ADMINISTRATIVE PROCEEDING
FILE NO. 3-6380

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
BLINDER, ROBINSON & CO., INC. MEYER BLINDER	:

INITIAL DECISION

August 30, 1985
Washington, D.C.

David J. Markun
Administrative Law Judge

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In the Matter of BLINDER, ROBINSON & CO., INC. (8-15727) MEYER BLINDER	INTITIAL DECISION

APPEARANCES: Rodney K. Vincent, Thomas J. Amy and Donald M. Hoerl, Esqs., Denver, Colorado, for the Division of Enforcement.

Arthur F. Mathews, Andrew B. Weissman, Richard F. Goodstein, Esqs., of Wilmer, Cutler & Pickering, Washington, D.C., and Alan C. Jacobson, P.C., of Englewood, Colorado, for the Respondents.

BEFORE: David J. Markun, Administrative Law Judge.

I. THE PROCEEDING

This public proceeding was instituted by an order of the Commission dated June 27, 1984 ("Order"), pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 ("Exchange Act") [1/] to determine whether Respondents Blinder, Robinson & Co., Inc. ("Blinder Robinson" or "registrant") and Meyer Blinder ("Blinder"), as the Division of Enforcement alleged in the Order, (a) were the subjects of a permanent injunction entered against them on June 8, 1982, by the United States District Court for the District of Colorado enjoining them from future violations of Section 17(a) of the Securities Act of 1933, as amended ("Securities Act"), [2/] and of Sections 10(b) and 15(c) of the Exchange Act [3/] and Rules 10b-5, 10b-6, 10b-9, and 15c2-4 promulgated thereunder, [4/] and (b) wilfully violated the anti-fraud provisions and antimanipulation provisions of the securities laws and rules mentioned in the allegation concerning the entry of permanent injunctions, and, if such injunctions were issued or such violations were committed, the remedial action, if any, that is appropriate in the public interest.

1/ 15 U.S.C. §78o(b), 78s.

2/ 15 U.S.C. §77q(a).

3/ 15 U.S.C. §78j(b), 78o(c).

4/ 17 C.F.R. §240.10b-5, 240.10b-6, 240.10b-9, 240.15c2-4.

The violations of the antifraud and antimanipulation provisions of the various statutes and rules are alleged to have occurred during the period from about December 26, 1979 to August 28, 1980, in connection with a $25 million public offering of various securities of American Leisure Corporation ("American Leisure"), for which Blinder Robinson acted as underwriter. These alleged violations arose out of the same factual circumstances as constituted the factual and legal predicates for issuance of the alleged permanent injunctions; indeed, counsel for the Division stated on the record that the allegations of violations of laws and rules reflected in the Order were patterned directly upon the findings of the U.S. District Court made as the basis for its issuance of the alleged permanent injunctions. 5/

A 12-day evidentiary hearing was held in Denver, Colorado, during October and November, 1984.

The parties were represented by legal counsel; they filed proposed findings of fact, conclusions of law, and supporting

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5/ As noted more particularly later herein, the Division relies upon the United States District Court's judgment, injunctions, and supporting memorandum opinion and order, 542 F. Supp. 468 (U.S. D.C., D. Colorado, 1982), Exhibits 1 and 2 herein, as establishing the charged violations of statutes and rules.

briefs pursuant to the Commission's Rules of Practice.[6/]

The findings and conclusions herein are based upon the record and upon observations of the demeanor of the various witnesses. The standard of proof applied is that requiring proof by a preponderance of the evidence.[7/]

II. FINDINGS OF FACT AND LAW

A. The Respondents.

Respondent Blinder Robinson, a broker-dealer whose principal office is in Englewood, Colorado, has been registered with the Commission pursuant to Section 15(b) of the Exchange Act since April 22, 1970. It has been a member of the National Association of Securities Dealers, Inc. ("NASD") at all times relevant here. Currently the firm has 24 offices located in 8 states; it specializes in underwriting, and making markets in, penny stocks.

Respondent Meyer Blinder is now, and has been since the inception of Blinder Robinson, the president, a director, and controlling person of the firm. He owns approximately 66% of registrant's outstanding stock. He and his son Larry together own about 92% of the stock.

6/ 17 CFR §201.16. The motions of the parties that they be allowed to exceed 60 pages in the length of their briefs are hereby granted.

7/ Steadman v. S.E.C., 450 U.S. 91, 101 S.Ct. 999 (1981).

B. Issuance of Permanent Injunctions Against Respondents in Connection with American Leisure Underwriting.

Subsections 15(b)(4) and 15(b)(6) of the Exchange Act provide in pertinent part as follows:

> (4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated -
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> (C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, entity or person required to be registered under the Commodity Exchange Act, or municipal securities dealer, or as an affiliated person or employee of any investment company, bank, entity or person required to be registered under such Act, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.
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> (D) has willfully violated any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, this title, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.
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> (6) The Commission, by order, shall censure or place limitations on the activities or functions of any person associated, or seeking to become associated, with a broker or dealer, or suspend for a period not exceeding twelve months or bar any such person from being associated with a

> broker or dealer, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in subparagraph (A), (D), or (E) of paragraph (4) of this subsection . . . or is enjoined from any action, conduct, or practice specified in subparagraph (C) of said paragraph (4).

The record establishes, as the Division alleges in the Order, that on June 8, 1982, judgments of permanent injunction were entered in the United States District Court for the District of Colorado against Respondents Blinder Robinson and Blinder enjoining them from future violations of Section 17(a) of the Securities Act and Sections 10(b) and 15(c) of the Exchange Act and Rules 10b-5, 10b-6, 10b-9 and 15c2-4 promulgated thereunder. S.E.C. v. Blinder, Robinson & Co., Inc.; Meyer Blinder, et al., 542 F.Supp. 468, (U.S.D.C., D. Colorado, 1982). The memorandum opinion and order of United States District Judge Matsch is attached hereto and incorporated herein as Attachment A. It is also a part of the record herein as Division's Exhibit 2. The Court's judgment against the two Respondents appears in the record as Division's Exhibit 1.

The injunctions were issued after a full trial to the Court; the facts giving rise to the injunctions arose out of Respondents' $25 million underwriting of securities of American Leisure, a new issuer with no operating history, during the period December 26, 1979 to August 28, 1980.

On appeal, the U.S. District Court's judgment of permanent injunction was affirmed by the Court of Appeals for the 10th Circuit in S.E.C. v. Blinder, Robinson & Co., Federal Securities Law Reports, CCH 1983, ¶99,914, pp. ¶96856-96858, Sept. 19, 1983. Respondents' petition for a writ of certiorari was denied on January 7, 1985. 105 S.Ct. 783 (1985), __ U.S.__; 53 U.S.L.W., January 7, 1985, No. 84-649.

Respondents do not dispute the issuance of the injunctions or that under Subsections 15(b)(4) and 15(b)(6) of the Exchange Act, quoted above, their issuance constitutes a basis for the imposition of sanctions, if sanctions are found to be in the public interest.

Respondents' contention that the District Court's injunctions are invalid and that its memorandum opinion and order should not be accepted as proof in this proceeding on the ground, among others, that the Commission's order for investigation that led to the injunction was itself invalid or improperly utilized will be treated under part IIC below, where Respondents assert essentially the same defenses.

C. Violations by Respondents of the Antifraud and Antimanipulation Provisions of Sections 17(a) of the Securities Act, and of Sections 10(b) and 15(c) of the Exchange Act and Rules 10b-5, 10b-6, 10b-9 and 15c2-4 thereunder, in Connection with the American Leisure Underwriting.

The Order, as already noted, contains the Division's allegations that Respondents, in the course of underwriting various

securities of American Leisure during the period December 26, 1979 to August 28, 1980, wilfully violated the antifraud and antimanipulation provisions of the laws and rules mentioned immediately above.

In proof of these allegations the Division introduced Judge Matsch's injunction judgment and his memorandum opinion and order in the Commission's successful enforcement suit for injunction in the United States District Court against Respondents and others. Attachment A hereto (Division's Exh. 2), 542 F.Supp. 468 (D. Colo. 1982), and Division's Exh. 1. In that opinion and order the Court found wilful violations of the mentioned antifraud and antimanipulation statutes and Commission rules as a basis, among others, for enjoining future violations of such statutes and rules. As noted under IIB above, the U.S. District Court's judgment of permanent injunction was affirmed by the Court of Appeals, ¶99,491 Federal Securities Law Reports, CCH 1983, pp. 96856-96858, Sept. 19, 1983, (Division's Exhibit 3), and Respondents' petition for certiorari was denied on January 7, 1985, 105 S.Ct. 783 (1985).

Respondents concede that the U.S. District Court issued the mentioned injunctions against them and that in the process of doing so the Court found wilful violations of the antifraud and antimanipulation provisions of the statutes and rules charged to have been violated in the Order in connection with

their underwriting of American Leisure. Nor do they dispute that findings of such violations constitute a basis for imposition of sanctions against them under Subsections 15(b)(4) and 15(b)(6) of the Exchange Act if sanctions are found to be in the public interest.

Respondents contend, however, that the permanent injunctions and memorandum opinion and order are not admissible in this proceeding for any purpose or, if admissible at all, that they are admissible only for the limited purpose of establishing that injunctions were issued but not to establish violations of law or the nature and extent of any such violations.

Respondents make three principal arguments in support of these contentions.

In support of their limited-use theory, Respondents contend that Judge Matsch's findings of violations and the findings of fact related thereto may not be used herein because they were not "necessary" to the Court's conclusion that injunctions against Respondents should issue. In effect, Respondents seem to argue that the Court's findings of violations of the statutes and rules and the findings of fact supporting them were so much surplusage. This argument is wholly without merit.

It is entirely clear that under established criteria for the issuance of injunctions both the findings of violations and the findings of facts supporting the conclusions as to violations

were "necessary", indeed essential, bases for issuance of the injunctions.

It is not every violation that will result in an injunction. Issuance of an injunction against future violations of the law based upon past violations necessarily involved findings that past violations occurred. Having found past violations, the standard for issuing an injunction against future violations of the law is whether ". . . the inferences flowing from the defendant's prior illegal conduct, viewed in light of present circumstances, betoken a 'reasonable likelihood of future transgressions.'" S.E.C. v. Zale Corp., 650 F.2d 718, 720 (C.A. 5), cert. denied, 454 U.S. 1124 (1981). The findings of law, fact, and mixed fact and law made by the District Court were thus all clearly relevant on, and essential ingredients in determining, the question whether an injunction should issue on the basis of the past violations found.

Respondents' broader argument, i.e. that the "American Leisure" injunctions issued against them by the U.S. District Court for the District of Colorado and the memorandum opinion and order of Judge Matsch accompanying and underlying them are not admissible in this proceeding for any purpose, includes two contentions, i.e. (1) that the Commission's investigative order that led to the enforcement action from which the injunctions emanated was invalid and (2) the asserted gross negligence

of their then counsel in not objecting at the "American Leisure" enforcement trial to the admission of purportedly tainted evidence.

Respondents have had their "day in court" on both of these contentions.

At the outset it should be noted that in their answer to the Commission's complaint that resulted in the injunctions against them, Respondents alleged as an affirmative defense that the Commission's case resulted from an illegal investigation. However, at the trial of the Commission's enforcement action Respondents did not seek to introduce any evidence relating to their purported illegality defense, nor did they object to the Commission's introduction of any evidence derived from its investigation. Instead, Respondents chose to assert that contention in a separate proceeding and, at a later date, in yet another proceeding, they asserted the incompetent-counsel contention.

In these two separate proceedings initiated in the U.S. District Court for Colorado, Respondents sought, in the first suit, injunctive and declaratory relief based upon their challenge to the Commission's formal order of investigation that led to the enforcement action that resulted in the injunctions and, in the later, second proceeding, relief from the injunctions entered against them some 19 months earlier under Fed. R.

Civ. P. 60(b)(6) on the basis of the asserted gross negligence of their counsel in not objecting to the admission of allegedly tainted evidence at trial.

Respondents lost in both proceedings. In the first, after a remand, the District Court again granted summary judgment in favor of the Commission. In the second proceeding, the District Court denied the Rule 60(b)(6) motion, concluding that, based on the records of the trial of the Commission's injunctive enforcement suit and Respondents' suit against the Commission for injunctive and declaratory relief, the Respondents were vigorously represented by competent and experienced lawyers whose tactical decision was binding upon their clients.

Respondents appealed both of these proceedings to the Court of Appeals for the Tenth Circuit. The Circuit Court consolidated the two appeals (C.A. No. 83-2041 and C.A. No. 84-1483) and affirmed both judgments. Blinder Robinson & Co. and Meyer Blinder v. U.S. S.E.C., et al., 748 F.2d 1415 (1984).

