Filed 9/24/82

ADMINISTRATIVE PROCEEDING
FILE NO. 3-6071

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

FILE COPY

In the Matter of	:
INVESTORS FINANCIAL PLANNING, INC.	:
(File No. 8-15278)	:
NATIONAL EXECUTIVE PLANNERS, LTD.	:
DAN KING BRAINARD	:
(File No. 801-11187)	:
HENRY LEROY HEYBROCK	:
RICHARD O. WHITE	:

INITIAL DECISION

Washington, D.C.
September 24, 1982

Ralph Hunter Tracy
Administrative Law Judge

ADMINISTRATIVE PROCEEDING
FILE NO. 3-6071

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

Office of Administrative Law Judges

Date : September 24, 1982

Re: Investors Financial Planning, Inc., et al

Dear Sirs:

Enclosed is the Initial Decision of Ralph Hunter Tracy Administrative Law Judge.

Your attention is directed to the Commission's Rules of Practice, and particularly to Rules 17, 18, 22 and 23, which pertain to petitions for review of initial decisions, briefs and the service and filing thereof.

Sincerely,

George A. Fitzsimmons
Secretary

Enclosure

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INVESTORS FINANCIAL PLANNING, INC. (File No. 8-15278)	
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HENRY LEROY HEYBROCK	
RICHARD O. WHITE	

APPEARANCES:

Joseph L. Grant and R.W. Jones, attorneys, Atlanta Regional Office, for the Division of Enforcement

James W. Miles, Jr., of Graham, Cooke, Miles & Bogan for Dan King Brainard and National Executive Planners, Ltd.

Steven J. Gard of Trauner, King & Cohen for Richard O. White

Henry Leroy Heybrock, pro se.

BEFORE:

Ralph Hunter Tracy, Administrative Law Judge

This is a public proceeding instituted by Commission Order (Order) dated November 3, 1981, pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 (Exchange Act), and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 (Advisers Act), to determine whether the above named respondents committed various charged violations of those Acts and the Securities Act of 1933 (Securities Act), and regulations thereunder, as alleged by the Division of Enforcement (Division) and the remedial action, if any, that might be appropriate in the public interest.

The proceeding has been determined as to 3 respondents who submitted offers of settlement which were accepted by the Commission. 1/ Therefore, this initial decision is applicable only to the remaining respondents although, in view of the nature of the charges and the factual circumstances it may, also, involve findings with respect to some or all of the other respondents.

The Order alleges, in substance, that the remaining respondents, National Executive Planning, Ltd. (NEP), Investors Financial Planning, Inc. (IFP), Dan King Brainard (Brainard), Henry Leroy Heybrock (Heybrock) and Richard O. White (White), wilfully violated and/or wilfully aided and abetted violations of Sections 5(a), 5(c), 17(a)(1)(2) and (3) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder and Sections 203(a), 206(1) and 206(2) of the Advisers Act.

1/ The Commission has accepted offers of settlement from William H. Cain and Barry Eugene Weed, Securities Exchange Act Release No. 18703/ May 3, 1982; and Halton Q. Bittick, Securities Exchange Act Release No.19043/September 8, 1982.

The Order included an allegation that on November 27, 1978, the U.S. District Court for the Middle District of North Carolina entered preliminary injunctions against NEP, Brainard, Heybrock and White enjoining them from further violations of Sections 5(a), 5(c) and 17(a) of the Securities Act; Sections 10(b) and 15(a)(1) of the Exchange Act and Rule 10b-5 thereunder; and Sections 203(a), 206(1) and 206(2) of the Advisers Act. On September 10, 1981 Heybrock and White were permanently enjoined from violating the above mentioned provisions by the same court.

The Order also includes an allegation that on May 8, 1980, Brainard was convicted by the U.S. District Court for the Middle District of North Carolina on 13 counts of mail fraud involving the offer and sale of securities. This conviction is presently on appeal.

The evidentiary hearing was held at Greensboro, North Carolina from March 29 to April 6, 1982. IFP was not represented and Heybrock appeared pro se but all of the other respondents were represented by counsel although Brainard did not appear at the hearing. Proposed findings of fact, conclusions of law and supporting briefs were filed by all parties except IFP.

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

FINDINGS OF FACT AND LAW

Respondents

Investors Financial Planning, Inc. (IFP) was incorporated in North Carolina on September 26, 1969, and its principal place

of business is in Greensboro, North Carolina. IFP has been registered with the Commission as a broker-dealer since November 30, 1969, and is a member of the National Association of Securities Dealers, Inc. (NASD). Although IFP filed an appearance in this proceeding it was not represented at the hearing and has not filed proposed findings of fact or conclusions of law or a brief in support.

National Executive Planners, Ltd. (NEP) is a North Carolina corporation which was purchased by Halton Q. Bittick (Bittick) and another partner in 1972. At that time it sold only insurance. During the pertinent period herein it engaged in the offer and sale of mutual funds, limited partnerships, stocks, bonds and other securities. NEP also offered investment advice to individuals and its employees were known as "financial planners." The salesmen were registered with the NASD through IFP which was the broker-dealer on all transactions. In late 1972 Dan King Brainard (Brainard) became a partner in NEP.

Dan King Brainard (Brainard) was born in Greensboro, North Carolina on August 8, 1946. He served in the U.S. Navy from August 1965 until August 1969. Thereafter he attended the University of North Carolina at Greensboro for 3 years where he studied business and finance but did not obtain a degree. In 1972, while still in college, he began working for a firm by the name of Registered Funds which later changed its name to Conference Concepts. He was hired as a trainee in the sale of insurance and mutual funds. While there he met Bittick. In 1972

and early 1973 he was employed by Bruce Bailey in High Point, North Carolina, selling mutual funds and insurance. In 1973 he was approached by Bittick to buy into NEP. Brainard purchased a 30% interest and became a director and vice-president, and thereafter from June 1976, to at least November 1978, he served as president, director, and majority shareholder of NEP. He was also a shareholder, officer and director of IFP from about July 1975 until July 1976. He has been registered individually with the Commission as an investment adviser since December 15, 1975.

Richard O. White was born on October 24, 1945. He received a B.A. in zoology from Arkansas State University in 1968 and was employed as a salesman by the Upjohn Co. from September 1968 to November 1973. He was self-employed from November 1973 until May 1, 1974 when he became associated with NEP as a salesman. In 1976 he purchased a 20% interest in NEP for $20,000 and became a director and vice-president. Subsequently, he was in charge of training salesmen at NEP and was a registered representative with IFP. Also, he was certified as a financial planner by the Investment Training Institute of Atlanta.

Henry L. Heybrock was born April 28, 1933. He graduated from Stevens Institute of Technology as a mechanical engineer in 1959. From June 1959 until June 1974 he was employed as an engineer with the Western Electric Co. He was with Conference Concepts, a broker-dealer, from April 1974 to May 1975 when he

joined IFP and NEP. In 1976 he purchased a 20% interest in NEP and subsequently became vice-president and director. He was a registered representative with IFP. He is a graduate of the Investment Training Institute of Atlanta and certified as a financial planner.

Sheldon Moss (Moss), age 48, was not named as a respondent in this proceeding but was one of the defendants in the securities mail fraud in which Brainard and Bittick were convicted. He pleaded guilty and is presently serving a 5 year prison term. He maintained offices in Chicago, Illinois, and was president of Correlated Equities (Correlated) and its subsidiary Television Marketing Corp. (TVM) both Illinois corporations. On September 17, 1972, the Commission obtained an injunction against Moss, Brokers First Mortgage Corporation, and Correlated in the U.S. District Court for the Northern District of Illinois, enjoining them from violations of the Securities Act and the Exchange Act in the offer or sale of securities. During part of the pertinent period covered in this proceeding he was a partner in both NEP and IFP.

