $19,500.00, which represented the cost of the 6,000 shares and was credited to Hartupee's account in payment, and the other for $6,749.00, which represented the profit on the 6,000 shares and was credited to Canfield's account at Registrant. Hartupee testified that he could not recall how he was able to obtain an allotment of 7,000 shares but that he did not have to negotiate the amount. He denied being a nominee for Canfield and said the $6,749.00 that was credited to Canfield's account was a loan which he made to Canfield. He could not remember how long he had known Canfield at the time of the loan. The loan was made in Registrant's office when Hartupee returned from the bank with the

two cashier's checks. Hartupee produced a note dated April 6, 1979, for $6,750.00, which he says was signed by Canfield in his presence. It was a demand note with interest at 10 percent and Hartupee thinks it was repaid in June 1979 at Registrant's office. The repayment was in cash and Hartupee waived the interest. He could not recall specifically what he did with the money except that he used it for personal expenses. He did not deposit it and has no documents showing its receipt. When he was interviewed by Division staff on March 8, 1981 he produced a copy of the typed note fully executed but without any notation regarding disposition. However, at the hearing a copy purporting to belong to Canfield was produced by respondents upon which was written "Paid in full, Bill Hartupee." Hartupee was clearly a reluctant witness and his testimony was not credible.

Francis W. Canfield (Canfield) is a printing salesman. He has known Pagel since 1970 and considers him his best friend. He testified that he purchased 30,000 shares of FilmTec in the private offering through Pagel. He asked Pagel for 30,000 shares in the public offering, but Pagel told him that amount was more than he felt comfortable for Canfield to be alloted. Canfield did not ask for any other amount, nor how many Pagel would have felt comfortable with, but implemented his secondary strategy which he

had planned originally, i.e. to purchase through nominees.

Canfield said he "orchestrated" the purchases through his "little group" of nominees, including Hartupee who, he says, was not a nominee. Any profit realized from the nominee accounts was to go to Canfield. He did not know a "David Williams," but thinks that Burton Lee used a relative for some of the shares and he may have been Williams. All profits came to Canfield in cashier's checks, the amount of the check being determined by the profit.

Canfield testified that another reason for using nominees was that he was not in a liquid cash position at the time and did not want to liquidate other holdings. Also, by using nominees he did not need to invest a nickel of his own money to acquire the FilmTec shares. Canfield told nominees to sell on the first day of public trading, and he then reinvested the profits in FilmTec.

Canfield testified that the nominees did not have any difficulty obtaining the amount of shares they requested. He said that Titcomb just asked for the shares and got them. As for the 14,000 shares obtained by Roberts, he says he did not have to do anything, simply told Roberts to buy them. In his testimony at the hearing he stated that he did not tell Pagel about the nominee purchases until after they were made. However, in his previous testimony during the investigation, when asked whether he had discussed the matter at all with Pagel, he gave the following answers: "Q. How were you able to arrange to have

Mr. Roberts get that volume of shares? Did you have to do anything in order to get 14,000 shares? A. No, just tell him to buy them. Q. You had no conversations with Jack Pagel about that? A. I'm sure I might have, but are you getting to did he ask me to call Roberts and by (sic) in his account? Q. Certainly. I'm trying to determine if you discussed the matter at all with Mr. Pagel. A. I don't recall whether I did at the time."

Canfield testified that Hartupee was not a nominee, but that in following his plan not to use his own money, he borrowed some six thousand odd dollars from Hartupee. Canfield testified that he met Hartupee at the First National Bank of Edina where he borrowed the money in cash. He also repaid the loan to Hartupee in cash at the same bank. Canfield was very positive about both transactions having taken place at the Edina bank. At the hearing Canfield produced a copy of a note dated April 6, 1979 in the amount of $6,750.00. It should be noted that this loan was made after the Hartupee FilmTec shares had been sold, and that Hartupee testified that he made the loan to Canfield at Registrant's office out of proceeds of the sale of his FilmTec stock; also, that Canfield repaid the note in cash at Registrant's office. Canfield's copy of the note has written on it: "Paid in full. Bill Hartupee," but Canfield does not know when this was put on it. He said that the note was returned to him when he repaid the loan, but that when this litigation started he thought that

to be on the safe side he should have Hartupee sign it to indicate that he did indeed get repaid.

Canfield denied that Pagel knew anything about his transactions in FilmTec stock until after they had occurred and that Pagel expressed surprise when he told him. However, Canfield testified that when Pagel saw Canfield's cash position as a result of the FilmTec profits he asked if he could have part of it. Accordingly, Canfield loaned Pagel an amount which he could not recall precisely but thinks around $42,000.00; nor did he remember how the loan was made, that it may just have been out of his account at Pagel. There was no note or other evidence of indebtedness. Pagel repaid Canfield with a personal check dated August 5, 1979, in the amount of $47,500.00. This represents the repayment of two loans, one for the $42,000.00 and one for about $5,000.00 which he loaned to Pagel on another occasion.

Canfield testified that he was at Pagel's home one evening when he loaned Pagel some five thousand odd dollars and change out of his pocket. Canfield testified that he is a collector of various types of antiques and frequently carries large sums of money on his person so that he can make purchases at a moment's notice if something strikes his fancy at an antiques show or elswhere. He did not know why the repayment was in even numbers when the loan was for an odd amount and some cents. During the investigation Canfield was asked: "Q. Can you explain why it was that the money you loaned to Mr. Pagel came from proceeds of FilmTec sales? A. No. It was just the timing. It was timely. Q. Is it pure circumstances, sir, that Mr. Pagel asked to borrow the money at the time you had it from these FilmTec shares?