With particular relevance to the instant proceeding, the Court of Appeals, in affirming the District Court in the first proceeding, held that Respondents' challenge to the Commission's investigatory order became moot when the formal order of investigation was terminated in September 1982 and that, to the extent that Blinder Robinson and other subpoena recipients complied with subpoenas issued prior to the order's termination,

claims to declare those subpoenas unlawful were moot. As to Respondents' Rule 60(b)(6) proceeding, the Court of Appeals in affirming agreed with the District Court's reasoning that Respondents were bound by the tactical decision of their competent and experienced counsel. The Appeals Court cited with approval, at p. 1421, the U.S. Supreme Court's decision in Ackerman v. United States, 340 U.S. 193, 198, 71 S.Ct. 209, 211-12: "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

The United States Supreme Court denied certiorari on May 28, 1985. 17 Securities Regulation and Law Report (BNA) 961, May 31, 1985.

At the hearings herein, I ruled out evidence Respondents sought to introduce to establish their claim that the Commission's investigative order, or the Division's utilization thereof, was unlawful. I did so primarily on the ground that the place for Respondents to have raised and pursued that defense was in the Commission's enforcement suit in the U.S. District Court which resulted in the injunctions. Secondarily, I indicated that even apart from that consideration, I had some doubt that the instant Order authorizing this proceeding and directing that the charges reflected therein be adjudicated, authorized inquiry into the Respondents' illegality contention. For reasons developed below, I conclude it is not necessary to consider this second question.

In urging that it was error to exclude evidence concerning their illegality defense, Respondents rely now, as they did at the hearings, on Haring v. Prosise, 462 U.S. 306 (1983). Haring is totally inapposite. In Haring, the Court held that a crimiral defendant's plea of guilty (and his consequent failure to challenge the legality of a search) did not collaterally estop him from maintaining a subsequent action for damages under 42 U.S.C. §1983 based on the alleged unconstitutionality of the search under the Fourth Amendment. The Court reasoned that under a plea of guilty there was no "necessary" determination of the unlawful search issue since that determination would have been irrelevant in the context of the guilty-plea proceeding; the Court further concluded that entering a guilty plea did not constitute a waiver of any Fourth Amendment claim.

Here the situation is entirely different.

To begin with, Subsections 15(b)(4)(c) and 15(b)(6) of the Exchange Act [8/] provide a statutory basis for the imposition of sanctions in this proceeding, providing sanctions are found to be in the public interest, when a respondent has been enjoined from described conduct or activity connected with the securities business, as Respondents here admittedly have been, by an "order, judgment, or decree of any court of competent jurisdiction."

8/ Set forth in pertinent part at pp. 5-6 above.

It is therefore unnecessary to rely upon the common law doctrine of collateral estoppel to give effect to the U.S. District Court's injunctive judgment and order as a basis or predicate for imposition of sanctions in this proceeding. Moreover, the Court's memorandum opinion, with its underlying detailed findings of fact and findings of violations of securities laws and rules, is clearly relevant and admissible on the question of the "public interest" as an exception to the hearsay rule under Rule 803(8) of the Federal Rules of Evidence, if on no other basis. Thus, even if the Order had not included specific allegations that Respondents had wilfully violated various securities laws and Rules, the District Court's memorandum opinion and order finding such violations and making related findings of fact and mixed fact and law would be admissible here on the question of whether the public interest requires the imposition of any sanctions based upon the District Court's injunctive judgments and orders.

Secondly, Subsections 15(b)(4)(D) and 15(b)(6) of the Exchange Act [9/] also provide a statutory predicate, as distinct from a common law basis, for the imposition of sanctions in this proceeding, again assuming sanctions are found to be in the public interest, when a respondent has wilfully violated

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9/ Set forth in pertinent part at pp. 5-6 above.

provisions of, among others, the Securities Act, the Exchange Act, and rules and regulations promulgated under such Acts. While these statutory provisions do not specify how the wilful violations of statute, rule, or regulation are to be established, e.g. in the course of an administrative proceeding instituted by the Commission or in a prior judicial proceeding in a "court of competent jurisdiction", the provisions, read in the context of the entire content of Subsections 15(b)(4) and (6) of the Exchange Act, clearly contemplate that proof of such violations may be achieved in either way. Where, as happened here, an Article III federal court necessarily determined in the course of an enforcement proceeding for injunctions brought by the Commission against Respondents that Respondents had wilfully committed violations of securities statutes and rules, as alleged, it would be inimical to important interests in efficient adjudicative administration to permit a respondent to challenge those judicial determinations in a subsequent administrative proceeding initiated by the Commission. To permit that would contravene the whole structure of the statutory scheme.

On the rationale already discussed, the District Court's memorandum opinion and all findings therein are relevant and admissible on the question of whether the public interest requires the imposition of sanctions based upon wilful violations

of statutes and rules.

In effect, the structure of Subsections 15(b)(4) and 15(b)(6) of the Exchange Act is such that, where courts have issued injunctions and made determinations of wilful violations of securities laws, rules, or regulations, such adjudications as to those matters operate more in the manner of res judicata than collateral estoppel in a subsequent administrative proceeding brought by the Commission to ascertain whether sanctions need to be imposed in the public interest.

Lastly, assuming arguendo that the doctrine of collateral estoppel is applicable in the circumstances here presented, these circumstances are readily distinquishable from the facts in Haring in a number of significant respects, of which only a few need be noted.

In Haring there was a guilty plea. The Court held that in the context of that guilty plea it was simply irrelevant to consider any Fourth Amendment claim and therefore such claim was not necessarily disposed of in the guilty plea and could therefore thereafter be asserted in a subsequent suit for damages under 42 U.S.C. §1983 without in any way impacting or nullifying the judgment of guilt of the criminal offense.

Here, by contrast, Respondents sustained injunctions after a full trial to the Court. They were held to have been bound to have raised and pursued their illegality defense in the

Commission's civil enforcement suit resulting in the injunctions. They had full opportunity and motivation to do so, particularly since under Section 15(b) of the Exchange Act the issuance of injunctions against them could constitute a basis for sanctions against them in subsequent administrative proceedings that the Commission might institute against them. As chronicled above, Respondents' efforts to assert their illegality defense in collateral litigation as well as to assert an incompetent-counsel defense were unsuccessful notwithstanding their exhaustion of all appellate remedies both in the Commission's enforcement action and in Respondents' collateral litigation.

In effect, given the structure of Section 15(b) of the Exchange Act, Respondents are here attempting to nullify significant effects potentially flowing from the issuance against them of injunctions in the U.S. District Court and from that Court's underlying findings that they wilfully violated specified securities laws and Rules.

Also, in Haring the Court was dealing with state law and decisions and was concerned (462 U.S. at 322) about "important interests in preserving federal courts as an available forum for the vindication of constitutional rights."

Here, by contrast, state court decisions are not involved and such consideration is not present inasmuch as civil proceedings initiated by the Commission are tried in Article III

federal courts and appeals from its administrative decisions lie to the federal Court of Appeals.

Accordingly, it is concluded that the violations of anti-fraud and antimanipulation provisions of securities statutes and Rules charged in the Order are established as found in the U.S. District Court's memorandum opinion and order as set forth in Attachment A, (Division's Exhibit 2), and affirmed by the decision of the Court of Appeals, cited above at p. 7.

III. THE PUBLIC INTEREST

The issuance of injunctions against Respondents as found herein, and the commission by Respondents of wilful violations of antifraud and antimanipulation provisions of the Securities Act and of the Exchange Act and of Rules promulgated thereunder, as found herein, afford independent grounds for the imposition of sanctions if such are found to be in the public interest.

It seems unnecessary to review more than very briefly here the circumstances out of which the injunctions and findings of wilful violations in the American Leisure underwriting arose, as bearing on the question of possible sanctions, inasmuch as the findings herein of injunctions and wilful violations are predicated upon determinations made in the federal courts, and the U.S. District Court's memorandum opinion and order containing detailed findings of fact and law have been incorporated by reference in this initial decision and the injunctive judgment

and affirmance by the Court of Appeals are parts of the record herein (Exhibits 1, 2, 3) and have been officially published, as already noted.

Respondent Blinder Robinson entered into an agreement with American Leisure, a new business with no operating history, to act as underwriter for a $25 million public underwriting of its securities. Respondent Blinder, as president and principal shareholder of Registrant, was an active participant in negotiating and carrying out the underwriting agreement.

The offering, consisting of 10 million units of common stock and two warrants priced at $2.50 per unit, was on a "best efforts, all-or-none" basis. Thus, if all of the units were not sold to the public during the 90-day period during which the offering would be open, all proceeds would be returned and the offering terminated. The prospectus represented that all funds received from investors would be deposited in an escrow account in Metro National Bank ("Metro Bank") of Denver, Colorado.

Since the offering was on an all-or-none basis, Respondents' compensation was largely contingent on its success. If they were able to sell the offering, Blinder Robinson would receive $2.25 million in commissions plus $250,000 for expenses. If the offering failed, the substantial potential commissions would be lost.

Respondents conducted a vigorous sales campaign that included misrepresentations and fraudulent price predictions. U.S. District Court Judge Matsch found, inter alia (Attachment A, pp. 474, 475):

> "Meyer Blinder and the Blinder-Robinson sales force aggressively promoted the American Leisure securities before the registration statement became effective and then followed the manipulative and deceptive practice of maintaining market interest by suggesting that the hotel-casino development would be assured because of deals that were being made. The sales presentations followed a pattern of misstatements and omissions. Sales representatives predicted that the American Leisure securities would open at a premium in the after-market, without any factual basis for their predictions. They told buyers that the firm's personnel had inside information about developments positively affecting the issuer, when in fact there were no positive developments for the new company during the distribution period.
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> " . . . It is clear that the Blinder-Robinson sales force practiced a program of deliberately deceptive misinformation which Blinder orchestrated . . . ."

It became evident to Respondents that they could not sell the entire offering to the public by the closing date of March 25, 1980. Instead of returning the investors' funds, however, Respondents contrived a series of non bona fide transactions in the final days before the closing date to create the false impression that the all-or-none contingency had been satisfied.

In one of these transactions, American Leisure itself indirectly financed a purchase of 600,000 units by Scope, Inc., which borrowed the necessary $1.5 million from a Florida bank.

As an accomodation for this loan, American Leisure agreed to deposit $3 million in certificates of deposit with the bank, half of which would earn interest at a below-market rate of 2% less than the rate being charged Scope.

In a second transaction that the District Court found was not a bona fide transaction, proceeds from a Metro Bank loan facilitated by a Blinder Robinson sales representative were used to purchase another 400,000 units of the offering.

A third transaction involved Blinder Robinson's own purchase of 956,393 units, slightly less than 10% of the offering and just enough to purportedly "sell out" the offering. Although Respondents purported to pay for this purchase with the proceeds of an unsecured "loan" from Metro Bank, the U.S. District Court found that the funds were in fact an improper advance on Blinder Robinson's unearned commissions out of the escrow account. Respondents improperly placed these units in Blinder Robinson's trading account for immediate resale to the public; after the deadline for the closing of the offering, Blinder Robinson distributed American Leisure securities to the public from its trading account and concurrently began purchasing American Leisure securities in the over-the-counter market and making a market in the securities. Contrary to the advice of counsel, Respondents made a "business decision" not to supplement the prospectus with a "sticker" that would have advised potential

investors that Blinder Robinson was itself purchasing nearly 10% of the offering. Judge Matsch found that Respondents concealed "the frantic manipulations which resulted in the pretension that all of the issue had been sold by the March 25 deadline." Attachment A, p. 475. Thus investors were never informed of the circumstances under which some 20% of the American Leisure units were deemed sold as a result of what the District Court found to be non bona fide transactions in the final days before the offering was to be closed.

With respect to the involvement of third parties in the non bona fide transactions, the District Court concluded (Attachment A, p. 480):

> "What is significant is that none of the above activities by third parties occurred in a vacuum. Rather, those activities were either at the direction of Blinder and Blinder-Robinson, or with their full knowledge and tacit approval; and the particular actions taken by the bank and others were simply component parts of the overall scheme which Blinder and Blinder-Robinson orchestrated to give the appearance of completing the offering by March 25, 1980.

Judge Matsch also concluded that, by purchasing 956,393 units for Blinder-Robinson's trading account, Respondents fell short of selling out the offering and that, consequently, the distribution continued after the purported closing date on March 25 and that Respondents therefore violated Rule 10b-6 (17 C.F.R. §240.10b-6) by making a market in American Leisure securities after that date. Attachment A, pp. 477-8.