Although Halton Q. Bittick (Bittick) is no longer a respondent 2/ his key role in the activities herein require a brief sketch of his career. He was born on July 28, 1931, in Wichita Falls, Texas, attended high school in Phoenix, Arizona, and after military service, California Polytech but did not receive a degree. In 1965 he went to work for Registered Funds, a broker-dealer, in Fayetteville, North Carolina, as a registered representative. In 1976 he was promoted to district manager in the Raleigh, North Carolina, office of Registered Funds, and in 1969 was transferred to Greensboro as regional vice-president in charge of sales. Registered Funds changed its name to Conference Concepts about 1970. Bittick left in January 1972

2/ At the commencement of these proceedings Bittick submitted an offer of settlement and did not appear at the hearing except as a witness called by the Division.

when he purchased a controlling interest in NEP. Bittick was president, director and controlling shareholder of NEP until July 1976, when he sold his interest to Brainard and became controlling shareholder of IFP. He served as president of IFP from about June 1976 until about June 1980.

Injunctions and Conviction Chargeable to Respondents

Section 15(b) of the Exchange Act provides that a previous conviction or an injunction may serve as a basis for barring a person from association with a broker-dealer or the imposition of lesser sanctions. 3/

The Order alleges, and the record establishes, that on November 27, 1978, the U.S. District Court for the Middle District of North Carolina entered preliminary injunctions

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3/ Section 15(b)(6) provides as follows:

"(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 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, has been convicted of any offense specified in subparagraph (B) of said paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of said paragraph (4)."

Subparagraphs (B) and (C) provide that:

(B) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor which the Commission finds -
(i) involves the purchase or sale of any security . . .

(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, or municipal securities dealer, or as an affiliated person or employee of any investment company, bank, 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."

against NEP, Brainard, Heybrock and White enjoining them from further violations of Sections 5(a), 5(c) and 17(a) of the Securities Act; Sections 10(b) and 15(a)(1) of the Exchange Act and Rule 10b-5 thereunder; and Sections 203(a), 206(1) and 206(2) of the Advisers Act. On September 10, 1981, Heybrock and White were permanently enjoined by consent from violating these same provisions. On May 8, 1980, Brainard was convicted in the same court on 13 counts of mail fraud involving the offer and sale of securities.

Background

National Executive Planners, Ltd., (NEP) was founded in 1970 as a North Carolina corporation with offices in Greensboro, North Carolina. It was originally an insurance agency but following its purchase by Bittick in January 1972 it expanded into other fields. Brainard joined the firm in late 1972, and he and Sheldon Moss later became equal partners with Bittick. Under the direction of Bittick, and later Brainard, NEP became an investment and financial planning service dealing in mutual funds, limited partnerships, tax shelters, retirement plans, commercial paper, stocks and bonds, gold, silver, rare coins and diamonds. It was never registered as a broker-dealer but channeled all mutual fund and securities transactions through Conference Concepts, a registered broker-dealer. All salesmen employed by NEP were considered "independent contractors" and were required to become registered representatives with Conference Concepts and later IFP.

Investors Financial Planning, Inc., (IFP) a registered broker-dealer, was acquired in May 1975 by Bittick, Brainard and Moss, as one-third partners. Thereafter, all NEP brokerage business was transacted through IFP. On July 6, 1976 NEP and IFP entered into an agreement whereby Brainard bought out Moss and Bittick and became president of NEP while Bittick became president of IFP. IFP was to pay NEP 70% of commissions received on business submitted by NEP. Also, all present and future salesmen of NEP were to be registered with IFP as NASD registered representatives.

In July of 1973, Brainard received a telephone call at NEP's office in Greensboro from Moss in Chicago concerning an investment which NEP might be interested in selling to its clients. This investment was Television Marketing (TVM) which Moss explained as a fixed principal investment paying interest. Brainard had met Moss briefly in 1972 when Brainard was with Bruce Bailey and Moss had come to Greensboro looking for someone to handle regional sales of first mortgages which he had advertised in the Wall Street Journal. 4/ Brainard and Bittick had further discussions with Moss by telephone about TVM and it was decided that Brainard should go to Chicago and investigate the company. On August 8, 1973, Brainard flew to Chicago where he spent the day with Moss, returning to Greensboro that

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4/ The first mortgages apparently were those of Brokers First Mortgage which, together with Moss, had been enjoined by the SEC on September 27, 1972. Brainard has admitted selling at least one of these mortgages.

evening.

Moss explained to Brainard that TVM was a marketing firm which would market products brought to it by manufacturers or investors for a fee or an interest in the product. A separate corporation in which TVM would have ownership would be formed for each product. The product was then to be promoted by television advertising in a certain area and TVM would produce the commercial and pay for the air time. The retail chain stores in the area would then be contacted and shown the commercial and, if they purchased the product, they would be listed in the commercial as the place to obtain the product. Moss represented that TVM was producing commercials for such large chains as K-Mart, J.C. Penney, Sears and others.

Moss told Brainard that TVM incurred costs in developing and manufacturing the product, producing and running the commercials and paying commissions to salesmen and that the retail stores sometimes took 90 to 180 days to pay and, therefore, TVM had a cash flow problem. As a result TVM had to use the receivables due as collateral with banks and factors who would charge TVM 3 and 4 percent a month to borrow against the receivables. Moss wanted Brainard to sell the TVM accounts receivable to his clients and pay 1% a month. NEP would receive a 1/2% per month on all sales. A portion of a receivable from a retailer would be assigned to the client at a fixed rate, and the client would receive a State of Illinois Form UCC-2 showing the assignment of such portion in the amount of 120% of the

amount the NEP client would invest. 5/

Moss told Brainard that this was not a security, that he had taken it to his attorneys and asked them to help him structure it so that he would not have a securities problem with this one, and they had intentionally structured it as an assignment of a receivable, and not a promissory note, in order to avoid any securities problem. Moss made the point that in Brokers First Mortgage they had a promissory note to pay and the SEC had declared it to be a security and had stopped him from selling it.

Subsequent to his trip to Chicago, Brainard requested the North Carolina National Bank to obtain Dun & Bradstreet reports on the companies in which Moss had an interest, including TVM and Correlated Equities. Brainard testified that these reports confirmed Moss's representations. 6/ Brainard also requested and received a financial statement from Moss but Moss instructed him not to use any financial statements in the sale of TVM. At Brainard's request Moss came to Greensboro in

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5/ Form UCC-2 was a Uniform Commercial Code Financing Statement filed with the State of Illinois which purportedly showed the total value of the receivable due, for example from Sears, and an assignment to the investor to cover his investment. (See Division Exhibit No. 8)

6/ Brainard did not testify in this proceeding but portions of his testimony at his criminal trial were put in evidence by his counsel and the Division.

April 1974 and made a sales presentation of the TVM investment for the NEP salesmen.

Beginning in 1973 NEP offered and sold TVM interests to investors in North Carolina. Between July 1973 and September 26, 1978, when the State of North Carolina issued a cease and desist order, NEP sold at least $4,375,000 in TVM securities to at least 767 investors.

TVM was incorporated in the State of Illinois on March 23, 1972, to engage in the business of marketing goods and services through the use of television and other advertising media. It was dissolved on November 16, 1974, apparently becoming a subsidiary of Correlated Equities. The funds invested in TVM "receivables" were not used to finance the operations of TVM. All of the monies invested through NEP were sent to Moss, less commissions and were used for his personal purposes. The money invested by later investors was used to pay the "interest" to earlier investors; to pay commissions to NEP; to invest in a heavy weight boxer; in a gold mine in Colorado; in currency options on the foreign currency market; in a mail order worm farm; in the development of a real estate subdivision in Wisconsin, and for various personal expenses and loans to friends.