A. It is good circumstances. It is a time to borrow it, when I've got it. Q. What were the terms of the loan? A. There are no terms. Q. Any interest involved? A. I don't think so. Q. Was there a note involved? A. There may have been a note. It is a little loose, I'm afraid. I don't recall."

It should be noted that the $42,000.00 loan closely approximates the amount of $42,313.50 which was the profit from the Williams and Titcomb accounts and which was credited to the Jack and Karen Pagel account at Registrant (see p. 10 supra).

Canfield testified that his tax return as originally filed for 1979 did not contain the profits from his FilmTec transactions, and that he subsequently filed an amended return but does not recall when.

When confronted during the hearing with his previous testimony, Canfield said that at that time he was being badgered to answer and that today he is a little more reviewed on the situation, "but I can tell you that if I said at that date, that I paid in cash, or in check, it was purely that I didn't recall, and I was trying to please Mr. Shaeffer." [1]

Canfield was an evasive witness, and his testimony became progressively more implausible. Overall his testimony was not credible.

Respondents Pagel and Registrant state in their brief, (the Pagel brief), that it is undisputed that the public

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1/ Peter B. Shaeffer, Division attorney.

offering of FilmTec stock was fully subscribed and sold by March 29, 1979. They argue that Canfield's use of nominees to obtain a substantial number of shares without using his own money, whether or not appropriate for a customer, was something which they could not control and for which they cannot be held accountable. Registrant and Pagel state that the testimony of Canfield and those nominees who testified, supported by exhibits in the record, demonstrates that Pagel did not have a beneficial interest in the Williams and Titcomb accounts. Registrant and Pagel state that they are unable to comment on Markus' alleged involvement with nominees since they have no knowledge concerning it.

Registrant and Pagel state, further, that both Canfield and the nominees were members of the investing public and therefore the distribution of FilmTec to Canfield and/or his nominees at the public offering constituted a distribution not violative of Rule 10b-6, regardless of the manner in which they transferred it among themselves.

Registrant and Pagel contend that a showing of scienter is required in order to find a violation of Rule 10b-6; also, that no adverse inference concerning liability of respondents may be drawn from the assertion of the Fifth Amendment privilege by Pagel, Markus, and others.

Markus adopts totally the Pagel brief and then advances two arguments: (1) that the violations have not been proven by a preponderance of the evidence, and (2) that the evidence was unreliable or improperly received at the hearing. He did not address his use of nominee accounts or the 10b-6 violations.

Respondents concede that they were engaged in a distribution of FilmTec stock. However, their contention that it was fully subscribed and sold by March 29, 1979 is not supported by the record, which clearly shows that 62,705 shares had not ultimately come to rest in the hands of the investing public[2/] but were effectively "parked," a practice which the Commission has found violative of the securities acts.[3/] Of these 62,705 shares, at least 50,805 were sold before they were paid for so that the nominees and beneficial owners received a "free ride," which is prohibited by Regulation T and by the NASD Rules of Fair Practice. In fact, these purchases were actually "bankrolled" by Registrant, whose checks for sales were used to cover the purchases, thus enabling Canfield,

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2 / Lewisohn Copper Corp. , 38 S.E.C. 226,234 (1958).

3/ Securities and Exchange Commission v Blinder, Robinson, 542 F. Supp 468,477 (DC Colo. 1982); R.A. Holman & Co. v. SEC, 366 F.2d 446,449 (1966), modified on other grounds, 377 F.2d 665 (2d Cir. 1967), cert denied 389 U.S. 991 (1967); Batten & Co., et al, 41 SEC 538,540 (1963); Atlantic Equities Company, et al, 43 SEC 354,363 (1967).

as he testified, to make large profits without investing "a nickel of his own money"; nor did respondents put up any of their own money.

The numerous transactions undertaken in an effort to conceal the beneficial interests of respondents in the nominee accounts have been detailed at some length hereinbefore. The documentary evidence reveals a web of cashier's checks, nominee accounts, and brokerage firm transfers all calculated to cover up respondents' participation. One of the nominees, Williams, was never identified; three took the Fifth Amendment and refused to testify. The testimony of those who did testify, with the exception of Titcomb, was for the most part not credible. The respondents, Pagel and Markus, also availed themselves of the Fifth Amendment throughout and refused to testify. The Division asks that adverse inferences be drawn against Pagel and Markus because of their refusal to testify. Respondents assert that adverse inferences are not permissible.

Although there are a number of SEC cases in which the Commission has stated that such an inference may be drawn in an appropriate case, no such inference was in fact drawn in those cases.[4/] Accordingly, no such inference will be drawn in this proceeding.

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4 / Securities and Exchange Commission v Kelly Andrews & Bradley, Inc., et al., 341 F. Supp. 1201,1205 (S.D.N.Y. 1972); James De Mammos, et al., 43 SEC 333,338 (1967); Century Securities Company, et al., 43 SEC 371,382 (1967); Strathmore Securities et al., 43 SEC 575,590 (1967); Melvyn Hiller, et al., 43 SEC 969,973 (1968).