The District Court rejected Respondents' claim of reliance upon advice of counsel, finding that (a) having failed to make complete disclosure to counsel and (b) having failed to follow counsel's advice, Respondents "cannot hide now behind legal advice which [they] chose to ignore." Attachment A, pp. 480-481.

Judge Matsch rejected strongly Respondents' contentions that they acted without scienter (Attachment A, pp. 476-7, 478, omitting footnote):

> "Defendants' contention that their mental state fell short of the requisite scienter is rejected. The evidence fails to establish a basis in fact for the representations made by Blinder to his sales force regarding American Leisure's prospects for success. Rather, it shows that Blinder knew that the company had no positive developments during the distribution period, and that the offering was meeting with difficulty. The defendants knew that the closing of March 25, 1980 was a pretense. There is no more telling indication of knowledge than the direct receipt of the advice of the involved attorneys to attach a sticker to the prospectus. But despite that knowledge of the materiality of their conduct, and its potential consequences, they ignored counsels' advice. This is not a case of "recklessness"; the defendants acted with a knowing "intent to deceive, manipulate, or defraud" under Ernst & Ernst.
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> ". . .It is not necessary to reach that issue in this case, because the evidence reveals that defendants acted with scienter throughout their involvement with the American Leisure offering."

As previously noted, the Court of Appeals affirmed the District Court, upholding its factual findings and its conclusions

that Respondents had violated federal statutes and rules as charged by the Commission. In affirming the injunction without an express finding concerning the likelihood that violations would recur, the Court of Appeals concluded that "[t]he findings of the trial court * * * are sufficient to support the injunctive relief", noting in particular "the nature of the violations, the knowledge that certain actions were in violation, [the] placement of the shares purchased in the trading account, the deliberate deception by the sales force and the finding by the trial court on scienter", and stated that "[n]o particular recitations [regarding the likelihood of recurring violations] are required." Federal Securities Law Reports, ¶99,491, (C.A. 10th, Sept. 19, 1983), at p. 96,858.

The record discloses various sanctions that have been incurred by one or both Respondents in proceedings before the NASD and in numerous State proceedings that may properly be considered in determining what sanctions should be imposed in this proceeding.

On July 30, 1971, Blinder Robinson paid a $250 fine assessed by the NASD. Under a consent agreement, Blinder Robinson conceded it had violated Section I of Article III of the Rules of Fair Practice with respect to the computation of its net capital. Blinder was not named a respondent, but he was a principal and controlling person of the firm at the time.

On June 3, 1981, Blinder Robinson and Blinder, among others, were each censured and fined $1,000 by the NASD based upon "free riding" violations by certain personnel, including "Butch" Gordon, prior to May 1980. Both Respondents, as well as Larry Blinder, were found to have failed properly to supervise in order to safeguard against the violation.

The record also shows that from 1978 to 1984, Blinder Robinson or the firm and Blinder were the subjects of disciplinary proceedings in 16 states under the securities laws of those states. The states and years involved were as follows: California, 1980; Maryland, 1984; Massachussetts, 1982; Colorado, 1978; Wisconsin, 1979; Kansas, 1979; Montana, 1982; Tennessee, 1981; Georgia, 1981; Virgina, 1983; Texas, 1980; Pennsylvania, 1984; Michigan, 1984; Illinois, 1983; Wyoming, 1983; and Missouri, 1983.

In general, these proceedings resulted in cease-and-desist orders, consent orders or injunctions, and default orders or injunctions. The charged violations generally involved selling securities within the state without the firm's having been registered to do so, selling securities through salesmen not licensed in the state, or unlawful advertisements.

Some proceedings culminated in fines, the largest being a $25,000 fine imposed by Virginia and a $20,000 fine imposed by Maryland. In some cases there were suspensions of the firm's

registration for prescribed periods of time. In a number of instances temporary cease-and-desist orders became final after Respondents chose not to request a hearing on the charges.

Respondents seek to dismiss some of these state sanctions as involving "minor" violations. In his testimony, Respondent Blinder sought in part to dismiss these state violations on the asserted basis that everyone was doing it. Neither argument is valid or acceptable. What is more, the large number of state sanctions incurred, stretching over a period of six years and involving repeatedly the same kinds of violations, suggests that Respondents took a very cavalier attitude towards state securities law compliance, in effect adopting a policy of unconcern with compliance until they got caught.

As relevant on the question of appropriate sanctions, Repondents claim in effect that subsequent to the American Leisure violations the firm has undergone a metamorphosis -- that except in name and ownership it is no longer the same firm, in that, among other things, there has been a virtually complete turnover at the management level of the firm. In support of this claim Respondents note, in particular, that Steve Theys ("Theys"), executive vice president, with overall management and operational responsibility under Meyer Blinder, but specializing in corporate finance, including underwritings, and sales, and John Cox ("Cox"), vice president-compliance and

special assistant to Blinder, have been engaged within the past two years. Respondents contend that Cox, with 13 years' experience with the NASD before being employed by Blinder Robinson under a 3-year contract, in matters of compliance has complete and final authority, with power to override even the wishes of Blinder and Larry Blinder, the firm's owners.

The record does not support these sweeping claims by Respondents. While Theys and Cox were indeed engaged within the past two years it does not follow from that, or from other personnel changes made at lower levels in the firm, that Blinder Robinson is now "a different organization" in respects pertinent to compliance or other factors related to sanctions. The record is quite clear that Theys is completely subordinate to Blinder, as would be expected. Moreover, although Blinder and Cox testified that Cox had final authority in compliance matters, that testimony is not credited. It is significant that Cox's employment contract contains no such stipulation, nor does the contract contain a provision guaranteeing Cox's compensation for the term of the contract in the event he should sever his association in a disagreement over compliance matters or procedures. Nor does anything else in Registrant's policies or procedures spell out in writing Cox's claimed overriding authority in compliance matters. In a word, it is clear that Blinder, and his son Larry, are still in a position to "call the shots" both on

particular matters and on the nature of the business that Blinder Robinson conducts and how it will be conducted.

In addition to the foregoing unsupportable claim of a managerial transmogrification of the firm, Respondents claim other changes in the firm since the American Leisure violations that serve greatly to minimize the likelihood of future violations. Among these are the introduction of a computer system in the firm, the institution of a revitalized firm-wide training program, and the beefing up and other strengthening of the compliance department.

The Division, while not disputing that some of the claimed changes have occurred, contends that the effectiveness of these programs is greatly exaggerated, that some aspects of the program are not relevant to the kinds of violations that occurred in American Leisure, and that, most importantly, the claimed improvements proved to be ineffectual on two subsequent occasions, both involving the sale by Blinder Robinson of Cable West stock.

The merits of the conflicting contentions will be examined both in the light of the claimed improvements examined on their own apparent virtues and in light of the Cable West experiences as an indication of their effectiveness.

Blinder testified that he spent over $2 million in the installation in the firm of a computer system that gives

Respondents the capability, among other things, of catching and preventing securities sales in states where Registrant is not licensed to do business and to prevent sales by salesmen not licensed to do business in a particular state. This undoubtedly helps prevent or to minimize certain of the types of violations that kept getting Respondents into hot water with numerous state authorities, as found above. To that extent it is of course a positive development, and one that is on the plus side for Respondents when it comes a consideration of sanctions. At the same time, however, it must be noted that the plea that the system was installed at "enormous cost" overstates the case in that the record does not establish how much of the cost of installing the computer system was related to compliance capabilities as distinct from costs that would have been incurred in any event simply to serve the obvious business needs of a firm of Registrant's size and number of branch offices. But in the last analysis it isn't a question of how much money Registrant spent on a computer system that is important, in this context, but whether the computer system incorporates features that improve the likelihood of compliance. While I have already concluded that in various respects the new computer system does improve the capability and the likelihood of compliance as respects certain kinds of violations, the computer

system is of course no panacea when it comes to considering the whole gamut of possible securities violations. Notably, the compliance features of the computer system would be of no help in preventing the kinds of violations that Judge Matsch found to have been committed in the American Leisure underwriting. Moveover, the compliance features of the computer system were in the last analysis ineffectual in precluding, or causing internal remedial steps to be taken in connection with, subsequent transgressions that occurred on two separate occasions in the firm in connection with transactions in Cable West stock, as will be developed at a later point below.

Respondents also point with pride to a second claimed remedial step taken since the American Leisure antifraud and antimanipulation violations. This is the introduction, at substantial cost to the firm, of a training program for registered representatives as well as for branch managers and assistant branch managers. The program was recommended by Theys and approved for implementation as a three week in-house training program for new and existing personnel by Blinder. The program is designed for the most part to instruct participants in how to conduct their sales activities and matters related thereto. There is testimony in the record that compliance matters are among the subjects covered in the training programs

but the record is not particularly clear as to what compliance matters are treated or in what depth.

As is the case with the introduction of the computer program, the Respondents' emphasis on its costs in connection with the training program is misplaced or at least overly emphasized. This is so for the reason that, since Registrant for the most part hires inexperienced or little-experienced, relatively young personnel, and since the record shows that turnover among penny-stock brokerage firms is significantly higher than it is among firms dealing in higher-priced securities, some kind of training program to make sales personnel "knowledgeable of the business" was in any event necessary irrespective of any need to teach compliance obligations. Respondents have failed to quantify what part of the purported costs of running the training program are attributable to compliance matters, but what evidence there is on the subject suggests that relatively little of the training program is directed to compliance subjects. Indeed, the record suggests that Respondents' view towards compliance by registered representatives is pretty much along the lines that since the Registered Representatives have passed an exam or exams to become Registered Representatives they are presumed to know compliance procedures.

Respondents' training program is understandably geared to the nature of the business the firm does. Registrant makes a

market in some 70 penny stocks, essentially all of which have previously been underwritten in initial underwritings by Registrant, or, to a lesser extent, by a broker dealer since acquired by Registrant. A registered representative at Blinder Robinson is free to recommend any of these stocks for purchase by a customer on the basis of "data sheets" supplied by Registrant without obtaining the prior approval of a superior. If, however, the salesman should want to recommend a stock in which Registrant does not make a market, prior approval would have to be obtained. In practice, the great bulk of Blinder-Robinson's transactions are in penny stocks, i.e. under $1. All but 3 of its underwritings have been under $1 and the other 3 have ranged in price from $1.50 to $2.50.

One of the featured and significant elements of the training program is instruction and practice in the 3-call cold-call system for soliciting prospective customers. "Cold calls" are calls to persons not known to the salesman and with whom he has had no prior contact. Names are customarily derived from a telephone book. The first three pages of the Blinder Robinson training manual, prepared in May 1984 when the firm implemented a new training program, set forth the suggested script for the series of three calls as follows [Res. Exh. W]:

"1st CALL

GOOD MORNING

This is _____from Blinder Robinson,

Investment Bankers. How are you today?

In the past we have had very successful results from our investments, where some of our people have made a lot of money.

The reason I am calling you is to find out if a opportunity comes up that I believe is exciting, would you like to know about it ALSO?

Great, then I would like to send you some information on our company and my card. As soon as something that I think is exciting comes up I will get back to you. Is it better to reach you here or at home?

What is the phone number at your home or business?"

"2nd CALL

This is _____ from Blinder Robinson. How are you today?

I am calling you for two reasons #1 I wanted to make sure you received the information I sent you and #2 I told you if something exciting came up I would get back to you. Well, nothing has come up yet, I just didn't want you to think I forgot about you.

However, our research department is working on something that looks very exciting and as soon as it is put together I will be back to you."

"3rd CALL

GOOD MORNING

This is _____ from Blinder Robinson. How are you today?

I am calling you about a situation that I think is very exciting and would like to discuss it with you now, (Explanation about Company). This stock is trading at ___ and in my opinion this is a excellent speculation. Can you handle 100,000 shares or can you handle more?"

As respondents contend, there is nothing inherently wrong in utilizing cold calls to prospect. However, the three-call

system set forth in the May 1984 training manual is deceptive and misleading in a number of respects.

As structured, the second call is clearly a "set up" call, one in which the salesman builds up a false expectation in the prospect that something new and significant is about to emerge from the firm's research department that the salesman will have determined is "exciting" and suitable to the investment objectives of the prospect.

This is a false and misleading practice because at the time of the first call or at any time thereafter the salesman had any of some 70 stocks that he was free to recommend based on the simple fact that Blinder Robinson was making a market in those stocks. Blinder Robinson in fact has no research department. The one man involved in so called research in reality only keeps tabs on the current developments among the issuers in whose stocks Registrant makes a market. This "updating" is based entirely upon information furnished by the issuer or its public relations agent -- the Blinder Robinson research person does no independent study of the issuer nor is it claimed, and the record does not show, that he has any adequate expertise or experience to perform such independent research if it were requested of him.