Section 5 Violations

The Order alleges that during the period from about 1973 to November 27, 1978, all of the respondents wilfully violated

and wilfully aided and abetted violations of Sections 5(a) and 5(c) of the Securities Act in that they offered to sell, sold and delivered after sale certain securities, namely TVM evidences of indebtedness, when no registration statement was on file or in effect as to said securities pursuant to the Securities Act.

Respondents do not dispute the fact that TVM was not registered. In making such unregistered sales respondents relied on representations by Moss and repeated by Brainard that this was "commercial paper" and not a security. Therefore, there was no need to register it. While this contention was made during the course of the hearing it was not raised or argued in respondents' briefs.

In Securities and Exchange Commission v. W.J. Howey Co., 328 U.S. 293 (1946) the Supreme Court held that a security can exist where there is an investment of money in a common enterprise with an expectation of profits to be derived from the efforts of a third party.

Here there were investments by over 700 individuals totalling more than four million dollars in the TVM "receivables" with the promise of larger than normal returns or profits to be achieved through the investment proficiency of TVM's management. Therefore, all of the elements enunciated by the Court in Howey are present here and, accordingly, it is found

that TVM was a security and should have been registered. 7/

The elements of a prima facie case for violation of the registration provisions of the securities laws have been stated to be:

> "The establishment of a prima facie case... for the alleged violations of Section 5 require(s) that the Commission prove three essential elements: (1) no registration statement was in effect as to the securities; (2) the defendant sold or offered to sell these securities; and (3) mails were used in connection with the sale or offer of sale." Securities and Exchange Commission v. Continental Tobacco Co. of South Carolina, 463 F.2d 137, at 155 (CA 5th Cir. 1972)

All three elements are clearly present here: there was never any registration on file or in effect for TVM; respondents sold TVM to over 700 investors; and the funds received from investors in North Carolina were regularly mailed to Moss in Chicago while the monthly interest checks were sent by Moss to Chicago to NEP officials in Greensboro and then mailed to investors.

Accordingly, it is found that all of the respondents wilfully violated and wilfully aided and abetted violations of

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7/ In addition, the TVM offerings were found to be securities by the court in SEC v. National Executive Planners, Ltd., 503 F. Supp. 1066, 1072 (1980); and by the Secretary of State of North Carolina in a cease and desist order issued on September 26, 1978.

Sections 5(a) and 5(c) of the Securities Act.[8/]

Anti-Fraud Provisions

The Order alleges that during various periods from about 1973 to November 27, 1978, the respondents, Brainard, Heybrock, White, NEP and IFP wilfully violated and wilfully aided and abetted violations of Sections 17(a)(1), 17(a)(2) and 17(a)(3) of the Securities Act and Section 10(b)(5) of the Exchange Act and Rule 10b-5 thereunder in connection with the offer, sale and purchase of TVM securities by employing directly and indirectly devices, schemes and artifices to defraud and by means of untrue statements of material facts and omissions to state material facts in order to make the statements made, in the light of the circumstances under which they were made, not misleading.[9/]

As part of the aforesaid conduct the respondents, among

8/ Willfulness does not require an intent to violate the law, Tager v. SEC., 344 F.2d 5, 8 (C.A. 2, 1965); First Pittsburgh Securities Corporation, Securities Exchange Act Release No. 16897 (June 16, 1980), 20 SEC docket 401, 403, n. 10. Scienter is not required for a Section 5 violation, see SEC v. L&S Petroleum, Inc., 44 F. Supp. 38, 40 (W.D. Okla. 1977) where the court said: "it is apparent from the provisions of Section 5 of the 1933 Act... that Section 5 makes violations of its provisions unlawful regardless of scienter on the part of a defendant." See, also Feeney v. SEC, 564 F.2d 260, 262 (C.A. 8, 1977), cert. denied 435 U.S. 969 (1978).

9/ Section 10(b) as here pertinent makes it unlawful for any person to use or employ in connection with the purchase or sale of a security any manipulative device or contrivance in contravention of rules and regulations of the Commission prescribed thereunder. Rule 10b-5 defines manipulative or deceptive devices by making it unlawful for any person in such connection: "(1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading or (3) to engage in any

(continued on next page)

other things, would and did:

1. Falsely represent that the "security offered" was secured by a Sears account receivable, or the receivable of another nationally known retailer;

2. Falsely represent that the TVM securities were safe and sound investments;

3. Falsely represent that an investment in TVM involved no or minimum risk;

4. Falsely represent that the interest in the account receivable which represented the investor's collateral was filed with the State of Illinois;

5. Falsely represent that TVM was a corporation after November 16, 1974, when it was dissolved;

6. Fail to disclose that Moss and Correlated Equities had previously been enjoined from further violations of the registration and anti-fraud provisions of the federal securities laws;

7. Falsely represent that TVM and Correlated Equities were financially sound;

8. Fail to disclose the amount of commissions received by NEP and its representatives in connection with the sale of TVM;

9. Falsely represent that an investment in TVM was as sound as the retail store buying the product.

10. Fail to disclose the financial condition of Moss, Correlated Equities or TVM.

NEP began selling TVM shortly after Brainard's visit to Moss in August 1973 and continued until September 27, 1978, when the State of North Carolina issued a cease and desist order.

9/ (continued from page 14)

act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . ." Section 17(a) contains analogous antifraud provisions.

NEP solicited customers by means of a brochure which set forth various investment strategies and the professional talents of Brainard, White and Heybrock, among others. A confidential questionnaire would be obtained from the prospective investor concerning his finances and a worksheet would be prepared tailored to his individual needs. This was usually reviewed by Brainard. Recommendations would then be made for investment in mutual funds, stocks, bonds, tax shelters, retirement plans and other things. Many investors were advised to convert their life insurance, refinance their homes and use other means to obtain funds for investment. Several investors were persuaded to invest the funds in their Keogh accounts in TVM.

TVM was recommended as a safe investment in which any amount could be invested from a few hundred to several thousand dollars. The investment could be for a one, two or three year period and at the end of each period the investor had the option of withdrawing his or her money or reinvesting. A one year investment would pay 10%, a two year 11% and a three year 12%. In addition NEP received 8% every year in commissions with half or 4% going to the salesman. In other words on a one year contract NEP would receive 8%, on a 2 year, 16%, and on three years 24%, with the commission being paid each year.

Seven investor witnesses who testified during the course of the hearing concerning their purchases of TVM were in general agreement as to the representations made to them which induced

them to make such purchases. They were told that they would receive a prospectus or financial statement but as a matter of fact no prospectus or other documentation concerning TVM was ever used. They were told that TVM was as good as Sears and that they could lose only if Sears went broke; that TVM was commercial paper registered with the State of Illinois; that there was no risk. They were not told anything about the financial condition of TVM or Correlated; that Moss had previously been enjoined by the SEC; that TVM had been dissolved in 1974; that commissions would be paid every year of the investment.

Mrs. T., an elderly housewife, testified that Heybrock recommended TVM and told her that his family was investing in it and thought it was a good idea. She said that Heybrock told her it was backed by Sears and other companies. Heybrock did not tell her that the person who controlled TVM had been previously enjoined for violation of the securities laws. If he had told her she would not have invested. She identifies a letter from NEP to her, dated July 5, 1978, which says TVM is now paying 13 1/2% and that "this would be a good time for you to invest." After she got the letter she made another investment of $1,000. She was never provided with a prospectus. She invested for 3 years and her total investment was $11,000. She was paid a few interest checks, but has never gotten any of the principal back. She never received a financial statement or any written material about TVM or Correlated. She was never given any information about

the management of TVM or Correlated.