However, although no adverse inference has been drawn from the failure of respondents and others to testify, the inescapable fact remains that the evidence presented by the Division stands unrebutted. The record establishes an intricate pattern of financial subterfuge from which inferences may be drawn that the nominee accounts did include Pagel and Markus, or at the very least, operated for their beneficial interests (see p. 10, supra). In so doing at least 62,705 shares were effectively "parked," thus frustrating a distribution and violating Rule 10b-6.

In support of their contention that scienter is required to prove a violation of Rule 10b-6 respondents cite Chemetron Corporation v. Business Funds, Inc., 682 F.2d 1149 (5th Cir. 1982) reh. den. (1982). However, this case is not relevant as the court in Chemetron was concerned with Rule 10b-5 and Section 9 of the Exchange Act and did not make any findings with respect to Rule 10b-6.

In a recent decision, Securities and Exchange Commission v. Blinder, Robinson & Co.,[5/] the court, in finding a Rule 10b-6 violation, stated:

> Defendants contend that the SEC has not established scienter for purposes of Rule 10b-6. Whether scienter is required under the rule has not been decided by the Supreme Court, and this court is aware of no lower court decision which has considered the issue since the Supreme Court's decisions in Ernst & Ernst v. Hochfelder, and Aaron v. Securities and Exchange Commission. It is not necessary to reach the issue in this case, because the evidence reveals that defendants acted with scienter throughout their involvement with the American Leisure offering.

5/ SEC v. Blinder, Robinson & Co., 542 F. Supp. 468,478 (D.C. Colo. 1982), presently on appeal to the 10th Circuit Court of Appeals.

It is concluded that because of the knowing partic-ipation of Registrant, Pagel, and Markus in the events de-cribed herein that they acted with scienter. As the court stated in Securities and Exchange Commission v Blatt, 583 F. 2d 1325,1334 (5th Cir. 1978):

> The record in this action reveals knowing omissions by each appellant . . . .
> Their conduct, in our judgment, encompassed just the type of "knowing or intentional misconduct" that Section 10(b) was intended to proscribe. See Hochfelder, 425 U.S. at 197, 212-213; SEC v. Commonwealth Securities, Inc., 547 F. 2d 90, 102 (2d Cir. 1978); cf. Arthur Lipper Corp. v. SEC 547 F. 2d 171,180 (2d Cir. 1976) . . . .
> We are confident that "knowing conduct" satisfies the scienter requirement.

Accordingly, it is found that Registrant, Pagel, and Markus wilfully violated Section 10(b) of the Exchange Act and Rule 10b-6 thereunder.

The Order alleges that during the period from on or about March 26, 1979 to March 31, 1980 and continuing thereafter, Registrant, Pagel, and Markus wilfully violated and wilfully aided and abetted violations of Sections 17(a)(1), 17(a)(2) and 17(a)(3) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in connection with the offer, sale, and purchase of the common stock of FilmTec by employing, directly and indirectly, schemes and artifices to defraud and by means of untrue statements of material facts and omissions to state material facts in order to make the statements made, in light of the circumstances under which they were made, not misleading.[6/]

As part of the aforesaid conduct the respondents, among other things, would and did:

1. Dominate, control, and manipulate the market for the common stock of FilmTec;

2. Publish quotations and effect transactions at prices not related to supply and demand;

6/ Section 10(b) as here pertinent makes it unlawful for any person to use or employ in connection with the purchase or sale of a security any manipulative device or contrivance in contravention of rules and regulations of the Commission prescribed thereunder. Rule 10b-5 defines manipulative or deceptive devices by making it unlawful for any person in such connection: "(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 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 . . ." Section 17(a) contains analogous antifraud provisions.

3. Artificially increase, maintain, and depress the price of FilmTec common stock;

4. Artificially restrict the available supply of FilmTec common stock;

5. Represent that transactions in the common stock of FilmTec were being effected "at the market" when in fact transactions were being effected at arbitrarily established prices not reflecting supply and demand, and no market existed other than one dominated and controlled by Registrant;

6. Use, and allow to be used, undisclosed nominee accounts to conceal the true beneficial ownership of shares purportedly offered and sold as part of the public distribution of FilmTec common stock;

7. Omit to state material facts concerning the placing into undisclosed nominee accounts of a substantial portion of the FilmTec common stock purportedly being publicly distributed.

The FilmTec offering became effective on March 26, 1979 and was purportedly sold out by March 29, 1979 with the after-market beginning on March 30, 1979. With the exercise of the over-allotment option by Registrant a total of 352,000 shares were offered. Jack Pagel formed a small selling group which was alloted 34,800 shares, as follows:

Broker/Dealer	Allotment
Alstead, Strangis & Dempsey	2,300
Craig Hallum, Inc.	12,500
R.J. Steichen & Co., Inc.	5,000
Engler & Budd	10,000
John G. Kinnard & Co.	5,000

The limited allotment to the selling group permitted Registrant to retain 90 percent of the offering and to in-

sure that the stock would open at a premium in the after-market. The use of nominee accounts to "park" shares served to further restrict the shares available and afforded respondents the ability to control the timing and pricing of the shares at the opening of after-market trading and for a period of at least ten days thereafter. It should be noted that in the offering on March 29, 1979, the selling group was allotted only 34,800 shares while the nominee accounts were allotted 45,300 shares.