Moreover, Respondents contend that Blinder Robinson does not make recommendations either to buy or to sell, and that

only the Registered Representatives, exercising their own judgments, make buy or sell recommendations. Respondents can't have it both ways: they can't employ a 3-call cold-call prospecting system that tells the prospect that they have a research department that does make recommendations to buy (and, implicitly, that they will tell the prospect/customer when it is time to sell) and at the same time argue that Blinder Robinson makes no recommendations to buy or sell and that such recommendations are the exclusive province of the salesman.

The record shows that while Blinder Robinson indeed does not ever issue a sell recommendation (Blinder's testimony suggests that if they thought the price of a stock were rising too far too fast they would simply stop promoting, or quietly discourage, its purchase), they do, in fact, continually make buy recommendations in the sense, as already mentioned, that their salesmen are free to recommend any stock that Blinder Robinson makes a market in to their customers without prior approval. 10/ If salesmen are to make a living at Blinder Robinson, they must keep recommending for purchase the stocks the firm makes a market in, given the nature of Registrant's business.

Both Blinder and Cox, the compliance director, conceded

10/ Suitability to the customer's needs and objectives is not in issue here.

in their testimony that the 3-call cold-call prospecting system was in certain of the material respects found above misleading and deceptive. Cox also conceded that the call sheets carry a misleading implied representation that Blinder Robinson will make a sell recommendation should the situation call for it, whereas the firm, as already noted, never makes a sell recommendation. Cox also admitted that the sales presentation failed to disclose the material fact that Registrant essentially restricts its market-making (and as a corollary its buy recommendations) to the stocks it has underwritten.

Apparently recognizing the faults and deficiencies in the three-call cold-call aspects of their training program and sales practices, Respondents sought and obtained (see my order of August 14, 1985) permission to submit in evidence a Cox affidavit of July 18, 1985, to which are attached revised cold-call sheets and a new "introduction". These revised sheets represent only a very modest improvement over those that were in use since May 1984 when the supposedly new and efficient training program was begun. The basic, misleading aspects persist: -- there is still reference to a non-existent "research department" and implied reliance thereon. There is still a failure to disclose adequately how and from what sources the salesmen will obtain the buy recommendations they make, i.e. that essentially salesmen are limited to stocks the firm makes a market in.

There is still a failure to advise that Blinder Robinson never makes a sell recommendation. And, finally, taking the three calls together, they still embody a misleading "set-up" aspect that serves to whet the prospect's appetite for something new and exciting that is supposed to be coming up, whereas the reality is that from the time of his first contact with the prospect, the salesman had available some 70 stocks he could have recommended.

The effort in the introduction to the 3-call approach to place the "compliance burden" on the salesman, given their relative inexperience and, perhaps more importantly, the manner in which Blinder Robinson conducts its business, is simply unrealistic and is therefore but a patent effort to cover up the basic defects and deficiencies in the outlined 3-call cold-call procedures, even as modified.

The Respondents' utilization of the 3-call cold-call prospecting procedures, well after the American Leisure injunctions questioning Registrant's sales practices were issued, is significant not only as establishing that Respondents failed to correct their sales practices and their training program in this respect after the injunction, but as an indication that the highly acclaimed (by Respondents) new managerial/compliance team of Theys and Cox over long periods appeared to be unaware of or insensitive to the implications of employing the 3 call system,

and that, even after the hearings in this proceeding highlighted the misleading and deceptive aspects of 3-call procedures as employed by Respondents, they failed to come up with remedial procedures that would satisfactorily eliminate the problem.

A third claimed remedial step that Respondents strongly urge has taken place since the American Leisure antifraud and antimanipulation violations found by Judge Matsch is the introduction into the firm, under Cox, of new expertise in and commitment to, matters of compliance, particularly as respects the kinds of violations found in American Leisure.

The Division contends, with equal conviction, that Respondents' improvements in their compliance capability are exaggerated and that proof of their lack of committment to compliance is to be found in their responses on two separate occasions to obvious improprieties in the sale of Cable West stock.

Without question Cox, who now heads up the compliance department, is well qualified by experience for the position. Though not a lawyer, he has on his staff 2 or 3 in-house attorneys who have been added to assist on compliance matters. Quite properly, Respondents also regard Theys, who is in charge of sales, as a part of the compliance "team".

As previously noted, neither Theys nor Cox would be given high marks for their awareness of or response to Blinder Robinson's introduction of the 3-call cold-call system of

customer prospecting into the firm's training program and sales practices.

In his testimony Cox conceded that the firm's current practice of having branch managers and assistant branch managers "monitor" what salesmen say to customers or prospects by "walking through" the office from time to time is less effective than could be desired or reasonable. Cox expressed his belief that customer-complaints were the best single indication (not excluding others, of course) that something may be amiss in terms of representations being made by salesmen to customers/prospects. In my view the reliance on customer complaints in the firm is too heavy; customers who have made a relatively small investment in a penny stock are perhaps less likely to complain than purchasers who have invested a more significant sum in a higher priced stock.

In any event, Blinder-Robinson's claimed capacity for and dedication to compliance matters can perhaps most reliably be gauged by the responses of Blinder, Theys, and Cox in the two Cable West incidents, to which attention is next directed.

On two separate occasions in 1984 the top level of management in Blinder Robinson -- specifically, Blinder, Theys, and/or Cox -- became aware of improprieties in the way the firm was executing transactions in the stock of Cable West, a firm that Blinder Robinson had underwritten and in whose stock it was the

principal market maker.

The first such occasion occurred on February 24, 1984. On that day the price of Cable West as quoted on NASDAQ moved up steadily and rapidly from $.18 to $.25, to $.26, to $.27 or $.28 by about 11:00 a.m. and the volume of transactions increased likewise. Noting this sizeable and rapid increase in price and volume, Theys made inquiries of a couple of the branch managers in the branches showing greatest activity, and also talked to a few registered representatives who he thought would give him straight answers. From his inquiries Theys learned that the rapid price and volume rise in Cable West was attributable to rumors that Cable West was about to obtain an important contract for the installation of cable TV in Saudi Arabia, even though there had been no public announcement concerning such an impending contract. Theys felt "uncomfortable" that Blinder Robinson should be selling Cable West on the basis of nonpublic rumors and therefore instructed the firm's senior trader to request NASDAQ to ask that trading in Cable West be halted pending a clarifying release from the issuer. NASDAQ replied that a request to halt trading would have to come from Cable West, the issuer, something that Theys presumably should have known. To help him in getting Cable West to make the request to hold trading in its stock, Theys enlisted the aid of Egan Bresnig, manager of Blinder Robinson's headquarters office in Englewood,

Colorado. Bresnig's aid was obtained because he had been an "advisor" to the Board of Directors of Cable West from the firm's inception in 1981 and a member of its Board of Directors since January, 1984, representing the continuing interests of Blinder Robinson in Cable West. (Resp. Exh. SSS, at p. 12). Theys and Bresnig together called Robert Ball, president of Cable West, to get trading stopped, and it was in fact halted that day.

When Theys clued Blinder in on what had happened or was happening with Cable West, Blinder immediately personally questioned Bresnig, who, according to Blinder's testimony, 11/ denied any involvement in spreading the Saudi-contract rumors. Blinder had Bresnig arrange to have Ball come in for a meeting among the three of them. At the meeting, according to Blinder's testimony, Ball and Bresnig denied any responsibility for disseminating any unfounded rumors concerning an impending Saudi contract.

Blinder did not personally pursue the matter further but told Theys to make further inquiry. Theys talked again to 2 branch managers and a few registered representatives and concluded that no disciplinary action was indicated. Theys did

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11/ Bresnig did not testify. Respondents chose not to call him and the Division was unable to serve him inasmuch as he was then assigned to Europe by the firm and residing there.

not talk to any customers.

Blinder testified that it was at this time that he first learned Bresnig was on Cable West's board of directors. I do not credit this testimony. The way both Theys and Blinder zeroed in on Bresnig indicates that both were well aware of Bresnig's status on the Board of Cable West and of his status as Blinder Robinson's "advisor" to Cable West, as reflected in Respondents' own exhibit, as already noted. Moreover, Blinder is an archetypal self-made man, tough as nails, and it is not credible to me that Bresnig or others would have kept from him the fact of Bresnig's presence on the Cable West board.

The second instance in which top level management at Blinder Robinson became aware of alarming trading activity in Cable West stock was in June, 1984, when Theys was advised that once again there was particularly heavy buying in Cable West. By this time Cox had come aboard, and Theys passed the information on to Cox.

By consulting with the firm's senior trader, Cox identified the Englewood and Cherry Creek branches as the most active branches in Cable West trading.

Among other things, Cox questioned Bresnig, who reported that Cable West had been seeking a contract with Sacramento, California, and that the Company "believed" it would be awarded the contract. Cox spoke to a few of the registered representatives at Englewood, where Bresnig was branch manager, and said he

received no indication that Bresnig was responsible for spreading rumors of an impending Sacramento contract for Cable West, which the record establishes to have been the cause for this second flare-up in Cable West trading activity.

Cox "monitored" customer complaints on Cable West -- there were only two or three according to his testimony -- but said he did not find any indication of circumstances differing from what Bresnig had told him. Cox did not call any customers who had bought Cable West or make any extended inquiry of salesmen whose customers bought the stock heavily to determine the reasons why they purchased.

Cox wrote to the local office of the NASD concerning this second Cable West trading episode. He stated his view that because the firm's long position increased while the stock was on the rise there was little basis for concluding that any manipulation had occurred. He also stated that after reviewing Bresnig's accounts, he concluded that they disclosed no suspicious activity.

It was only after this second instance in which top management at Blinder Robinson became aware that rumor-induced buying of Cable West had occurred that Bresnig was ordered to resign his directorship on the Cable West board. He was also relieved of his position as branch manager and given an assignment overseas in connection with the firm's offshore activities.

If Theys, Blinder, or Cox had made, or caused to be made,

the reasonably adequate inquiries that the circumstances clearly called for, they would have discovered, as the record herein discloses, a congerie of improper sales practices involving Cable West spanning a period of some 8 months and actively involving not only numerous salesmen but a half dozen or more managers and assistant managers, including, notably, Bresnig, in at least four branch offices of Blinder Robinson. With the circumstantial evidence pointing so strongly to the contrary, Theys, Blinder, and Cox were not at all entitled to accept at face value Bresnig's purported protestations of innocence and noninvolvement. These top level management personnel, with all of their collective expertise and experience, knew very well how to conduct or cause to be conducted, an appropriate investigation. That they chose not to do so, under the circumstances disclosed by this record, manifests, contrary to Respondents' claim of dedication to compliance, a disinclination to probe too deeply out of fear of uncovering an unsightly can of worms. None of the managers or salesmen, with the single exception of Bresnig, was subjected to any form of disciplinary action. The efforts of the three Blinder Robinson officers were, indeed, as the Division contends, superficial and not compatible with what the circumstances called for.

Ironically, while Blinder Robinson salesmen and managers were promoting Cable West on the basis of unsupported, nonpublic

rumors of lucrative impending contracts, generated prinicipally by Bresnig, they failed to advise their customers of numerous material weaknesses in Cable West, e.g. (a) that it was unable to pay its financial obligations as they came due; (b) that it might have to liquidate its assets to continue its operations; (c) that it was in technical default on certain long-term loans or obligations; (d) that it had received a qualified opinion or "going concern" qualification from its independent auditors in its audited financial statements for fiscal year 1983; (e) that its contracts with hotels and motels in Wildwood, New Jersey, had expired and had to be renegotiated; (f) that it had experienced losses from its operations for fiscal years 1982 and 1983 and, in fact, had lost money throughout its history; and (g) that its partner in a Santa Domingo Cable TV project had failed to make its installment payments in January and February 1984. Here again, Respondents' claimed dedication to compliance did not square with the evidence.

In light particularly of the Cable West experiences, I conclude that Respondents have not carried their burdens of proving their claimed new dedication to compliance or the efficacy of their new training program in bringing about the claimed improvement in their sales practices.

Respondents also claim a "record of fair-dealing with customers" and "extraordinary concern for the interest of

investors in its underwritings" (Resp. Br. pp. 50-51). Respondents have not carried the burden of proving these claims. The Cable West experiences certainly do not demonstrate fair treatment of customers. Moreover, Blinder Robinson's practice of more or less continuously recommending purchases of stock of companies in which it makes a market and never issuing a sell recommendation, as discussed above, suggests that the firm is less concerned with the interests of customers than it is with keeping up the price levels of stocks it has underwritten.