Mr. H., an internal revenue agent, purchased from Heybrock who performed an analysis of his financial situation and discussed possible investments he might make to gain a better yield on some of his assets. When Heybrock recommended TVM he explained that it financed receivables for different companies that were in need of funds. His investment would be secured by Sears & Roebuck receivables due to TVM and the collateral would be 120% of the investment. His investment in the accounts receivable of Sears was supposed to be registered with the State of Illinois. Heybrock never made any comments about risk and H. was not furnished any financial information or sales literature on TVM. He made a 3 year investment of $10,000 and assumed there would be different collateral furnished as the receivables were paid off. He has not received any of the investment back.

Mr. G., a salesman, invested through White who told him that TVM was a very good investment and very sound. White told him that the only way he could lose was that if Sears & Roebuck went broke; that the money was loaned to Sears on a short-term basis at a high interest rate. He was to receive 12% which was higher than similar investments at the time. White did not explain the value of the assets of TVM and did not show any financial information of TVM. Mr. G., asked about the company and was told he would receive a prospectus but never did. White

showed him a pamphlet of NEP which listed different investments, including diamonds. White did not provide any printed sales material or information on TVM. White told him he would receive a document showing where his money had been placed. The only thing he got looked like onion skin paper and it had on it a loan to Sears & Roebuck in excess of $200,000. White did not tell him anything about the financial condition of TVM or who controlled it. White told him the president of TVM was Mr. Moss but did not tell him Moss had been previously enjoined for violations of the securities laws. If he had been told this he would not have invested in TVM. G. invested $5,300 for 3 years and was told he could get the funds out within a reasonable time, but has gotten nothing back. He was not told that White would receive a commission every year of his investment. G. understood NEP to be a stock brokerage firm that sold securities.

Mr. F., a manufacturer's representative from High Point, North Carolina, was referred to White by a friend. White told him he had some investments that paid in the range of 12 and 15% and in 1975 that was as good as you could do because the interest was 8 or 9% in bonds and savings. F. says that he also invested in TVM through High Point Bank & Trust. He closed out his Keogh plan at Wachovia Bank and transferred it to High Point because High Point Bank approved TVM as an investment while Wachovia did not. F. invested his entire Keogh retirement of $35,604.01 in TVM. White was aware of this, in fact he advised him to do it.

White informed F. that he had made arrangements with the High Point Bank to accept these kind of investments in Keogh Plan accounts. F. received a Form UCC-2 in the mail evidencing the collateral behind his investment. The fact that Sears & Roebuck was purportedly backing the investment affected his decision to buy TVM. F. also cashed his life insurance policies and bought term insurance from White and invested the remaining cash in TVM because it offered a better return. F. asked White how safe this investment was and White said it was as safe as the company that backed the accounts, Sears & Roebuck. White brought Moss to F's office in early 1978. F. sells petroleum equipment and Moss was head of Correlated Oil so White thought they might do some business. Moss tried to sell F. a $25,000 investment in Correlated Oil Reclamation but F. declined. White never told F. that Moss had previously been enjoined. If he had known that he would not have invested in TVM. White did not provide him with any sales material or financial information concerning TVM or tell him anything about the organization of TVM or how long it had been in business. F. understood that TVM was some kind of commercial paper. F's father also invested about $33,000 of his Keogh Plan fund at High Point in TVM. White sold the investment to F's father. F. inquired as to why he received TVM interest checks in Correlated envelopes and was told by White that TVM and Correlated were all part of the same company run by Moss.

Mr. J.G. is a salesman who was visited by Bittick who told him that TVM was deeply involved in ongoing sales promotion not only with Sears but with Zayre and K-Mart. Moss came to Greensboro and J.G. had lunch with Moss and Bittick. Moss told him the same thing as Bittick. Moss said that if he was not happy with Sears they could fix him up with Zayre or K-Mart or whatever, since they were all comparable. J.G. put in $15,000 for one year at 10% and his wife invested $10,000 for three years at 12%. This was in April 1977 and it took about three weeks for the checks to start coming. Bittick led J.G. to believe that NEP had a complete product line of investment opportunities. When he met Moss he was told that Moss was president of TVM and Correlated Equities, but was not told that Moss had previously been enjoined by the SEC. J.G. says he was supposed to get his investment back at the end of one year, but that it took him another 5 months before he got his money. His wife never received any of her money back. J.G. was not provided with any sales material or financial information about TVM. When J.G. asked how they could justify the high interest rates he was told that when you are dealing with Sears and their TVM accounts receivable from Sears it would be safe enough. J.G. said if it was a payable from Sears to TVM it was good enough for him.

Mrs. N. met Brainard through a friend who went to work for NEP. She also attended an investment course at Guilford

Technical Institute (GTI) in Greensboro which course was run by Heybrock and at which Brainard was a guest speaker. Brainard came to her home and talked to Mrs. N. and her husband about investments. They first invested in mutual funds and in a market timing service which involved transferring funds so as to get the best return. Brainard charged a 1% fee for this service. Mrs. N. originally invested in September 1975 in 2 mutual funds at $25 a month each. In 1978, at Brainard's suggestion she removed her money from the mutual funds and invested in a commercial paper, TVM, which Brainard recommended. TVM was paying 10% and she invested $3,600 on September 6, 1978. Brainard said that the investment "was absolutely no risk and was as good as Sears." She was not told that TVM was controlled by Moss or that Moss had previously been enjoined from violations of federal securities laws. If she had been aware that Moss controlled TVM and that he had previously been enjoined she would not have invested in TVM. She was not told about the TVM organization, how long it had been in business, marketing status, amount of sales, amount of accounts receivable or the relationship between TVM and Correlated Equities. She received only one interest check. In October 1978 she learned about the cease and desist order from the State of North Carolina. In December she received a letter from NEP stating not to worry. She has not gotten any of her $3,600 investment back.

Miss W., a teacher, was introduced to White through

another investor witness, Mr. G., and went to White's office to meet him. White recommended TVM and told her that it was an investment in which TVM was loaning money to Sears and that it was as good as Sears. The statement that it was "as good as Sears" influenced her to make the investment. She received a form entitled Assignment of Receivables of TVM which White signed in her presence. She received this receipt on May 15, 1978 when she invested $10,000 in TVM. She was not provided with any information concerning the management of TVM and does not recall the name of Moss. She was not told that the person in control of TVM had been previously enjoined for violations of the federal securities laws. If she had known whe would not have invested in TVM. She received $300 in interest payments but has not gotten any of her $10,000 back. Miss W. was told by G. that he had called the High Point Bank and been told that TVM was a good investment.

In addition to the foregoing investors who testified at the hearing the testimony of Mrs. B. was received in evidence.[10/] Mr. and Mrs. B. met with Brainard in August 1978 at the NEP offices to discuss the $30,000 retirement fund, which was invested in a mutual fund. Brainard recommended that they withdraw their retirement fund from the mutual fund and invest it

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10/ This was testimony given at Brainard's criminal trial. Mrs. B. was deceased at the time of the administrative hearing.

in either a savings account earning 5 1/4%, a money market fund earning 8%, or in TVM securities paying 12%. Mr. and Mrs. B. told Brainard that their primary concern was safety. He assured them that TVM was very safe and backed by Sears accounts receivable.

The retirement funds were withdrawn and Brainard then met with Mr. and Mrs. B. at their home on the evening of September 27, 1978. At the meeting Mrs. B. reminded Brainard that she had previously lost money in another investment purchase from Brainard and NEP in 1972. This was Equitable Development Corp. where the investment was purportedly secured by a deed of trust on Florida property recorded with the state. However, it had turned out that there was no deed of trust recorded and the investment proved to be worthless. Mrs. B. did not want to get into a similar situation with TVM. Brainard reassured her that nobody had lost any money on it (TVM) and that she absolutely was not going to lose any money on it. Mrs. B. then wrote a personal check for $30,000, dated September 27, 1978.