The opening price on March 30, 1979, was set by Pagel and Markus at $4.37 but was steadily increased during the day. An analysis of the March 30, 1979 after-market trading on a minute-by-minute basis and summarized into hourly segments was prepared by the Division. This shows an artificial restriction of the available supply of stock so that the price increased in a manner inconsistent with supply and demand. For example, by 1:59 p.m. customer accounts at all broker-dealers had recorded the purchase of 53,050 shares and sales of 82,205 shares but nevertheless customers were paying as high as $7.00 for the shares. The customer activity at all brokers other than Registrant was evenly balanced in that customers had bought 17,300 and sold 17,200. However, at Registrant customers had sold 65,005 shares and purchased only 35,750 shares with the 30,255 share excess being absorbed by Registrant's trading account.

The disparity between supply and demand is greater when the customer "demand" at Registrant is analyzed.

Of the 35,750 shares recorded as purchased in customer accounts, the nominee accounts of Canfield (20,000), Gunderson (5,650) and Dubie (2,000) total 27,650, leaving only 8,100 shares having been purchased by *bona fide* accounts at Registrant.

The supply and demand disparity was consistent during the first five hours of trading on March 30, 1979. At no time was there any relationship between supply and demand and price movement or price level. This is illustrated by the following summary schedule:

PAGEL, INC. CUSTOMER ACTIVITY EXCLUDING
CANFIELD, ROBERTS, DUBIE, TITCOMB, GUNDERSON, AND HARTUPEE

Period		Bought	Sold
9-10		1,800	29,605
10-11		700	7,800
11-12		900	1,000
12-01		1,400	2,500
1-02		3,300	4,100
	TOTAL	8,100	45,005
2-Close		10,825	4,650

The schedule clearly illustrates that there was not a significant demand by customers to purchase FilmTec in the after-market to account for the price rise. Equally clear is the fact that customers were more interested in selling stock so that it was necessary for respondents to absorb the excess supply in order to maintain the price level.

The March 30, 1979 price level is not explained by reference to the customer demands at firms other than Registrant, as illustrated by the following schedule:

CUSTOMER ACTIVITY AT ALL FIRMS OTHER THAN REGISTRANT

Period		Bought	Sold
09-10		3,200	4,200
10-11		9,800	8,000
11-12		2,400	2,450
12-01		1,350	1,100
01-02		550	1,450
	TOTAL	17,300	17,200
2-Close		6,700	1,600

As the above schedules demonstrate, the excess customer supply at Registrant substantially exceeded the level of customer demand at other broker-dealers, so that if the excess shares at Registrant had been offered to the market it would have of necessity depressed the market, and the price to which the stock was manipulated on March 30, 1979 could not have been sustained.

Further analysis of the FilmTec transactions at other dealers on March 30, 1979 indicates that much of the customer activity was stimulated by Pagel and Registrant. The customers of selling group members bought 7,250 shares and customers of non-selling group broker-dealers purchased 16,750 shares so that a total of 24,000 shares were purchased by customers at other broker-dealers.

Jerome McClees (McClees) was the trader and a registered representative at Moore, Juran & Co., a Minneapolis broker-dealer. On March 30, 1979, Moore, Juran purchased 5,550 shares of FilmTec as agent for several customers. McClees

executed the trades and 4,300 of the shares were purchased for McClees (600) and two of his customers (3,700). These customers were themselves employed in the securities business and McClees induced them to purchase FilmTec. The purchase of the 5,550 shares was executed by McClees at prices from $6.00 to $6.75 a share.

At the time that McClees was executing the FilmTec transactions on March 30, 1979, he was personally indebted to Pagel for $5,000.00. The loan had no interest, was not evidenced by a promissory note, and had no fixed term of payment. In addition to the $5,000.00 loan, McClees also had an undisclosed beneficial interest in 1,000 shares of FilmTec purchased at Registrant in the account of Wayne Nelson, his brother-in-law, for whom Pagel was the registered representative. Although McClees denied having the interest, the facts are that McClees paid the purchase price for the shares with a cashier's check purchased with part of the proceeds of a second loan from Pagel in the amount of $7,050.00. To complete the nominee relationship, McClees received the proceeds of the sales of the stock in the Nelson account and used them to purchase another 1,000 shares of FilmTec in his own account at Registrant where Pagel was his registered representative. McClees paid for his purchase of the 600 shares at Moore, Juran with a cashier's check purchased with the balance of the second loan from Pagel. When the

shares were sold at a profit on April 3, 1979, they were purchased by Registrant. Once the facts are pieced together they show that all of McClees' profitable trading in FilmTec was financed by Pagel, who was making loans to McClees while purportedly borrowing money from Canfield (page 16, supra).

Larry Grady has been employed in the securities business as a registered representative, owner of his own brokerage firm, and a market-maker on the floor of the Chicago Board Options Exchange (CBOE). He is a sophisticated investor and during March and April of 1979 was trading privately for his own account.

Grady was a customer of Registrant and through his registered representative, Barry McLaughlin, obtained an allotment of 5,000 shares of FilmTec which he purchased in the public offering on March 29, 1979. On March 30, 1979, Equity Securities, as agent for Grady, purchased 5,000 shares of FilmTec from other dealers at prices from $6.50 to $7.25, at a total cost of $34,144.02. None of the shares were purchasd from Registrant. On April 2, 1979, Grady sold the 5,000 shares purchased in the offering for $35,873.00 and used the proceeds as payment for the stock purchased at Equity Securities. Grady gave instructions to the trader at Equity Securities concerning the execution of the trades, including the price and location of the shares. Grady was an evasive witness

and not credible. Barry McLaughlin, the registered representative at Registrant, claimed his Fifth Amendment privilege and refused to testify.