The record establishes substantial charitable contributions by Respondents, and this fact will be given appropriate, significant weight in assessing sanctions.

In determining what sanctions, if any, it is appropriate to apply in the public interest, it is necessary for the Commission, among other factors, to ". . . weigh the effect of . . . action or inaction on the welfare of investors as a class and on standards of conduct in the securities business generally." 12/

The Division recommends a permanent bar of Respondent Blinder from the securities business and a suspension for not

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12/ Arthur Lipper Corporation, Securities Exchange Act Release No. 11743 (October 24, 1975) 8 SEC DOCKET 273, 281. Although the reviewing Court In Arthur Lipper Corp. v. S.E.C., 547 F.2d 171, 184-5 (2nd Cir. 1976) reduced the Commission's sanctions on its view of the facts, it recognized that deterrence of others from violations is a legitimate purpose in the imposition of sanctions.

less than nine months of Respondent Blinder Robinson, coupled with the impositon of certain limitations following expiration of the 9 month suspension.

Respondents contend that the Division's recommendations are grossly excessive and unnecessary, that a nine month suspension might be tantamount to putting the firm out of business as a practical matter, and that there is no justification for the recommended continuing limitations. Respondents contend, therefore, that if any sanctions are to be imposed they should be limited to censures.

In light of the egregiousness of the antifraud and anti-manipulation violations found in the American Leisure injunction opinion, which Blinder was found to have "orchestrated", together with Respondents' numerous state and NASD violations, coupled with the failures of Respondents to establish in the main their claims to fullsome rehabilatative actions and to a new and genuine dedication to compliance, as found herein, it is concluded that substantial sanctions and some suitable limitations are necessary and appropriate in the public interest, but that sanctions of the severity recommended by the Division are not required in light of the mitigative factors found herein, including the remedial steps actually taken, to the extent found herein, as

well as the substantial charitable contributions. Respondents "track record" for compliance indicates pretty clearly that they will comply only when there is a likelihood of meaningful sanctions having a substantial financial impact if they fail to comply. Additionally, as already noted, deterrence of others is a consideration.

The Division's proposed continuing limitations are not viewed as practical in that they have the potential for excessively involving the Commission in management concerns.

Based on the entire record and the aforementioned considerations, the sanctions ordered below will be imposed.

IV. ORDER

Pursuant to Sections 15(b) and 19(h) of the Exchange Act, IT IS ORDERED as follows:

(a) Respondent Meyer Blinder is suspended from association with any broker or dealer for a period of 90 days : Provided, however, that this suspension shall not require Meyer Blinder to divest himself of his ownership interest in Respondent Blinder Robinson during the suspension period.

(b) Respondent Blinder Robinson's registration as a broker-dealer is suspended for a period of 45 days : Provided, however, that during such suspension period the firm shall nevertheless be

allowed to: -- effect unsolicited retail customers' transactions; effect inter-dealer transactions related to such customers' retail transactions; complete outstanding transactions; and make deliveries and transfers of securities.

(c) For a period of two years following expiration of the suspension described in paragraph (b) next above, Respondents Meyer Blinder and Blinder Robinson are forbidden to engage in any securities offering, directly or indirectly, as underwriter, selling group member, or in any other manner.

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

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen (15) days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission pursuant to Rule 17(c) determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect

to that party. 13/

David J. Markun
Administrative Law Judge

Washington, D.C.
August 30, 1985

13/ 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.

ATTACHMENT A

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,

v.

BLINDER, ROBINSON & CO., INC.; Meyer Blinder; et al., Defendants.

Civ. A. No. 80-M-1125.

United States District Court, D. Colorado.

June 8, 1982.

The Securities and Exchange Commission brought civil enforcement action against underwriting corporation and its principal shareholder. The District Court, Matsch, J., held that: (1) where underwriter's sales force aggressively promoted corporate securities before registration statement became effective and then followed manipulative and deceptive practices maintaining market interest by suggesting that hotel-casino development would be insured because of deals that were being made, and where sales presentation followed pattern of misstatements and omissions, statements and omissions were material and underwriter and its principal shareholder possessed requisite scienter to be found in violation of antifraud provisions of securities laws in connection with sale of particular corporations; (2) underwriter and its principal shareholder violated securities rule designed to prohibit market manipulation by any person participating in distribution of security for duration of that participation when firm purchased for its trading account 956,393 units, continued selling those units to the public, and simultaneously bid for and purchased units; (3) underwriter's representation that offering was on an "all or none" basis constituted manipulative or deceptive device prohibited by securities laws where prompt refunds were not made to purchasers when all securities were not sold at specified price within specified time and where total amount due seller was not received by it by specified date, and (4) where defendants charged with violation of antitrust provisions of securities laws and seeking to rely upon good-faith defense did not in fact rely upon advice rendered by counsel, they could not now hide behind legal advice which they chose to ignore

Injunction ordered.

1. Securities Regulation ⇐63

Under rule prohibiting making of any untrue statement of "material fact" or omission to state a "material fact" necessary in order to make statements made not misleading, a "material fact" is one which a reasonable investor might have considered important in making of investment decision. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b), Securities Act of 1933, § 17(a)(2), 15 U.S.C.A. § 77q(a)(2).

See publication Words and Phrases for other judicial constructions and definitions

2. Securities Regulation ⇐105

Even if evidence did not demonstrate underwriter's principal shareholder's active role in securities fraud, principal shareholder would be liable for acts of sales representatives whom he supervised and for whose misconduct he was responsible. Securities Exchange Act of 1934, § 20, 15 U.S.C.A. § 78t.

3. Securities Regulation ⇐63, 117

Where underwriter's sales force aggressively promoted corporate securities before registration statement became effective and then followed manipulative and deceptive practices maintaining market interest by suggesting that hotel-casino development would be insured because of deals that were being made, and where sales presentation followed pattern of misstatements and omissions, statements and omissions were material and underwriter and its principal shareholder possessed requisite scienter to be found in violation of antifraud provisions of securities laws in connection with sale of particular corporation. Securities Act of 1933, § 17(a), (a)(2), 15 U.S.C.A. § 77q(a), (a)(2); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

4. Securities Regulation ⇐60

Underwriter and its principal shareholder violated securities rule designed to prohibit market manipulation by any person participating in distribution of security for duration of that participation when firm purchased for its trading account 956,393 units, continued selling those units to the public, and simultaneously bid for and purchased units. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

5. Securities Regulation ⇐60

Underwriter's representation that offering was on an "all or none" basis constituted manipulative or deceptive device prohibited by securities laws where prompt refunds were not made to purchasers when all securities were not sold at specified price within specified time and where total amount due seller was not received by it by specified date. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

6. Securities Regulation ⇐55

Where underwriter and principal shareholder transferred proceeds from escrow account established for funds received for sale of corporation as proceeds were received but transferred proceeds from account prior to occurrence of the "all or none" contingency and failed to return purchasers' funds upon occurrence of contingency, there were clear violations of securities rules. Securities Exchange Act of 1934, § 15(c), 15 U.S.C.A. § 78o(c).

7. Securities Regulation ⇐101

Underwriting corporation was responsible for its employees' action under securities laws where those actions were directed by the firm, through its principal shareholder.

8. Securities Regulation ⇐102

Where none of securities fraud activities by third parties occurred in vacuum and rather were either at direction of underwriting corporation and its principal shareholder or with their full knowledge and tacit approval and particular actions taken by bank and others were simply component parts of overall scheme which underwriting corporation and its principal shareholder orchestrated to give appearance of completing offering, defendant underwriting corporation and its principal shareholder would be both directly liable as primary but silent participants, and secondarily liable as aiders and abettors for conduct of other involved persons. Securities Act of 1933, §§ 20(b), 22(a), 15 U.S.C.A. §§ 77t(b), 77v(a); Securities Exchange Act of 1934, §§ 21(d), 27, 15 U.S.C.A. §§ 78u(d), 78aa.

9. Securities Regulation ⇐104, 117

Finding of scienter would preclude finding of good faith by firm with respect to same actions which constituted violation of the antifraud provisions of securities laws. Securities Act of 1933, §§ 20(b), 22(a), 15 U.S.C.A. §§ 77t(b), 77v(a); Securities Exchange Act of 1934, §§ 21(d), 27, 15 U.S.C.A. §§ 78u(d), 78aa.

10. Securities Regulation ⇐104, 117

A defendant invoking his reliance on advice of counsel as defense to charge of violation of antifraud provisions of securities laws must establish that he made complete disclosure to counsel and then followed advice rendered. Securities Act of 1933, §§ 20(b), 22(a), 15 U.S.C.A. §§ 77t(b), 77v(a); Securities Exchange Act of 1934, §§ 21(d), 27, 15 U.S.C.A. §§ 78u(d), 78aa.

11. Securities Regulation ⇐104, 117

Where defendants charged with violation of antifraud provisions of securities laws and seeking to rely upon good-faith defense did not in fact rely upon advice rendered by counsel, they could not hide behind legal advice which they chose to ignore. Securities Act of 1933, §§ 20(b), 22(a), 15 U.S.C.A. §§ 77t(b), 77v(a); Securities Exchange Act of 1934, §§ 21(d), 27, 15 U.S.C.A. §§ 78u(d), 78aa.

Rodney K. Vincent, Richard S. Vermiere, Robert Davenport, S.E.C., Denver, Colo., for S.E.C.

William Fishman, Marc Geman, Fishman & Geman, P.C., Donald T. Trinen, Denver, Colo., for Blinder, Robinson & Co., Inc. and Meyer Blinder.

MEMORANDUM OPINION AND ORDER

MATSCH, District Judge.

This is a civil enforcement action against Blinder, Robinson & Co., Inc. (Blinder-Robinson), a registered broker-dealer, and Meyer Blinder (Blinder), its president and principal shareholder. The plaintiff's allegations of violations of federal securities laws and regulations all concern offers to sell, sales and delivery after sales of a registered offering of 10 million units of common stock and warrants issued by American Leisure Corp. (American Leisure), a New Jersey corporation, which was a wholly-owned subsidiary of Beef & Bison Breeders, Inc. (BBB).

The SEC brought this action pursuant to Section 20(b) of the Securities Act of 1933, 15 U.S.C. § 77t(b) (1976), and Section 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d) (1976). This court has jurisdiction of the action under Section 22(a) of the 1933 Act, 15 U.S.C. § 77v(a) (1976), and Section 27 of the 1934 Act, 15 U.S.C. § 78aa (1976). Venue in this court is proper. Blinder-Robinson is located and does business within the State of Colorado, Blinder resides in the state, and many of the acts alleged in the SEC's complaint occurred within the state.

The complaint alleged violations of the anti-fraud provisions of both Securities Acts, Section 17(a) of the 1933 Act, 15 U.S.C. § 77q(a) (1976), Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b) (1976), and of Rules 10b–5, 6 and 9 promulgated thereunder, 17 C.F.R. §§ 240.10b–5, 6, 9 (1981); it also alleged violations of Section 15(c) of the 1934 Act, 15 U.S.C. § 78o(c) (1976), which prohibits fraudulent acts by brokers, and of Rule 15c2–4 promulgated thereunder, 17 C.F.R. § 240.15c2–4 (1981). The Commission seeks an injunction against future violations of these sections and rules.

In addition to Blinder-Robinson and Blinder, the SEC originally named the following corporations and individuals as defendants in this action: American Leisure, Cavanagh Communities Corp., Scope, Inc., Nathan S. Jacobson, Irwin S. Lampert, Joseph Klein, and Leon Joseph. These defendants all have entered into consent decrees with the SEC, and no longer are active parties in this litigation.

FACTS

The offering was on a "best efforts, all or none basis." For a unit price of $2.50, the purchaser received one share of American Leisure common stock; one Class A Warrant (two of which entitled the holder to purchase one share of common stock for $3.50 on or before July 26, 1980); and one Class B Warrant (four of which entitled the holder to purchase one share of common stock for $7.00 on or before December 26, 1980). The offering was to be open for a period of 90 days from December 26, 1979, the effective date of the registration statement. A subscription offer of 2 million of the 10 million units was made to the shareholders of BBB. The proceeds from the offering and the exercise of the warrants were intended to be used for the construction and operation of a casino hotel in Atlantic City, New Jersey.

Blinder-Robinson was the underwriter for this offering and the underwriting agreement with American Leisure provided for the deposit of all monies collected from subscribers into a special account at Metro National Bank of Denver, Colorado (Metro Bank). It also required the refund of that money and termination of the offer if all of the units were not sold within 90 days from the effective date of the prospectus, or an additional 90 days if extended by mutual agreement between the issuer and the underwriter. The parties did not agree to extend the original deadline of March 25, 1980.