What Mr. and Mrs. B. did not know and what Brainard did not tell them was that he had that morning received the cease and desist order from the State of North Carolina, dated September 26, 1978.

None of the remaining respondents, Brainard, Heybrock and White, disputes that TVM was a fraud. Their principal arguments are that they did not know the true facts concerning TVM, that they were mislead by others, that they made sufficient investigation to satisfy themselves that everything was all right, that they believed what they were telling investors, that they had a right to rely on the information furnished them and that, in any event, scienter has not been proved.

Brainard takes the position that all of the representations made by Moss concerning his business interests, Correlated and TVM were false, that he was duped by Moss. He contends that the investigation he made on his one day trip to Chicago and the ordering of 3 or 4 Dun & Bradstreet reports are sufficient to absolve him of all responsibility.

White asserts that NEP was already selling TVM when he became associated with the firm and that he received all of his training in the sale of TVM from Brainard. Brainard gave all of the salesmen at NEP the same basic "sales pitch" to give to customers about TVM. Brainard told the salesmen, including White, that TVM was not a security and that he had performed the requisite due diligence on TVM. Brainard said that NEP had a legal opinion of counsel that TVM was not a security. Brainard in fact did make a trip to Chicago to investigate TVM. White says he did not engage in high pressure sales techniques, nor did he recommend TVM to the exclusion of other investments offered by NEP and IFP. Until the collapse of NEP following the cease and desist order, White had no knowledge

that there was anything wrong with the investment or that it was considered to be a security.

White maintains that he was merely a sales representative at NEP prior to 1976 and that even after he became a part owner and was named a vice-president the only additional duties he was given involved the training of salesmen. Brainard had the majority interest in NEP and always prevailed over the other officers or owners whenever a disagreement arose.

Heybrock's arguments in support of his position that he did not violate any securities laws are closely parallel to those of White. He says that when he purchased a 20% interest in NEP he was technically made a director but that Brainard made all of the decisions. His only additional duty was to assist Brainard in the selection of new products. He says he was not responsible for due diligence. He states that his belief in TVM as a valid investment is demonstrated by the fact that he and his family invested $40,000 in it and that he certainly would not have done that if he had had any idea that it was a fraud. He points out that he attempted to validate the UCC-2 forms that were used to show the collateral behind the TVM investments and while he was unsuccessful the effort was still underway when the cease and desist order was received by NEP.

Respondents' protestations that they were relying on what was told to them and that they did not know any facts which should have made them aware of the falsity of their statements are not

supported by the record.

Following his one day visit to Moss in Chicago Brainard never made any serious attempt to validate the information being fed to him by Moss. At sales meetings he downplayed the Moss injunction as a minor violation; he said he had obtained a Dunn & Bradstreet Report on TVM but never made it available to the salesmen or put it in the due diligence file; he stated that TVM was not a security and that he had a legal opinion to that effect; he was told by Moss not to make inquiries of Sears because it would jeopardize sales; he did receive a financial statement on Correlated, dated September 30, 1976, from Moss, who had written across the first page: "King - For your eyes only - this statement is not to be used to influence a prospect in any way, please remember you are dealing with an unregistered private offering."

When White joined NEP around May of 1974, he was not told of the Moss injunction but learned about it through reading the prospectus for a private offering which NEP was then selling. This was the Longferry Limited Partnership, put together by Moss and Brainard, which offered 25 units at $1,995 each to North Carolina residents only. The prospectus sets forth the fact that Moss and Correlated had recently consented to a permanent injunction by the SEC. When White inquired about the injunction Brainard told him that it was nothing serious. Later the injunction was discussed, or at least mentioned, at sales meetings but

it was never disclosed to prospective investors.

White testified that the interest checks for TVM, and the UCC-2 forms, were brought to Greensboro every month by Moss and mailed out by NEP. White never saw a UCC-2 form stamped "received by the Secretary of State of Illinois" and when he asked Moss about it he was told that there were two little old ladies in Springfield who do these filings and they could not be hurried, White was told by Brainard that Moss would not furnish financial statements for TVM or Correlated. White discussed TVM with a trust officer of the High Point Bank about clients opening Keogh accounts and investing in TVM. High Point was the only bank where the customer could have a self-directed retirement plan. White cannot remember telling the trust officer that TVM was not a security.

White said that Brainard told him that he had checked TVM out with the NEP attorney. However, following the cease and desist order when the NEP officers met with the attorney White was quite surprised to discover that the attorney did not know about TVM. Following receipt of the cease and desist order, money was accepted from investors and forwarded to Moss in Chicago.

White never questioned anything that was told to him by Moss or Brainard and never made any effort to obtain information outside of NEP. He did not seek advice from an attorney and did not make inquiry of the SEC concerning the Moss injunction. He

made no attempt to verify the Sears connection.

Heybrock testified that he was told by either Brainard of Bittick that he could not use sales literature for TVM because it might be considered a security if he did. He never asked for any information about Moss or about contracts between TVM and the national retailers with whom TVM was supposed to be doing business.

Heybrock purchased a 20% interest in NEP in 1976 and at the time he was shown a financial statement for NEP which showed NEP's proposed income and he says that had a large impact on his decision to purchase NEP.

Heybrock stated that for the first 2 years he was at NEP, he used the names of other firms besides Sears as securing the commercial paper of TVM. These included Walgreen and Ekerts and about 15 other companies. However, many of the purchasers requested Sears so in 1976 Moss said "okay, we've got enough Sears paper available, we will just do everybody with Sears."

When Heybrock became vice-president he was assigned to do due diligence and Brainard suggested he might look into TVM. Heybrock wrote to the Secretary of State of Illinois on September 21, 1976, asking for a search of the files in his name for assigned collateral. He received a reply that there was no record. He wrote again on October 5, 1976, inquiring specifically about TVM. In response the State of Illinois indicated there was nothing on record and it did not have TVM at the address given.

Heybrock reported the result of his inquiry to Brainard who called Moss. Moss said that Illinois was very slow in assigning receivables and that what probably happened was that old invoices had matured and been paid off and new ones not yet recorded. Heybrock was satisfied with the explanation. He did not communicate with the State of Illinois again. Neither did he attempt to communicate with Sears.

Heybrock testified that he made an investment in Long Ferry shortly after he joined NEP but that he was not aware that Moss had been enjoined by the SEC until after the cease and desist order was issued. He says that NEP did not sell anything that officers believed to be a security and that all securities were sold through IFP.

Heybrock never made any effort to confirm information given him by Brainard or Moss. He did not make inquiry of the SEC, the NASD or outside counsel as to whether or not NEP was a security. Although he testified that he was not aware of the Moss injunction this is not deemed credible, particularly in view of the fact that he purchased Long Ferry whose prospectus carried the information about the injunction. Also, the injunction was discussed at sales meetings.

In January 1975, Brainard and Bittick made arrangements with an insurance agency in Fayetteville, North Carolina, to sell TVM on a 6% commission. The principal of the agency, Mr. S., had been

an associate of Bittick's at Conference Concepts. S., who was an NASD principal, was told by Brainard and Bittick that TVM was a security in the State of Illinois only and did not come under SEC or NASD regulations. S. was told that a maximum of a million dollars a month of TVM could be sold. S. was shown an unaudited Correlated balance sheet, dated July 31, 1973. He was not satisfied with this and asked for an audited balance sheet which was promised but which he never received.