The McClees and Grady transactions were not independent but rather a part of respondents' overall scheme to manipulate the market for FilmTec. The McClees transaction commenced at the opening of trading and served to generate customer interest in the after-market. The Grady transaction was executed toward the end of the trading day and served to keep the closing price high. In fact, the shares were purchased at prices from $6.50 to $7.25.

A summary of the trading in FilmTec on March 30, 1979 shows that all broker-dealers recorded the purchase of 81,530 shares and the sale of 89,225 shares. Registrant shows purchases of 56,830 shares and sales of 70,455 shares. If the nominee transactions are eliminated then all broker-dealers sold 69,255 shares and purchased 44,125 shares, or about one and one-half times more supply than demand. At Registrant the sales were 50,455 shares and the purchases 19,425 or about two and one-half times more supply than demand.

At the close of business on March 30, 1979 Registrant had an inventory of 23,580 shares of FilmTec

stock. Only one other broker had a long position, 1,000 shares, while 11 other firms which had effected transactions in FilmTec had a total short position of 6,700 shares. The Division argues that this substantial inventory further indicates Registrant's dominance of the market. However, respondents assert that Registrant's position in FilmTec at the close of business on March 30, 1979 was 4,775 shares and not the 23,580 claimed by the Division.

David Pagel, the younger brother of Jack Pagel, a former trader at Registrant, testified that Registrant had a long-established practice of allowing salesmen to "take down" stock and therefore such shares should not be included in the firm's inventory. To "take down" stock a salesman would ask to have shares given to him and he would then be responsible for selling them within three days. At the end of three days he was required to pay for them whether or not they had been sold. Any profits were split 50-50 with Registrant but any loss was 100 percent the salesman's. Accordingly, respondents argue, an intent to dominate or control the market in FilmTec cannot be inferred under these circumstances.

On the morning of April 5, 1979, nine dealers published quotes in the Minneapolis "white sheets." 7/ The high bid

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7/ These are daily local over-the-counter quotation sheets similar to the national "pink sheets" published by the National Quotation Bureau. FilmTec was not quoted on NASDAQ, the National Association of Securities Dealers Automated Quotation service, which furnishes automatic machine quotations.

was $7.25 and the low offer was $7.75. During the period from 1:43 p.m. to 2:22 p.m. Registrant, as agent for Barry McLaughlin, purchased 2,000 shares at prices from $8.25 to $9.00 and 500 shares as principal at $9.25. During the period from 1:00 to 1:23 p.m., Equity Securities purchased 900 shares for Grady at prices of $7.75 to $8.00 per share. These transactions caused the market price to rise to above $9.00 and Registrant then sold as principal to its customers at prices up to $9.95. During this time "Bud" McLaughlin, a registered representative at Registrant and brother of Barry McLaughlin, retailed at least 5,000 shares of FilmTec to his customers at the inflated price of $9.63. "Bud" McLaughlin refused to testify on grounds of Fifth Amendment privilege.

During the period from March 30 to April 10, 1979, customer transactions were effected as shown in the following schedule:

	Bought	Sold
Selling Group	11,950	32,825
Non-Selling Group	19,600	6,650
Totals	31,550	39,475
Pagel, Inc. (Registrant)	123,510	159,442
Totals	155,060	198,917

As of the close of business on April 10, 1979, eight dealers maintained an inventory position in FilmTec. Seven dealers were "short" in the aggregate amount of

4,750 shares. Only Registrant had a "long" position of 48,607 shares. Registrant and its customers were "long" 329,875 shares or 93.7 percent of the 352,000 share public offering.

Respondents state that it is of some significance that the Division's calculation of Registrant's ending inventory at the close of business April 10, 1979 of 48,607 shares is only 300 shares different from the 48,907 shares reflected on Registrant's inventory cards. Respondents say that this demonstrates the accuracy of its record-keeping; but what percentage of those shares was designated for salesmen, and therefore not part of Registrant's "long" position, is unknown.

From April 10, 1979 to January 1980 Registrant continued to control and dominate the market in FilmTec and the price rose to a high of $17.00 in December 1979. The market was inactive and the dealers stopped making markets because of the thin float and infrequent transactions. Registrant continued to directly control the dealer market by its net purchasing of 13,200 shares from other dealers. Although Registrant's customers purchased 28,312 more shares than they sold, the firm had an inventory position of 48,607 shares at the beginning of the period so that the purchases from dealers was not necessary to fill customer demand.

Additional manipulative conduct on the part of respondents is evidenced by their activities to depress the market in March and November 1980. Each of these occasions enabled Pagel to purchase substantial amounts of FilmTec stock at depressed prices.

During the month of March 1980, the price for FilmTec stock was manipulated downward by almost 50 percent. This arbitrary price reduction is not explicable by supply and demand related factors. Registrant published quotes in the "pink sheets" beginning on March 3, 1980, with a bid of $14.00 and an offer of $15.50 per share and declining by March 31, 1980, to a bid of $7.00 and an offer of $8.50. On March 21, 1980, Pagel purchased 32,000 shares of FilmTec from Registrant's trading account at $7.50 per share.