The prospectus made it clear that this offering was for an extremely speculative investment. Not only was American Leisure a new business without an operating history, it was unable to make any immediate use of the proceeds because it had only 1.72 acres of land in Atlantic City and that was insufficient for the development. The prospectus cautioned that American Leisure would have to acquire more land or obtain

the necessary variances and approvals to permit the use of its parcel. Accordingly, the prospectus provided that after the closing of the offering, the net proceeds, less deduction of underwriting costs, discounts, commissions and expenses, would be placed in a second escrow account with Metro Bank, as escrow agent, to hold the proceeds for a period not exceeding one year, during which no more than $1 million could be released for certain limited purposes.

Irwin Lampert, an attorney, has had a close personal relationship with Meyer Blinder since they met in Florida in 1972. Mr. Lampert was counsel for Blinder and Blinder-Robinson in an earlier securities case. Mr. Lampert has been president of BBB since its inception in 1976, and Blinder-Robinson did a small underwriting of one-half million dollars when that company went public. When BBB acquired American Leisure, Irwin Lampert became secretary-treasurer of that company and asked Meyer Blinder to do the underwriting of the securities to obtain the money for the casino hotel development. Meyer Blinder suggested a larger issue than was originally contemplated and recommended the use of warrants to obtain additional funds as the work progressed. He also recommended the employment of Nathan Jacobson as president because of his experience with gambling casinos in Nevada. That was accomplished and Mr. Jacobson, Mr. Lampert and Mr. Blinder met frequently in early 1979 to discuss this project.

The law firm of Friedman and Shaftan, P.C., of New York, New York, was retained as counsel for American Leisure in the offering and the Denver law firm of Brenman, Epstein and Zerobnick, P.C., represented the underwriter. That firm had frequently been counsel for Blinder-Robinson in other underwritings. Because of some difficulties in communicating with the SEC, American Leisure also retained Bernard Feuerstein, a New York lawyer, to assist with the registration. That was pursuant to the recommendation of Meyer Blinder.

The Blinder-Robinson sales force was very enthusiastic about the American Leisure offering. Most of them were quite young (under 30), inexperienced, aggressive and uninhibited. They talked up the American Leisure opportunity with their regular customers before the prospectus became effective and sales were brisk in January and February, 1980. It was common practice for the sales representatives to say that the American Leisure securities would open at a premium in the after-market and some suggested that $5.00 or more could be expected as the opening price. The evidence supports a finding that an established sales practice was to suggest that Blinder-Robinson people had inside information about pending developments which would make the stock increase in price, and this finding is buttressed by the convenient lapse of memory of sales representatives called as witnesses in this trial.

Much of what the sales representatives said was generated at a sales managers' meeting held in Florida in January, 1980. At that time, Meyer Blinder told the managers that negotiations were proceeding for American Leisure to obtain additional land in Atlantic City and that there would be a public announcement when the deal was made. The managers relayed the same message to the sales representatives who incorporated it in their presentations.

At the time of that meeting, Blinder knew of talks between Irwin Lampert and Joseph Klein, chairman of the board of Cavanagh Communities Corp. (Cavanagh), a company which had a contract to purchase 8.4 acres of land in Atlantic City, near the American Leisure site. Meyer Blinder had participated in those conversations in 1979. After Cavanagh acquired the land, Jacobson talked further with Klein who said there would be an interest in some arrangement if the American Leisure offering succeeded.

In January, 1980, Mr. Jacobson reported to Mr. Klein that the offering was going quite well, and Mr. Klein replied that he couldn't negotiate then because of a pending deal with another company which would or would not be made by February 15. That deal was not made and Lampert then

called Klein and said that $19 million of the offering had been sold, but another market-maker was needed for the final $6 million. Joseph Klein recommended Elkins and Co. (Elkins) which agreed to sell $5 million worth of American Leisure units, but then reduced its participation to $2½ million on legal advice that it should not take more than 10% of the issue.

Mr. Sgarlet of Elkins also was involved with Cavanagh and that involvement generated legal concerns for Elkins if an agreement were to be made between Cavanagh and American Leisure. Accordingly, on March 5, 1980, Mr. Nagy of Elkins called Mr. Padgett, vice-president of Blinder-Robinson, to read a draft of a letter advising purchasers and prospective purchasers of the American Leisure securities that there was no agreement between Cavanagh and American Leisure. Mr. Padgett refused to approve that letter because there was still hope for such an agreement. The result was the withdrawal of Elkins and the cancellation of many of its sales. Other cancellations also were coming through in early March.

It had been expected that the American Leisure offering would be completed and sold out during the week beginning Monday, March 17, 1980. Accordingly, the principal persons involved came to Denver to prepare for a closing during that week.

Recognizing a possibility that the issue would not be sold out, Meyer Blinder had asked Bernard Feuerstein to find out if an underwriter could purchase the securities in a "best efforts, all or nothing" offering, and Mr. Feuerstein called John Della Grotta, a young lawyer at the Washington, D.C. office of the SEC, about March 10, to ask the narrow question of whether there was an absolute restriction or a special rule prohibiting that possibility. Mr. Della Grotta replied that there was none. Mr. Feuerstein advised Mr. Blinder of that answer. Mr. Feuerstein also talked with the National Association of Security Dealers (NASD) on the same subject and received that same answer with the caveat that there would be concern if the underwriter sold the shares at a premium in the aftermarket.

What had been a possibility soon became a probability during the week of March 17 and there were further discussions by the involved lawyers concerning the purchase of a large block of the securities by Blinder-Robinson. Of particular concern was whether that purchase would be a material development which should be disclosed by a supplement to the prospectus, commonly called a "sticker." One sticker had already been placed on the prospectus because of a development concerning the subscription offer to the BBB shareholders.

While the evidence is conflicting, the more probable and credible testimony is that Bernard Feuerstein, Gerald Raskin of the Brenman firm, and Mr. Brenman as well, all concluded and advised both Blinder and Padgett that such a sticker would be necessary. When questioned concerning the basis of their advice, both Raskin and Brenman said that it was because the warrants imposed a continuing obligation on the issuer to disclose material developments, even after the closing date. That advice, which had been communicated by March 20, 1980, was rejected as a "business decision" by Meyer Blinder and others at Blinder-Robinson. Part of the rationalization for that rejection was that a sticker was seen as futile since more copies of the prospectus would not be delivered, and because it would damage Blinder-Robinson's reputation in the industry if it became known that it could not sell out an offering.

By Wednesday, March 19, 1980, it became apparent that the offering would not be sold out by the deadline of March 25, 1980. Irwin Lampert flew to Miami, Florida, to meet with Joseph Klein and he, in turn, introduced Leon Joseph, a former Cavanagh employee who was the principal of a company called Scope, Inc. (Scope). That company had substantial cash and was negotiating with Klein about the possibility of buying the equity in Perdido Bay Country Club Estates, a real estate development which was in foreclosure. Scope had a good banking relationship with Great American Bank of Dade County, Florida (Great American),

and had purchased certificates of deposit from that bank.

On Friday, March 21, 1980, Joseph Klein, his father Zola Klein, and Irwin Lampert met with Leon Joseph about the possible purchase by Scope of 600,000 American Leisure units. They went to the Great American Bank to negotiate a $1.5 million loan for that purpose. During the discussions, Mr. Klein suggested that Scope could realize a quick profit which could then be used to buy the Perdido Bay property and that he would try to guarantee the loan through Cavanagh. The final agreement was that the loan would be made at an interest rate of 2% more than the bank would pay on a certificate of deposit to be purchased by American Leisure, and Irwin Lampert, on behalf of American Leisure, then agreed that it would buy two certificates of deposit from the Great American Bank; one for $1.5 million at 10% and the other for $1.5 million at 16%, the latter being the market rate at the time. The bank loan to Scope was then made at 12%. It is a fair inference that the loan would not have been made without the agreement for the purchase of the certificates of deposit.

Also on March 21, 1980, a sales representative of Blinder-Robinson assisted his customer, Johan Van Baal, in obtaining a loan of $700,000.00 from Metro Bank for the purpose of assisting in the purchase of 400,000 units of American Leisure. That purchase was effected on March 24, 1980.

The Metro Bank issued Blinder-Robinson a cashier's check, dated March 24, 1980, for $2,371,987.50 for the purchase of the 956,393 units which had not been sold to the public. Those 956,393 units were put in the Blinder-Robinson inventory trading account. The loan was not secured and it was not recorded in the bank's loan records, contrary to the routine business practice of the bank.

On March 25, 1980, the Metro Bank credited Blinder-Robinson for $2,475,000.00, an amount representing the firm's commissions for the sale of 10 million units. Also on March 25, 1980, the bank wired $3,000,000.00 from the escrow account to the Miami bank for American Leisure to purchase certificates of deposit. Both of these distributions occurred prior to a formal closing of the offering. In fact, no closing ever took place. Most of the closing documents had been executed at the Metro Bank on March 20, 1980, when the offering was far short of completion. By letter of that date, an assistant vice-president of the Metro Bank wrote to the Division of Securities of the State of Colorado and included the following two paragraphs:

> Kindly consider this letter our certification to you that there is on deposit in the above mentioned Escrow Account the aggregate sum of $25,000,000.00 the same being held for the purposes as set forth in the Escrow Agreement.
>
> In view of the foregoing, the Metro National Bank, as Escrow Agent hereby request [sic] authorization from the Colorado Securities Commissioner to release to American Leisure Corp., and/or Blinder, Robinson and Company such funds now on deposit in the Escrow Account, or as may hereafter be deposited into said Escrow Account. (Plaintiff's Exhibit 39P).

At the trial of this matter that bank officer testified that the letter was actually delivered to the Colorado Securities Department on March 24, 1980, during working hours. That certification was false even as of March 24, because the $1,500,000.00 from the Miami bank did not arrive until March 25.

Blinder-Robinson began trading from the inventory of 956,393 American Leisure units with members of the public and other broker-dealers on March 25, 1980. From that date until July 18, 1980, Blinder-Robinson sold 2,209,320 units and purchased 1,828,715 units.

On August 28, 1980, the SEC and Blinder-Robinson orally stipulated that as of that date the firm would cease trading for its own account in American Leisure securities, and would freeze the firm's holdings in those securities. The stipulation permitted Blinder-Robinson to continue executing unsolicited agency transactions involving American Leisure securities. In a written stipulation filed on April 27, 1981, the Com-

mission and Blinder-Robinson agreed to vacate the earlier stipulation and substituted one which permitted Blinder-Robinson to resume its trading in American Leisure, but continued to require a freeze of the firm's holdings as of August 28, 1980. These stipulations define the continuing after-market distribution as from March 25, 1980 until August 28, 1980, although the evidence before the court traces Blinder-Robinson's after-market trading activity only through July 18, 1980.

SECURITIES ACTS VIOLATIONS

Sections 17(a), 10(b), and Rule 10b–5. The SEC alleges that Blinder-Robinson violated Section 17(a) of the 1933 Act, Section 10(b) of the 1934 Act, and Rule 10b–5, by embarking on a fraudulent course of conduct throughout the firm's involvement in the American Leisure offering. The Commission points to alleged fraudulent conduct during Blinder-Robinson's effort to sell the offering, and in connection with the closing of the "all or none" offering. Defendants' position is threefold: 1) that the alleged misrepresentations were not material; 2) that defendants cannot be held responsible for the acts of their salespeople; and 3) that the SEC has failed to establish scienter. Upon consideration of all of the evidence, my conclusion is that Blinder and Blinder-Robinson violated Sections 17(a), 10(b), and Rule 10b–5.

At the outset it is noted that throughout the relevant time period defendants used the mails, telephone and other means of interstate commerce in their various transactions with regard to the American Leisure offering.

[1] Sections 17(a) and 10(b) prohibit the use of a manipulative or deceptive device, or scheme or artifice to defraud, in connection with the offer, sale or purchase of any security. Section 17(a)(2) and Rule 10b–5 specifically prohibit the making of any untrue statement of material fact or the omission to state a material fact necessary in order to make the statements made not misleading. A "material fact" is one which a reasonable investor might have considered important in the making of an investment decision. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153–54, 92 S Ct 1456, 1472–73, 31 L.Ed.2d 741 (1972). Actual reliance need not be shown, *id.*, but defendants' scienter must be established for purposes of Rule 10b–5, Section 10(b), and Section 17(a)(1). *Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 691, 697, 100 S.Ct. 1945, 1952, 1956, 64 L.Ed.2d 611 (1980); *Securities and Exchange Commission v. Haswell*, 654 F.2d 698 (10th Cir 1981).