Originally S. sent all of his TVM business directly to Chicago but after about 2 months Brainard told him to send it to Greensboro and they would issue the interest checks to investors from there. S. had a customer who put in between $18,000 and $21,000. She wanted the money back in 1976, so S. sent a letter to Correlated in Chicago requesting it. Two weeks later, when he had not gotten the money, S. called Brainard who said he would have to check with Moss. Two days later S. received a call from Moss who said that he could not send the money back in a lump sum. S. gave the investors telephone number to Moss. The next day she called S. and said she was satisfied with the arrangement by which Moss was going to pay her back $3,000 a month. It took approximately 6 or 7 months to liquidate all but $5,000. S. asked Moss to explain why he could not return the funds immediately and Moss said it was because of cash flow problems. S. called Brainard after he talked to Moss and told him something had to be wrong with TVM if it was going to take 7 months for the woman to get

her money back. He could not understand why there was a cash flow problem with all the money being sent to Moss. S. was not satisfied with the story Moss or Brainard gave him so he called Bittick. Bittick said that unfortunately he was not the boss of TVM, that Moss was and that they had to accept what Moss said. Thereupon S. and his agency ceased selling TVM. This was around July 23, 1976. Bittick and Brainard never told S. that Moss and Correlated had been enjoined.

In September 1974, NEP was having financial problems and was unable to meet its bills. Brainard used some of the funds submitted by investors for the purchase of TVM. When it came time to send the TVM funds for the month to Moss in Chicago he did not have sufficient funds to match all of the applications for investment in TVM so he submitted only applications which were equivalent to the amount of funds he had available. The same thing occurred in October and November. Brainard then told Bittick about the shortage of funds and he contacted Moss to inform him of the problem and what was going on. Moss came to Greensboro to discuss the shortage which was about $13,800. Moss had previously indicated a desire of buying into NEP and had wanted 51% but Bittick would not agree. At the meeting in Greensboro it was decided Moss would buy 30% of NEP for $50,000 and he would pay $13,800 as down payment to cover Brainard's misuse of the funds.

On Wednesday, September 27, 1978, the cease and desist order, dated September 26, 1978, was received at the NEP offices in

Greensboro. Brainard immediately called Moss in Chicago and then held a mandatory meeting of the officers and salesmen of NEP. At the meeting Brainard said that the SEC was trying to say that TVM was a security; that he felt a lot of insurance agents were behind the cease and desist order because NEP had caused a lot of clients to cash their insurance policies and invest in TVM. Brainard said that Moss had not received a copy of the cease and desist order and, therefore, they would be able to continue sending funds to him. He said NEP would continue taking funds through that week because many commitments had already been made; a number of clients had given checks that had not been turned in yet so they would continue to take their investments through Friday, which was the 29th. Later, Brainard said that Moss had told him that he would return everyone's money and, therefore, the SEC would have no reason to pursue the matter. However, TVM could not be sold for 2 or 3 months. Brainard never attempted to get in touch with anyone at the North Carolina Department of Securities concerning the cease and desist order. Neither did he make any effort to contact the SEC.

On Friday, September 29, 1978, $69,769.66 was wired to Moss and 2 checks, one for $53,050 and one for $7,568.34 were mailed to him. The following week, when Moss came to Greensboro, individual checks from 13 investors, totalling $57,000 were given to Moss. The total amount of investors' funds retained by NEP and turned over to Moss following the issuance of the cease and desist order was $187,388.00.

On November 1, 1978, a compliance examiner from the Commission's Atlanta Regional Office visited NEP's offices to make a routine examination of Brainard who was registered as an investment adviser. The examiner testified that she felt most of the people in the office were being very rude, except for White, and when she asked him why he told her they were being investigated for selling TVM.[11/] However, while he was the only one who was nice to her, he did not mention the cease and desist order. She was not aware of any other SEC investigation at the time she was there.

While the SEC examiner was at NEP she asked to see files relating to mutual funds and security investments and also client files. Brainard's secretary relayed this information to Brainard and he said that the examiner was not to be shown any personal client files because she did not need to know the names and addresses of any of NEP's clients. However, the examiner insisted on seeing the client files. When the secretary told Brainard this he then told her that all documents that were in any way related to TVM or Correlated were to be removed from the files.

Brainard's secretary then went through every single file and removed letters, application forms and a few UCC-2 forms in 2 large filing cabinets. The documents which she collected were removed from the building by one of the NEP officers. The secretary testified, also, that one of the NEP attorneys advised her he had talked to the SEC and that she was to gather up all

11/ Apparently this was the investigation being conducted by Sears' legal staff. See Pgs. 35-37, Infra.

old and new NEP planning brochures and have them delivered to his office. He told her they were to be destroyed per instructions from the SEC.

The secretary stated she had conversations with Heybrock and White concerning the actions she had taken about gathering TVM documents, some of which were taken outside and dumped in the garbage can. She says they were aware of these activities as she was not the only one in the office removing things from the file. The representatives were also instructed to remove information from their files. Heybrock and White both told her that it was a means of simply keeping names and addresses and things like that from people who had no business having them and what she was doing was not wrong. That she was to follow instructions.

Around the end of September 1978, the manager of the Sears plant in Greensboro received a form letter, dated September 26, 1978 on the letterhead of NEP, addressed to a prospective investor setting forth information concerning the sale of Sears commercial paper by TVM. The letter had been sent to the prospect by an NEP salesman and the prospect sent it to Sears to confirm the fact that Sears was selling commercial paper based on its accounts receivable.

Upon receiving the letter Sears undertook an investigation which was conducted by an attorney, Mr. P., in its Atlanta office. Mr. P. checked with all of the various Sears departments, including

Sears Acceptance Corporation in Delaware, and learned that Sears did not sell commercial paper. He then telephoned NEP in Greensboro and talked to Brainard. He explained that he had this letter from NEP stating that NEP was offering Sears commercial paper for sale and wanted an explanation as to what arrangements they had to sell such commercial paper. Brainard stated that they were not selling Sears commercial paper; that he was the office administrator and not in a position to discuss the circumstances but would check and call P. back.

On October 4, 1978, P received a call from Moss who identified himself and said he was returning the call for Brainard and indicated that he was speaking for NEP. Moss said the salesman who sent out the letter was a new agent and that they were not selling Sears commercial paper, that they had nothing to do with commercial paper. He indicated that TVM was selling products to some of the Sears stores and they would discount invoices but that they had nothing else to do with Sears and he would write P. a letter about the situation. However, no letter was ever received.

Mr. P. was not satisfied with the Moss explanation. He next checked with Sears national accounts payable department as to whether Sears had business with TVM and, if so, whether or not its accounts payable could be discounted and sold by NEP. He was advised by the national manager of accounts payable that Sears

had not transacted any business with TVM or Correlated Equities. P. received the same response from the national manager of the Sears merchandise buying department. P. says he ascertained that Sears operates on a 30 day basis for paying its suppliers. As a result of his investigation P. concluded that Sears had never had any relationship with TVM.

It is clear from the record, as the foregoing summary illustrates, that the respondents made material misrepresentations and omitted to state material facts in their sales of TVM. In addition, despite numerous red flags, they made no attempt to ascertain the facts concerning the security they were so avidly recommending to prospective investors. No attempt was ever made to contact Sears, the SEC, or the NASD and when adverse information was received from the State of Illinois nothing was done about it. A call to the Sears office in Greensboro would have undoubtedly disclosed the entire fraud as illustrated by the prompt action taken by Sears when it was informed of the use being made of its name.

Not only were no efforts made to ascertain the truth during the entire period of TVM sales, but following receipt of the cease and desist order from the State of North Carolina the respondents continued to remit funds to Moss and then engaged in a cover-up which involved the destruction of records and concealment of information from an SEC examiner.