During the period from October 24, 1980 to November 17, 1980, Registrant's quotes were the only ones published in the "pink sheets." From October 24, 1980 to November 7, 1980 the bid was $9.00 and the offer $10.00 per share. On November 7, 1980, the quotes were dropped to $7.00 bid and $9.00 offered and on November 11 and 12, 1980, respectively, to bids of $6.50 and $6.00 and offers of $8.50 and $8.00. On November 11, 1980, Pagel purchased 61,900 shares of FilmTec at $6.05 per share. Thereafter, the quotes published by Registrant moved upward with a bid of $8.00 and an offer of $10.00 on November 13 and

14, 1980, and $10.50 bid and $12.50 offered on November 17, 1980. The arbitrary up and down movements in its published quotations demonstrate respondents continuing dominance and control of the market for FilmTec stock.

Respondents contend that Division's calculation of trading inventory, which they state is a prerequisite to finding market control or domination, is materially overstated. Respondents rely on David Pagel's testimony (page 31, _supra_) that stock designated for salesmen is not part of the firm's inventory. However, inasmuch as the firm continued to have a pecuniary interest in that stock, it is concluded that the Division properly included it in its calculation of ending inventory. Also, such designation of shares could merely be a means of pushing sales.

Respondents deny any intention to manipulate the market in FilmTec and assert that the public offering resulted in a wide distribution which was not conducive to a manipulative scheme; that the premium price in the after-market was a reflection of supply and demand; and that the trading during the period March 30 to April 10, 1979 demonstrates only that Registrant made the major market for the stock, which is customary for an underwriter in a first time

public offering. As to the price declines in March and November 1980, respondents state that during March there was a broad and precipitous decline in stock prices generally and that the 1980 yearly low was reached on every one of the seven NASDAQ indexes on March 27, 1980. They do not comment on November 1980 when three of those same indexes reached their yearly high.

The record herein, which has been described in some detail, clearly supports a finding that respondents engaged in manipulative conduct. As the Commission held in Bruns, Nordeman & Company:[8]

> A person contemplating or making a distribution has an obvious incentive to artificially influence the market price of the securities in order to facilitate the distribution or to increase its profitability. We have accordingly held that where a person who has a substantial interest in the success of a distribution takes active steps to increase the price of the security, a prima facie case of manipulative purpose exists.

In Securities and Exchange Commission v. Commonwealth Securities, Inc.[9] The court said:

> In a free and open public market, it is the competing judgment of numerous buyers and sellers in an auction which establishes the fair price of a security. When individuals, occupying a dominant

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8 / Bruns, Nordeman & Company, 40 SEC 652, 660, n.11 (1961). See, also Otis & Co., v. Securities and Exchange Commission, 106 F. 2d 579,583 (6th Cir. 1939); Associated Investors Securities, Inc., et al. 41 SEC 160,168 (1962); United States v. Stein, 456 F.2d 844,850 (2d Cir. 1972)

9 / SEC v. Commonwealth Securities, Inc. 410 F. Supp. 1002, 1013 (S.D.N.Y)

> market position, undertake a scheme to distort the price of a security for their own gain, they violate the securities laws by perpetrating a fraud on all public investors.

In addition, the failure to disclose that market prices are the subject of manipulative activity constitutes not only an element of a scheme to defraud, but also the omission of a material fact. False representations, or representations that are false and misleading because necessary qualifications or explanations are omitted, have long been held, in a number of cases, by the courts and the Commission, to constitute activity violative of the anti-fraud provisions of the securities acts.10/

It is fundamental that a misrepresentation or omission must be material to serve as a basis for a finding that a violation occurred. The concept of materiality has been described as the cornerstone of the disclosure system established by the federal securities laws. The basic test adopted by the courts for determining materiality is whether "a reasonable man would attach importance . . . (to those facts) in determining his choice of action in the transaction in question."11/

10/ Charles Hughes & Co., v. Securities and Exchange Commission, 139 F. 2d 434,437(2d Cir. 1943); Norris & Hirshberg v. Securities and Exchange Commission, 177 F. 2d 228,233 (D.C. Cir. 1949); Charles E. Bailey & Co., 35 SEC 33,43 (1953); Harris Clare & Co., Inc., et al, 43 SEC 198,201 (1966).

11/ Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F. 2d 833,849 (2d Cir. 1968), cert denied sub. nom. Coates v. Securities & Exchange Commission, 394 U.S. 976 (1969).

Positive proof of reliance is not necessary. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of his decision.[12/] Likewise, an omitted fact is material if "disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available."[13/]

Finally, respondents contend that the evidence does not support a finding that they acted with scienter. On the contrary, the record fully supports a finding of awareness on the part of each respondent, or at the very least, that they were recklessly indifferent to the consequences of their actions.[14/] Accordingly, it is found that respondents acted with the requisite scienter.[15/]

12/ Affiliated Ute Citizens of Utah, et al. v. United States, 406 U.S. 128,153 (1972).

13/ TSC Industries, Inc., v. Northway, Inc., 426 U.S. 438, 449 (1976).

14/ Recklessness has been held sufficient to satisfy the scienter requirement. See, e.g. Mansbach v. Prescott, Ball & Turben, 598 F. 2d 1017,1023-25 (6th Cir. 1979); Edward J. Mawod & Co. v. SEC 591 F. 2d 588,595-597 (10th Cir. 1979); First Virginia Bankshares v. Benson, 559 F. 2d 1307,1314 (5th Cir. 1977) cert. denied, 435 U.S. 952 (1978).