Meyer Blinder and the Blinder-Robinson sales force aggressively promoted the American Leisure securities before the registration statement became effective and then followed the manipulative and deceptive practice of maintaining market interest by suggesting that the hotel-casino development would be assured because of deals that were being made. The sales presentations followed a pattern of misstatements and omissions. Sales representatives predicted that the American Leisure securities would open at a premium in the after-market, without any factual basis for their predictions. They told buyers that the firm's personnel had inside information about developments positively affecting the issuer, when in fact there were no positive developments for the new company during the distribution period.

The cancellations in March came largely as a result of the letter, dated March 10, 1980, from Gabriel Nagy as general counsel of Elkins to its customers, containing the following paragraphs, among others:

> We have been informed that some interest in this offering has been generated in part by the expectation that ALC might invest some or all of the net offering proceeds in a casino project to be developed jointly with Cavanagh Communities Corporation ("CCC"). These two companies own neighboring parcels of land in Atlantic City, New Jersey, and there has been speculation in the public press that they might develop their properties jointly.

Partners and registered representatives of this Firm have substantial investments in CCC, and one of them currently serves as President of CCC.

We have also been informed that ALC and CCC had preliminary, tentative discussions sometime [sic] ago concerning the possibility of a joint development of their properties. However, we are told, no agreements or preliminary understandings resulted from those discussions, those discussions have been terminated and no negotiations or discussions are currently in progress between the two companies.

It is presently contemplated that the ALC offering will not settle before March 19, 1980. As noted above, we are not recommending the purchase of units. As the prospectus notes at page 9, you should understand that you may lose all or part of your investment in the units. If you decide that you do not wish to purchase the units, you may cancel this transaction *without obligation*, by so advising your registered representative by 4:00 P.M. on Thursday, March 13, 1980. (Plaintiff's Exhibit 40K).

Mr. Lampert, for American Leisure, and Mr. Padgett, for Blinder-Robinson, objected to this letter and urged that it not be sent because Mr. Lampert said that negotiations would continue. In my view, Elkins acted appropriately and Blinder-Robinson should have done the same thing. Given the sales practices which had been followed, the Blinder-Robinson customers buying the American Leisure units should have been given this information and the failure to provide it constitutes a fraudulent practice.

[2] These statements and omissions are directly attributable to Blinder and, through him, to Blinder-Robinson.[1] It is clear that the Blinder-Robinson sales force practiced a program of deliberately deceptive misinformation which Blinder orchestrated. Even if the evidence did not demonstrate his active role, this court would hold Blinder liable for the acts of sales representatives whom he supervised and for whose misconduct he is responsible under Section 20 of the 1934 Act, 15 U.S.C. § 78t (1976). *A. J. White & Co. v. Securities and Exchange Commission*, 556 F.2d 619, 622 (1st Cir. 1977), *cert. denied*, 434 U.S. 969, 98 S.Ct. 516, 54 L.Ed.2d 457 (1977); *Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc.*, 410 F.Supp. 1002 (S.D.N.Y.1976), *aff'd. in part and modified in part*, 574 F.2d 90 (2nd Cir. 1978).

[3] Blinder and Blinder-Robinson did not disclose the frantic manipulations which resulted in the pretension that all of the issue had been sold by the March 25 deadline. The investors were not told that $3,000,000.00 of the proceeds of the public offering had been committed to be used as an accommodation for the loan necessary for the Scope purchase with half of that amount invested at 6 points below the market rate. They were not told that the Metro Bank was so anxious to assist its good customer, Blinder-Robinson, that it found it expedient to make a $700,000.00 loan to a person who had no prior banking connection there, and to loan Blinder-Robinson almost the full amount of its commission with the bank paying itself off from that commission in immediate distribution of the first escrow. They were not told that Blinder-Robinson would, itself, purchase 956,393 units, and place them in inventory to participate in after-market transactions.[2]

The misstatements and omissions in this case are material. Information regarding

1. "A firm . . can act only through its agents, and is accountable for the actions of its responsible officers." *A. J. White & Co. v. Securities and Exchange Commission*, 556 F.2d 619, 624 (1st Cir. 1977), *cert. denied*, 434 U.S. 969, 98 S.Ct. 516, 54 L.Ed.2d 457 (1977). *Accord, Kerbs v. Fall River Industries, Inc.*, 502 F.2d 731, 741 (10th Cir. 1974).

2. The court finds without merit defendants' reasons for not attaching a sticker to the prospectus, despite counsel's advice. Their claim that a sticker would be useless since all the prospectuses were distributed already is not a valid excuse: "If it was too late to disclose the change, the investors had a right to assume that the prospectus would be complied with, not changed." *A. J. White & Co.*, 556 F.2d at 623. Their fear of damage to Blinder-Robinson's business reputation does not excuse their nondisclosure, but simply demonstrates the

the condition of the issuing company is of great significance to the reasonable investor, particularly where the company is new. *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968), *cert. denied*, 394 U.S. 976, 89 S.Ct. 1454, 22 L.Ed.2d 756 (1969). Moreover, in an "all or none" offering of securities by a new company, whether all the securities have been sold to the public in bona fide transactions is of particular importance because the "all or none" contingency is the investors' principal protection. Each investor is comforted by the knowledge that unless his judgment to take the risk is shared by enough others to sell out the issue, his money will be returned.

In *A. J. White & Co.*, where one-half of the minimum amount in an "all or none" offering was raised through non-bona fide short term loans, the First Circuit Court of Appeals affirmed the Commission's decision that the purported closing without disclosure of the purchases was a material omission under Sections 17(a) and 10(b), and Rule 10b–5:

> Particularly in cases such as this, an offering of shares in a new company, one of the investors' major concerns will be whether the price they are paying for the securities is a fair market price. The inability of the underwriter to sell the specified minimum to bona fide investors may well indicate that the market judges the offering price to be too high. Thus, to declare an offering completed through non-bona fide sales financed through bank loans, where the purported investors have not made an investment decision backed with their own money, may significantly mislead the legitimate investors as to a crucial factor in their decision.

Id., 556 F.2d at 623.

Perhaps most telling in all of the evidence presented at the trial of this case is the testimony of Mr. Padgett that he and Meyer Blinder decided to make a business decision contrary to the advice of their attorneys because to do otherwise would be very damaging to the company's reputation by letting it be known that it could not sell out this offering. That is an admission of materiality.

The requisite scienter for a violation of Sections 17(a)(1), 10(b), and Rule 10b–5, has been defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194, n.12, 96 S.Ct. 1375, 1381, n.12, 47 L.Ed.2d 668 (1976). The courts of appeal are in agreement that reckless behavior satisfies the scienter requirement. *Hackbart v. Holmes*, 675 F.2d 1114 at 1117 (10th Cir. 1982). In *Hackbart*, the Tenth Circuit adopted the following definition of recklessness: "'an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'" *Hackbart*, at 1118 (quoting *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977), *cert. denied*, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1977)).

Defendants' contention that their mental state fell short of the requisite scienter is rejected.[3] The evidence fails to establish a basis in fact for the representations made by Blinder to his sales force regarding American Leisure's prospects for success. Rather, it shows that Blinder knew that the company had no positive developments during the distribution period, and that the offering was meeting with difficulty. The defendants knew that the closing of March 25, 1980 was a pretense. There is no more telling indication of knowledge than the direct receipt of the advice of the involved

materiality of the omissions, as discussed *infra* at 476–477.

3. Of course, Blinder-Robinson is a corporate entity which is not capable of possessing a "mental state." But for purposes of establishing scienter, Blinder's mental state is imputed to Blinder-Robinson *Securities and Exchange Commission v Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1096–97, nn 16–18 (2nd Cir 1972)

attorneys to attach a sticker to the prospectus. But despite that knowledge of the materiality of their conduct, and its potential consequences, they ignored counsel's advice. This is not a case of "recklessness"; the defendants acted with a knowing "intent to deceive, manipulate, or defraud" under *Ernst & Ernst*.

[4] *Rule 10b–6.* The SEC alleges that Blinder and Blinder-Robinson violated Rule 10b–6 when the firm purchased for its trading account 956,393 American Leisure units, continued selling those units to the public, and simultaneously bid for and purchased American Leisure units. Defendants' position is that the firm's purchase of the remaining American Leisure units prior to the specified closing date of the "all or none" offering operated to complete the offering and to remove subsequent activities from the ambit of the rule.

Rule 10b–6 was promulgated by the SEC under Section 10(b) of the 1934 Act, and is designed to prohibit market manipulation by any person participating in the distribution of a security for the duration of that participation. In this case the SEC has established that defendants participated in a distribution of American Leisure units, which continued beyond the specified closing date of the offering, and that during their participation defendants bid for and purchased American Leisure units, in manipulation of the market and in violation of Rule 10b–6.[4]

Rule 10b–6 does not define "distribution" as used therein, but in its administrative decisions the SEC has clarified the meaning of the term. In *Gob Shops of America*, Securities Act Release No. 4075 (May 6, 1959), the Commission held that a "major selling effort" would constitute a distribution, and in *Collins Securities Corp.*, Securities Exchange Act Release No. 11766 (October 23, 1975) [1975–76 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 80,327, *remanded on other grounds*, 562 F.2d 820 (D.C.Cir. 1977), the SEC set out the following test:

> Rule 10b–6 . . . is designed to prevent manipulation in the markets. To that end, it precludes a person from buying stock in the market when he is at the same time participating in an offering of securities which is of such a nature as to give rise to a temptation on the part of that person to purchase for manipulative purposes. The term distribution in Rule 10b–6 should therefore be interpreted to identify situations where that temptation may be present.

The Commission also noted that "Rule 10b–6 undoubtedly applies to most registered offerings." *Id.*

It is clear that the American Leisure offering constituted a "distribution." Moreover, that distribution continued beyond March 25, 1980, the date of the purported closing, because the purchases and subsequent sales of American Leisure units by Blinder-Robinson was a continuing aftermarket distribution of the securities. Rule 10b–6(c)(3) defines an underwriter's participation in a distribution as complete "when he has distributed his participation, including all other securities of the same class acquired in connection with the distribution . . ." According to the American Leisure prospectus, Blinder-Robinson's participation was the sale of 10 million units "to the public" (less 2 million units which were reserved for sale to BBB shareholders). (Plaintiff's Exhibit 1, at 46–7). With its purchase of 956,393 units, it fell short of completing its distribution by that amount and, consequently, the distribution continued after the purported closing. *R. A. Holman & Co. v. Securities and Exchange Commission*, 366 F.2d 446, 449 (2d Cir. 1966), *modified on other grounds*, 377 F.2d 665 (2d Cir. 1967), *cert. denied*, 389 U.S. 991, 88 S.Ct. 473, 19 L.Ed.2d 482 (1967); *Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc.*; Whitney, "Rule 10b–6: The Special Study's Rediscov-

4. For purposes of Rule 10b–6, the court holds Blinder, as the president and controlling officer of Blinder-Robinson, liable for the firm's misconduct. The evidence presented at trial shows that the firm's purchase of American Leisure units and its subsequent market manipulation was either known to Blinder or at his direction

ered Rule," 62 *Mich.L.Rev.* 567,575 (1964). The parties stipulated that Blinder-Robinson would cease trading for its own account in American Leisure units beginning August 28, 1980. The court concludes that the after-market distribution lasted from March 25, 1980 until that date.

The court finds that during the continuing after-market distribution, defendants purchased and sold a large volume of American Leisure units. Those activities constitute the precise types of conduct forbidden by the rule, due to the potential for market manipulation by underwriters who stand to gain from an active market.

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 that issue in this case, because the evidence reveals that defendants acted with scienter throughout their involvement with the American Leisure offering. This finding certainly applies to defendants' continuation of the distribution by virtue of their purchase of the remaining 956,393 units, and their subsequent purchase of additional American Leisure units.

[5] *Rule 10b–9.* Under Rule 10b–9 a representation that an offering is on an "all or none" basis constitutes a manipulative or deceptive device prohibited by Section 10(b), unless prompt refunds are made to purchasers if all the securities are not sold at the specified price within the specified time and if the total amount due the seller is not received by it by the specified date. Defendants plainly violated this rule. They underwrote an offering on a "best efforts, all or none" basis; and they failed to promptly refund consideration received from purchasers when, on the specified deadline date, less than all of the securities had been sold, and less than the total proceeds due the seller had been received.

There is no dispute that this was an "all or none" offering, or that Blinder-Robinson failed to refund consideration paid by purchasers of American Leisure units. Defendants' position is that they had no obligation to refund the consideration. They contend that all 10 million units were sold by March 25, 1980; that all the money due the seller was received by that date; and hence, no refund was required.