False representations, or representations that are false and misleading because necessary qualifications or explanations are omitted, have long been held, in a number of cases, by the courts and the Commission, to constitute activity violative of the anti-fraud provisions of the securities acts. Charles Hughes & Co., v. Securities and Exchange Commission, 139 F. 2d 434,437 (2d Cir. 1943); Norris & Hirshberg v. Securities and Exchange Commission, 177 F. 2d 228,233 (D.C. Cir. 1949); Charles E. Bailey & Co., 35 S.E.C. 33,43 (1953); Harris Clare & Co., Inc., et al, 43 S.E.C. 198,201 (1966).

It is fundamental that a misrepresentation or omission must be material to serve as a basis for a finding that a violation of the anti-fraud provisions of the federal securities laws has occurred. The concept of materiality has been described as the cornerstone of the disclosure system established by the federal securities laws. The basic test adopted by the courts for determining materiality is whether "a reasonable man would attach importance . . . (to those facts) in determining his choice of action in the transaction in question." Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F. 2d 833,849 (2d Cir. 1968), cert denied sub. nom Coates v. Securities & Exchange Commission, 394 U.S. 976 (1969). Positive proof of reliance is not necessary. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of his decision. 12/

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

Likewise, an omitted fact is material if "disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." 13/

Respondents argue that they were all duped, that they made these false representations on the basis of "what they were told by others." Brainard claims to have been duped by Moss, and White and Heybrock by Brainard and Bittick. What respondents fail to realize is that they owed a duty to their customers to have a reasonable basis for making such statements. They had a responsibility, not only as registered representatives, but as officers of NEP, to make an investigation into the facts of the securities that they offered for sale. In Hanley v. S.E.C., 415 F. 2d 589 (1969) the court said, at 597:

> Brokers and salesmen are under a duty to investigate, and their violation of that duty brings them within the term 'willful' in the Exchange Act. Thus, a salesman cannot deliberately ignore that which he has a duty to know and recklessly state facts about matters of which he is ignorant. He must analyze sales literature and must not blindly accept recommendations made therein. . .
>
> In . . . summary, the standards . . . are strict. He cannot recommend a security unless there is an adequate and reasonable basis for such recommendation. He must disclose facts which he knows and those which are reasonably ascertainable. By his recommendation he implies that a reasonable investigation has been made and that his recommendation rests on the conclusions based on such investigation. Where the salesman lacks essential information about a security, he should disclose this as well as the risks which arise from his lack of information.
>
> A salesman may not rely blindly upon the issuer for information concerning a company, although the degree of independent investigation which must be made by a securities dealer will vary in each case. Securities issued by smaller companies of recent origin obviously require more thorough investigation.

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

In a recent case with facts closely resembling those herein, the Commission said:

> "Any professional in the securities business should have realized that debt securities cannot be recommended to customers without first obtaining the most basic and important information about the issuer -- its current financial situation. To have made such recommendations, and to have made representations about the safety of the investment and the good financial condition of the issuer without that information, were egregious violations."
>
> In the Matter of First Pittsburgh Securities Corporation, Securities and Exchange Act Release No. 16897 (June 16, 1980) 20 SEC Docket 401, 406-407. ("First Pittsburgh")

The evidence is clear that the respondents made recommendations without such information and thereby committed violations of the anti-fraud provisions.

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

It is found that respondents NEP, IFP, Brainard, White and Heybrock, wilfully violated and wilfully aided and abetted violations of Sections 17(a)(1)(2) and (3) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

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

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

Investment Adviser Violations

The Order charges that during the period from about 1973 until November 27, 1978, NEP and Brainard wilfully violated and IFP, Heybrock and White wilfully aided and abetted violations of Sections 206(1) and 206(2) 16/ of the Investment Advisers Act of 1940 (Advisers Act) by engaging in one or more of the acts specifically enumerated under the anti-fraud section of this decision. (See, p. 15, supra.)

Brainard argues that in Securities and Exchange Commission v. National Executive Planners, Ltd. (See n. 7, p. 13, supra), the court found no violation of the Investment Advisers Act and that, therefore, no finding of violation can be made in the instant proceeding. However, the record shows that a Memorandum Opinion and Order was issued by the court pursuant to Rule 56 of the Federal Rules of Civil Procedures. "Rule 56(d) orders are interlocutory, because they do not decide the whole case and therefore are not final decisions." Diamond Door Company v. Lane-Stanton Lumber Company, 505 F. 2d 1199, 1202 (9th Cir. 1974). "Such an order has no res judicata effect and is subject to continuing change, modification or reversal by the trial court." New Amsterdam Casualty Co. v. B.L. Jones & Co., 254 F. 2d 917, 919 (5th Cir. 1958).

It is apparent that the court's opinion was not premised on the evidence presented in this proceeding and, therefore, is not determative of the issues herein.

16/ Section 206 provides, as follows:

It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly-

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

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

Brainard has been registered as an investment adviser with the Commission pursuant to Section 203(c) of the Advisers Act since December 15, 1975. NEP, White and Heybrock have not been registered as investment advisers 17/ but have, nevertheless, as the record shows, been acting in that capacity. (See p. 7, supra).

NEP solicited investors through a letter offering a Market Timing 17a/ service at a charge of 1% of the assets managed. Market timing was described as "a means by which we have been able to dramatically increase the return from our mutual funds by moving into a fixed return during a declining market and into a growth situation during an increasing market." The letter went on to say "you may wish to invest in Commercial Paper paying 10% interest which we now offer . . . . If you wish to participate in the Market Timing service, please sign the enclosed form. This will allow us to switch the funds from a growth situation into some fixed return." The letter, as well as NEP prospectuses, was used by all salesmen.

NEP was compensated by the charging of a fee for its Market Timing service; by commissions from the sales of TVM; and by an override on all security and mutual fund transactions which it referred to IFP. (See p. 8, supra). White and Heybrock received

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17/ Section 202(a)(11) of the Advisers Act provides: "Investment Adviser" means any person who, for compensation, engages in the business of advising others, . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities;

17a/ ". . . a person who provides market timing services would be viewed as being in the business of giving investment advice." Investment Adviser Act Rel. No. 769/August 7, 1981, 23 SEC Docket 556,560.

commissions on TVM sales and, as officers, participated in NEP's earnings through bonuses and other perquisites.

The record fully supports a finding that NEP, White and Heybrock were acting as investment advisers.[18/]

In the capacity of investment advisers respondents owed an even more stringent duty to their clients than that owed by securities salesmen. As the Supreme Court stated in Securities and Exchange Commission v. Capital Gains Research Bureau, 275 U.S. 180,194 (1963), an investment adviser is a fiduciary who owes his clients "an affirmative duty of utmost good faith and full and fair disclosure of material facts." The very enactment by Congress of the Advisers Act evinced recognition of the nature of the advisory relationship and of the need for a regulatory scheme to protect investors from such persons who may engage in fraudulent and deceptive practices. Abrahamson v. Fleschner, (supra); Securities and Exchange Commission v. Myers, 285 F. Supp. 743,746 (D.C. Md. 1968).

Section 206 of the Advisers Act is analogous to the anti-fraud provisions of the Securities Act and the Exchange Act. In fact the language of Sections 206(1) and (2) is from 17(a)(1) and 17(a)(3), respectively, of the Securities Act. Therefore, the activities of respondents, explored and discussed heretofore in the preceding anti-fraud section, constitute violations of Sections 206(1) and 206(2) of the Advisers Act, as charged in the Order.

The Order charges IFP, White and Heybrock with aiding and abetting the violations of NEP and Brainard. In SEC v. Coffey 493

18/ Investment Advisers Act of 1940 Release No. 770/August 13, 1981, 23 SEC Docket 556; Abrahamson v. Fleshner, 568 F. 2d 862, 870 (2nd Cir. 1977), cert. denied sub. nom, Harry Goodkin & Company v. Abrahamson, 98 S. Ct. 2236 (1978).