15/ It is noted, however, that scienter is not necessary to establish violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act, and the findings of fraud herein are made under both those sections. Findings that respondents also violated 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder are merely cumulative.

Accordingly, it is found that Registrant, Pagel, and Markus wilfully violated Sections 17(a)(1), 17(a)2) and 17(a)(3) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Section 15(c) and Rule 15cl-8

The Order charges that during the period from March 30, 1979 until Registrant, Pagel, and Markus ceased participating or being financially interested in the primary distribution of the common stock of FilmTec, they wilfully violated and wilfully aided and abetted violations of Section 15(c)(1) of the Exchange Act and Rule 15cl-8 thereunder.

> Section 15(c)(1) in pertinent part prohibits "manipulative, deceptive or other fraudulent device(s) or contrivance(s)" by broker-dealers. Rule 15cl-8 defines "manipulative, deceptive or other fraudulent device or contrivance" to include any representation, made to a customer by a broker or dealer participating in a distribution, that securities are offered "at the market" if the market is "made, created or controlled" by the broker dealer.

Having found that the price of FilmTec stock was manipulated, it follows that such activity should have been disclosed to customers pursuant to Rule 15cl-8. The Commission has held that failure to disclose is fraudulent. In Halsey, Stuart & Co., Inc.: the Commission stated:

> A manipulation may be accomplished without wash sales, matched orders, or other fictitious devices. Actual buying with the design to create activity, prevent price falls, or raise prices for the purpose of inducing others to buy is to distort the character of the market as a reflection of the combined judgments of buyers and sellers, and to make it a stage-managed performance . . . . the manipulator's design in raising prices is to create the appearance that a free market is supplying demand whereas the demand in fact comes from his planned purpose to stimulate buyers' interest. It is of utmost materiality to a buyer under such circumstances to know that he may not assume that the prices he pays were reached in a free market; and the manipulator cannot make sales not accompanied by disclosure of his activities without committing fraud.16/

Accordingly, it is found that Registrant, Pagel and Markus wilfully violated Section 15(c)(1) of the Exchange Act and Rule 15cl-8 thereunder.17/

Section 17(a) and Rule 17a-3

The Order charges that from about March 29, 1979 to June 9, 1982, Registrant wilfully violated and Pagel and Markus wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder in that Registrant failed to accurately make and keep certain

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16/ Halsey, Stuart & Co., Inc., 30 SEC 106,112, (1949). See, also, Rickard Raimore Gold Mines, Ltd., 2 S.E.C. 377,385 (1937); Duker & Duker, 6 SEC 386,388 (1939) Gob Shops of America Inc., 39 SEC 92,105 (1959); Edward J. Mawod & Co. 46 SEC 865,871, n. 28 (1977), aff'd 591 F. 2d 588 (10th Cir. 1979).

17/ In this context it is well established that a finding of wilfullness does not require an intent to violate the law; it is sufficient that the person charged with the duty knows what he is doing. Billings Associates, Inc., 43 SEC 641,649 (1967); Tager v. SEC 344 F. 2d 5,8 (2d Cir. 1965); Hughes v. SEC 174 F. 2d 969,977 (D.C. Cir. 1949).

of its books and records reflecting the beneficial owner of each cash and margin account.[18/]

Registrant's books and records did not reflect the beneficial interests which Pagel, Markus, and Canfield have been found to have had in the nominee accounts previously discussed herein (page 21, *supra*). As a result of failing to record such interests Registrant's records were inaccurate and in violation of Section 17(a) of the Exchange Act and Rule 17a-3(9) thereunder.[19/]

Respondents Pagel and Markus deny beneficial interest in any nominee accounts for which reporting would have been required. With respect to the Canfield nominee accounts respondents admit that Registrant's records were not corrected to designate the nominee identities and admit that a technical violation may have occurred.

18/ Section 17(a)(1) of the Exchange Act, as applicable here, requires registered brokers and dealers to keep such books and records as the Commission by rule or regulation may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 17a-3 specifies the books and records that must be maintained and kept current. Rule 17a-3(9) requires a record in respect of each cash and margin account . . . containing the name and address of the beneficial owner of such account and, in the case of a margin account, the signature of such owner; . . .

19/ See *Sinclair* v. *SEC* 44 F. 2d 399,401 (2d Cir. 1971); *Haight & Company, Inc.*, 44 SEC 481,507 (1971).

The Commission has repeatedly stressed the importance in the regulatory scheme for strict compliance with the requirement that books and records be kept current in proper form,[20/] and that such records be true and correct.[21/] Failure to record the complete beneficial interest in an account has been found to violate the rule.[22/] Also, the Commission has held that false entries could hamper it in its investigatory functions.[23/] The instant case is a good example where such false records contributed to obfuscation of the true situation which was determined only by painstakingly tracing the sales proceeds through a labyrinth of cashier's checks, bank accounts, brokerage transactions, and purported loans to ascertain the beneficial owners.

The Order charges Pagel and Markus with aiding and abetting the violations of Registrant. In Securities and Exchange Commission v. Coffey.[24/] The court said:

20/ Olds & Company, 37 SEC 23,26(1956); Pennaluna & Company, Inc., 43 SEC 298,312 (1967)

21/ Lowell Niebuhr & Co., Inc., 18 SEC 471,475 (1945).

22/ Edward J. Mawod & Co., 591 F. 2d 588,592 (10th Cir. 1979).