The SEC has stated that "under Rule 10b–9, an offering may not be considered 'sold' for purposes of the representation 'all or none' unless all the securities required to be placed are sold in *bona fide transactions* and are fully paid for." Securities Exchange Act Release No. 11532 (July 11, 1975), 2 Fed.Sec.L.Rep. (CCH) ¶ 22,730 (emphasis added). The Commission specifically indicated that "sales designed to create the appearance of a successful completion of the offering, such as purchases by the issuer through nominee accounts or purchases by persons whom the issuer has agreed to guarantee against loss," are "non-bona fide sales." *Id.* The court finds that the last-minute transactions through which Blinder-Robinson "sold" almost 2 million units between March 21 and March 24, 1980, were not bona fide sales. *See Securities and Exchange Commission v. Coven*, 581 F.2d 1020, 1028, n.16 (2d Cir. 1978), *cert. denied*, 440 U.S. 950, 99 S.Ct. 1432, 59 L.Ed.2d 640 (1979); *Securities and Exchange Commission v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1095 (2d Cir. 1972).

In addition, the SEC established at trial that the $25 million due American Leisure was not received by the deadline of March 25, 1980. On March 24, 1980, the Metro Bank issued Blinder-Robinson a cashier's check in the amount of $2,371,987.50 for the purchase by the firm of the 956,393 units which had not been sold to the public. Although Blinder-Robinson and the bank called this transaction a "loan," the court is persuaded that it was in fact a distribution of commissions from the proceeds of the offering, prior to its completion. Because this payment occurred prior to March 25, on that date the escrow account was short of

the requisite $25 million. Moreover, proceeds received from non-bona fide sales must be considered non-bona fide proceeds which, even though present in the account on March 25, cannot be counted as part of the $25 million specified in the offering prospectus.

[6] *Section 15(c) and Rule 15c2–4.* Rule 15c2–4, promulgated under Section 15(c) of the 1934 Act, requires the underwriter to establish and maintain an escrow account or separate bank account for all funds received, which funds must remain segregated and untouched until the occurrence of the "all or none" contingency which completes or vacates the offering. Blinder and Blinder-Robinson established an escrow account at the Metro Bank and it appears that they deposited proceeds from sales into that account as they were received. However, the evidence shows that defendants transferred proceeds from the account prior to the occurrence of the "all or none" contingency on March 25, 1980, and failed to return purchasers' funds upon the occurrence of the contingency. The evidence demonstrates clear violations of Section 15(c) and Rule 15c2–4.

Proceeds were removed from the account, pursuant to defendants' instructions, on at least two occasions. On March 25, 1980, the bank wired $3 million from the escrow account to a Miami bank for use by American Leisure in order to accommodate a loan which the Miami bank agreed to make to Scope. On March 24, 1980, the bank made a purported "loan" to Blinder-Robinson, in which it actually distributed to the firm its commissions from the offering. Withdrawal of those funds prior to the sale of all 10 million American Leisure units was unlawful. *See Securities and Exchange Commission v. Coven*, 581 F.2d at 1028–29 n.17.

In an interpretative release, the SEC has stated that for purposes of Rule 15c2–4:

> If the contingency is "all or none," this requirement means that no funds may be disbursed from the agency or escrow account until all the securities are sold in bona fide transactions and are finally paid for.

Securities Exchange Act of 1934 Release No. 11532 (July 11, 1975). The court has determined that almost 2 million American Leisure units were sold in non-bona fide transactions, *supra*, at 19, which prohibited the completion of the offering and the lawful disbursement of funds from the escrow account to persons other than the purchasers. Yet, defendants failed to return purchasers' funds promptly after the deadline of March 25, 1980, and have not returned those funds to this day. Instead, having indirectly received their commissions through the Metro Bank "loan," they turned over the remaining funds to the issuer. This is the precise conduct prohibited by Rule 15c2–4. *FAI Investment Analysts, Inc.*, Securities Exchange Act Release No. 14288 (December 19, 1977).

[7] *Aider and abettor liability.* As a general defense to the violations which occurred during the American Leisure offering, defendants claim that they should not be held liable for the conduct of individual sales representatives. But, Blinder-Robinson is responsible for its employees' actions where those actions were directed by the firm, through Blinder. 15 U.S.C. § 78t (1976). *See* n.1, *supra* at 12. The liability of Blinder, as president and controlling officer of Blinder-Robinson, is the same as that of the firm. *A. J. White & Co.*, 556 F.2d at 621–22; *Commonwealth Chemical Securities, Inc., supra.*

Defendants have not raised as an issue the extent of their liability as aiders and abettors for conduct of other involved persons, but that issue is relevant where, as in this case, liability under the securities laws is premised in part on contributing conduct by persons not before the court.[5] Specifically, between March 19 and March 25, 1980, Irwin Lampert met with Leon Joseph,

5. Defendants' violations of Sections 17(a) and 10(b), and Rules 10b–5 and 10b–6, result solely from their own misconduct. However, the violations of Section 15(c) and Rules 15c2–4 and 10b–9, involve misconduct of the Metro Bank and of the persons who arranged the loan to Scope.

Joseph Klein and Zola Klein to negotiate an arrangement whereby Scope would borrow $1.5 million and purchase 600,000 American Leisure units, and American Leisure would accommodate that bank loan by purchasing from the lending bank certificates of deposit in the amount of $3 million. On March 20, 1980, an assistant vice president of the Metro Bank wrote to the state securities regulation agency certifying the amount deposited in the escrow account as $25 million; on March 24, the bank made a purported "loan" to Blinder-Robinson which was actually a distribution from the proceeds of the offering; on March 25, the bank wired $3 million from the account for American Leisure to purchase certificates of deposit from the Miami bank; and on March 24 or 26,[6] the bank released the funds from the escrow account to American Leisure.

[8] What is significant is that none of the above activities by third parties occurred in a vacuum. Rather, those activities were either at the direction of Blinder and Blinder-Robinson, or with their full knowledge and tacit approval; and the particular actions taken by the bank and others were simply component parts of the overall scheme which Blinder and Blinder-Robinson orchestrated to give the appearance of completing the offering by March 25, 1980. Under these circumstances, defendants are both directly liable as primary but silent participants, and secondarily liable as aiders and abettors. *Securities and Exchange Commission v. Coven*, 581 F.2d at 1028–29; *Kerbs v. Fall River Industries, Inc.*, 502 F.2d 731, 740 (10th Cir. 1974).

Good faith reliance defense. The defense of good faith reliance on advice of counsel, raised by Blinder-Robinson, is without merit. Although several courts have held that reliance on the advice of counsel can contribute to a general "good faith" defense to certain violations of the securities laws, none has recognized that defense under facts such as are present in this case.

Blinder-Robinson contends that prior to purchasing American Leisure units, it sought legal advice as to the propriety of such a purchase. It is undisputed that early in March, 1980, Meyer Blinder, acting for Blinder-Robinson, asked attorney Bernard Feuerstein to find out whether the firm, as the underwriter in a "best efforts, all or none" offering, could purchase the subject securities. In response to Blinder's request, Feuerstein did not render a formal opinion, but simply relayed the information received from a staff attorney at the SEC that there was no absolute restriction or special rule prohibiting an underwriter from purchasing the offered securities in an "all or none" offering. At no time did Blinder inquire as to the legality of other action it took to complete the offering by its deadline of March 25, 1980, and when later advised that a sticker should be placed on the prospectus, disclosing the purchase, Blinder-Robinson declined to follow that advice.

[9] As discussed earlier in this opinion, the evidence supports a finding that Blinder-Robinson acted with scienter in all its violations of the securities laws. This finding of scienter precludes a finding of good faith by the firm with respect to the same actions. *See Securities and Exchange Commission v. Bonastia*, 614 F.2d 908, 914 (3d Cir. 1980) (affirming district court's rejection of defense of good faith reliance on advice of counsel, "in view of the high ranking positions [defendant] held with the various companies engaged in the illegal activity and the specific finding of scienter made by the district court").

[10] There are additional reasons why the defense fails these defendants. A defendant invoking his reliance on the advice of counsel must establish that he made a complete disclosure to counsel and then followed the advice rendered. *Securities and Exchange Commission v. Savoy Industries, Inc.*, 665 F.2d 1310, 1314 n. 28 (D.C.Cir 1981)

6. The statement for the American Leisure escrow account reflects a debit of $22,130,276 72 on March 26, 1980 (Plaintiff's Exhibit 12f). But, in a handwritten ledger for that account maintained by the Metro Bank International Department, the payment to American Leisure is shown to have occurred on March 24 (Plaintiff's Exhibit 12g)

(*dictum*); *United States v. Hill*, 298 F.Supp. 1221, 1235 (D.Conn.1969). Blinder did not make a complete disclosure to Feuerstein when he requested advice regarding the purchase of American Leisure units. He indicated the possibility that Blinder-Robinson would buy units, but not that the firm would buy for its trading account and continue to sell the securities to the public after March 25, 1980. He did not disclose the possibility of accommodating loans to sell units to third parties, or that the firm would draw its commissions from the proceeds of the offering, prior to the closing, to purchase the American Leisure units. This information was material to the advice sought, and its omission precludes Blinder-Robinson from claiming reliance on that advice.

[11] The greatest obstacle to Blinder-Robinson's claimed good faith defense is that the firm failed to follow the advice rendered by counsel. By March 20, 1980, Feuerstein and attorneys for Blinder-Robinson had advised Meyer Blinder and Mr. Padgett, vice-president of Blinder-Robinson that a sticker on the prospectus would be necessary to disclose the intended purchase, which the lawyers viewed as a material development. The firm specifically declined to follow that advice, for fear that disclosure of its intent to purchase units would injure its business reputation, and in the belief that no additional prospectuses would be distributed. It is plain that Blinder-Robinson cannot hide now behind legal advice which it chose to ignore. *Securities and Exchange Commission v. Senex Corp.*, 399 F.Supp. 497, 507 (E.D.Ky.1975), *aff'd.*, 534 F.2d 1240 (6th Cir. 1976).

Upon the foregoing, it is

ORDERED, that the defendants, Blinder-Robinson & Co., Inc. and Meyer Blinder, and their officers, directors, agents, servants, employees, attorneys, successors and assigns, and those persons in active concert or participation with them, and each of them, be and they are hereby permanently enjoined, from directly or indirectly, in connection with the offer to sell, sale, delivery after sale or purchase of any securities of any issuer whatsoever, including, but not limited to, units (of common stock and warrants), common stock and warrants of American Leisure Corp., through the use of any means or instruments of transportation or communication in interstate commerce, or of the mails:

(1) employing any device, scheme, or artifice to defraud; or

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

(3) engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser or upon any person; or

(4) using or employing, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors; or

(5) bidding for or purchasing for any account in which they have a beneficial interest, any security which is the subject of a particular distribution of securities in which they have agreed to participate, or any security of the same class and series, or any right to purchase any such security, or attempting to induce any person to purchase any such security or right, until after they have completed their participation in such distribution; or

(6) making any representation to the effect that any security is being offered or sold on an "all or none" basis unless the security is part of an offering or distribution being made on the condition that all or a specified amount of the consideration paid for such security will be promptly refunded to the purchaser unless (a) all of the securities being offered are sold at a specified price within a specified time, and (b) the

total amount due to the seller is received by him by a specified date; or

(7) making any representation to the effect that any security is being offered or sold on any other basis whereby all or part of the consideration paid for any such security will be refunded to the purchaser if all or some of the securities are not sold, unless the security is part of an offering or distribution being made on the condition that all or a specified part of the consideration paid for such security will be promptly refunded to the purchaser unless (a) a specified number of units of the security are sold at a specified price within a specified time, and (b) the total amount due to the seller is received by him by a specified date; or

(8) accepting any part of the sale price of any security being distributed unless the money or other consideration received is promptly transmitted to the persons entitled thereto; or

(9) accepting any part of the sale price of any security being distributed unless, if the distribution is being made on an "all or none" basis, or on any other basis which contemplates that payment is not to be made to the person on whose behalf the distribution is being made until some further event or contingency occurs, (a) the money or other consideration received is promptly deposited in a separate bank account, as agent or trustee for the persons who have the beneficial interests therein, until the appropriate event or contingency has occurred, and then the funds are promptly transmitted or returned to the persons entitled thereto, or (b) all such funds are promptly transmitted to a bank which has agreed in writing to hold all such funds in escrow for the persons who have the beneficial interests therein and to transmit or return such funds directly to the person entitled thereto when the appropriate event or contingency has occurred.

WEST KEY NUMBER SYSTEM