23/ Haight & Company, Inc., et al, 44 SEC 481,507 (1971).

24/ SEC v. Coffey, 493 F.2d 1304,1316 (6th Cir. 1974), cert. denied, 420 U.S. 908 (1975)

> ". . . we find that a person may be held as an aider and abettor only if some other party has committed a securities law violation, if the accused party had general awareness that his role was part of an overall activity that is improper, and if the accused aider-abettor knowingly and substantially assisted the violation." See, also, Woodward v. Metro Bank of Dallas, 522 F. 2d 84,97 (5th Cir. 1975); In the Matter of Carter and Johnson, Securities Exchange Act Release No. 17597/February 28, 1981. 22 SEC Docket 292,316.

The record discloses that the conduct of Pagel and Markus brought them squarely within the requirements for an aider and abettor. Accordingly, it is found that Registrant wilfully violated and Pagel and Markus wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder.[25/]

Public Interest

The remaining issue concerns the remedial action which is appropriate in the public interest with respect to the respondents who have been found to have committed the violations alleged in the Order. The Division urges that Registrant's registration as a broker-dealer be revoked and that

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25/ Except for the anti-fraud provisions of the securities laws it is well established that a finding of wilfullness does not require an intent to violate the law; it is sufficient that the person charged with the duty knows what he is doing. Billings, Associates, Inc., 43 SEC 641, 649 (1967): Tager v. SEC 344 F. 2d 5,8 (2d Cir. 1965); Hughes v. SEC, 174 F. 2d 969,977 (D.C. Cir. 1949).

Pagel and Markus be barred from association with any broker-dealer. Respondents assert that the requisite scienter for a finding of violation of the anti-fraud provisions of the federal securities laws has not been established; that the various nominee issues raise questions concerning record-keeping requirements, but that the Division's efforts to tie those issues to an alleged manipulation are unsupported by the record; and that accordingly the proceedings should be dismissed.

Registrant, Pagel, and Markus have been sanctioned previously by the Commission. In Securities Exchange Act Release No. 17936, dated July 13, 1981, the Commission, in accepting offers of settlement from Registrant, Pagel, and Markus in an administrative proceeding, found that Registrant wilfully violated and Pagel and Markus wilfully aided and abetted violations of Sections 7(c), 15(c)(3), and 17(a)(1) of the Exchange Act, Rules 15c3-3, 17a-3, 17a-5 and 17a-11 thereunder, and subsection 4(c)(8) of Regulation T; Pagel and Markus wilfully violated and Pagel, Registrant, and Markus wilfully aided and abetted violations of Section 7(f) of the Exchange Act and subsection 2(a)(2) of Regulation X. Registrant was suspended for 10 business days from certain market making activities; Pagel and Markus were suspended for 30

calendar and 15 business days, respectively, from being associated with any broker, dealer, investment adviser, or investment company.

In light of the evidence in the record supporting the egregious violations found herein, and in the absence of any truly mitigating factors, it is concluded that the sanctions ordered below are appropriate and essential in the public interest.

As the court said in Arthur Lipper Corp., v. Securities and Exchange Commission: 26/

> The purpose of such severe sanctions must be to demonstrate not only to petitioners but to others that the Commission will deal harshly with egregious cases.

In Steadman v. Securities and Exchange Commission: 27/ the court said that when the Commission imposes severe sanctions it "should articulate why a lesser sanction would not sufficiently discourage others from engaging in the unlawful conduct it seeks to avoid."

Broker-dealers and registered representatives engaging in the type of conduct practiced by respondents impose a social burden on the community

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26/ Arthur Lipper Corp. v. SEC, 547 F.2d 171,184 (2d Cir. 1976, cert. denied 434 U.S. 1009

27/ Steadman v. SEC, 603 F. 2d 1126,1137 (5th Cir. 1979), aff'd 450 U.S. 91 (1981).

which must be considered. Both their present and past conduct has required the SEC to devote a great deal of its resources to police their activities and to protect the public from the fraud and deception practiced by respondents. Broker-dealers, registered representatives, and the securities industry must be put on notice that such conduct will not be tolerated. Accordingly, it is believed that any sanctions less than those imposed would be ineffectual.

ORDER

IT IS ORDERED that:

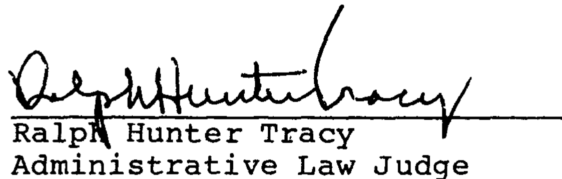
(1) The registration as a broker-dealer of Pagel, Inc. is revoked, and the firm is expelled from membership in the National Association of Securities Dealers.

(2) Jack W. Pagel and Duane A. Markus, and each of them, is barred from association with any broker-dealer.[28/]

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

28/ It should be noted that a bar order does not preclude making such application to the Commission in the future as may be warranted by the then existing facts. Fink v. SEC, 417 F. 2d 1058,1060 (2d Cir. 1969); Vanasco v. SEC, 395 F. 2d 349,353 (2d Cir. 1968).

Pursuant to that rule, this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon him, filed a petition for review pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.[29/]



Ralph Hunter Tracy
Administrative Law Judge

August 29, 1983
Washington, D.C.

29/ All proposed findings and conclusions submitted by the parties have been considered, as have their contentions. To the extent such proposals are consistent with this initial decision they are accepted