F. 2d 1304,1316 (6th Cir. 1974), cert. denied, 420 U.S. 908 (1975), the court said:

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

The record discloses that the conduct of White and Heybrock brought them squarely within the requirements for an aider and abettor. They were aware of their part in the overall activity at least by 1976. (See p. 29, supra).

Accordingly, it is found that NEP and Brainard wilfully violated and IFP, White and Heybrock wilfully aided and abetted violations of Sections 206(1) and 206(2) of the Advisers Act. It is found, also, that respondents clearly had the scienter necessary to establish the violations of Section 206(1). In any event, findings of scienter are not required in order to establish violations of Section 206(2). See Steadman v. S.E.C., 603 F. 2d 1126, 1134 (5th Cir. 1979), aff'd 450 U.S. 91 (1981). See also S.E.C. v. Capital Gains Research Bureau, Inc. 375 U.S. 180,195,200 (1963); Aaron v. S.E.C. 446 U.S. 680, 691-693, 696-697 (1980). All findings of fraud are made under the latter section. The finding that respondents also violated Section 206(1) are merely cumulative.

Investment Adviser Registration Provisions

The Order also charges that during the period from about 1973 to November 27, 1978, NEP wilfully violated and IFP, Brainard, White and Heybrock wilfully aided and abetted violations of Section 203(a) 19/ of the Advisers Act by engaging in business as an investment adviser when NEP was not registered as such with the Commission pursuant to Section 203(c) of the Advisers Act.

Having found in the preceding section of this decision that NEP was engaged in business as an investment adviser with the assistance of IFP, Brainard, White and Heybrock, and the record showing without dispute that NEP was not registered with the Commission at anytime, it follows that Section 203(a) of the Advisers Act was violated.

Accordingly, it is found that NEP wilfully violated and IFP, Brainard, White and Heybrock wilfully aided and abetted violations of Section 203(a) of the Advisers Act. 20/

19/ Section 203(a) provides, in pertinent part, that it shall be unlawful for any investment adviser, unless registered, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

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

Broker-Dealer Registration Provisions

The Order charges that during the period from about 1973 and continuing until November 27, 1978, NEP wilfully violated and IFP, Brainard, White and Heybrock wilfully aided and abetted violations of Section 15(a) 21/ of the Exchange Act, in that NEP engaged in securities transactions while it was not registered with the Commission pursuant to Section 15(b) of the Exchange Act.

NEP sold TVM to over 700 investors during a 4 year period. Total sales of TVM amounted to $4,375,000 from which NEP received at least $547,000 in commissions. In addition, NEP sold securities of Equitable Development and limited partnership interests in Longferry for which it also received commissions. Moreover, NEP received an override commission from IFP, pursuant to an agreement, for all securities sales effected through IFP. Consequently, the record clearly establishes that NEP "engaged in business" as a broker-dealer without being so registered. 22/ One of the investors who testified in this proceeding said he thought NEP was a brokerage firm.

It is found that NEP wilfully violated and IFP, Brainard, White and Heybrock wilfully aided and abetted violations of Section 15(a) of the Exchange Act. 23/

21/ Section 15(a)(1) provides, in pertinent part that it shall be unlawful for any broker or dealer . . . to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security . . . unless such broker or dealer is registered in accordance with subsection (b) of this section.

22/ Section 3(a)(4) provides that the term "broker" means any person engaged in the business of effecting transactions in securities for the account of others . . . Section 3(a)(5) provides that the term "dealer" means any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise . . .
See, also, Securities and Exchange Commission v. Century Investment Transfer Corp. CCH Fed. Sec. L. Rep. (1971-72 Transfer Binder) ¶93, 232 (S.D.N.Y. 1971); ITT v. Cornfeld, 619 F. 2d 909,923 (2nd Cir. 1980); In the Matter of Professional Investors, Inc., 37 S.E.C. 173 (1956); Eugene T. Ichinose, Jr., Securities Exchange Act Release No. 17381/December 16, 1980, 21 SEC Docket 970.

23/ See n. 20, supra concerning a finding of wilfullness for a non-fraud violation.

Public Interest

The remaining issue concerns the remedial action which is appropriate in the public interest with respect to the respondents who have been found to have committed certain violations as alleged in the Order. The Division urges that IFP's registration as a broker-dealer, and Brainard's registration as an investment adviser, be revoked and that NEP, Brainard, White and Heybrock all be barred from association with a broker-dealer, investment adviser or municipal securities dealer, with the exception that White and Heybrock have a right to reapply after 5 years.

The particular remedial action as to an individual respondent depends on the facts and circumstances applicable to him and cannot be measured precisely on the basis of action taken against other respondents,[24/] particularly where, as here, the action respecting others is based on offers of settlement which the Commission deemed appropriate to accept.[25/]

Brainard asserts that he made a reasonable investigation into TVM and that his reliance on the information he received was reasonable. Also, that his age, experience, restitution payment, prior record and prior litigation in this matter must be considered in arriving at the sanctions to be imposed.

White argues that he was entitled to rely on the information being given to him by Brainard and Bittick; that he was not aware of anything wrong with TVM until the cease and desist order; that he cooperated in the investigation and was not indicted; that he

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24/ See Dlugash v. S.E.C., 373 F. 2d 107,110 (2nd Cir. 1967).

25/ See Cortlandt Investing Corporation, et al, 44 S.E.C. 45,54 (1969); Haight & Company, Inc., 44 S.E.C. 481,512-612 (1971)

has voluntarily made restitution and that any violations he may have committed were not wilfull but were done unknowingly and unintentionally; and that he has a previously unblemished record.

Heybrock advances practically the same arguments as White but, in addition, points out that he and his family invested heavily in TVM and that he did make inquiry of the State of Illinois. He, also, says he was not indicted, that he cooperated fully in the investigation and that he made restitution.

The restitution which all of the respondents refer to arose from a judgement entered by the U.S. District Court in the case of George C. Simkins, Jr., et al v. National Executive Planners, Ltd., in which judgement was entered for the plaintiffs against the respondents, as follows: Brainard $2,966,140.45; White $158,891.39; Heybrock $143,678.97. The court later appointed a receiver and upon his recommendation respondents settled as follows: Brainard $45,000; White $16,500; Heybrock $16,500.

NEP was the center of all of the activity discussed and violations found herein. Its salesmen rendered investment advice and sold numerous securities to the public although it was never registered as an investment adviser or broker-dealer. All of NEP's salesmen were required to be registered representatives with IFP, which was a registered broker-dealer, but allowed its representatives to sell unregistered securities through NEP. It should be noted that IFP has interposed no defense to the charges in the Order and, accordingly, has in effect defaulted.

The violations found herein are extensive and serious and were the result of a scheme to defraud investors, organized and directed by Moss but willingly participated in by Brainard, White and Heybrock. All of the individual respondents have been enjoined and the Commission has found it in the public interest to impose sanctions based on such injunction.[26/] In addition, Brainard has been criminally convicted.

In view of all of the circumstances, it is concluded that the extent and character of the violations requires that the respondents be excluded from the securities business. As the court said in Arthur Lipper Corp. v. S.E.C., 547 F.2d 171, 184 (2d Cir. 1976), cert. denied, 434 U.S. 1009:

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

In Steadman v. Securities and Exchange Commission, 603 F. 2d 1126 (5th Cir. 1979), aff'd 450 U.S. 91 (1981), the court said that when the Commission imposes severe sanctions it "should articulate why a lesser sanction would not sufficiently discourage others from engaging in the unlawful conduct it seeks to avoid."

Registered representatives and investment advisers engaging in the type of conduct practiced by respondents impose a social cost on the community which must be considered. Not only did investors lose a great deal of money, but the State of North Carolina, the SEC, The Postal Inspectors, the U.S. Attorney's Office and the Federal Court system have been required to devote a great deal of

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26/ George B. Wallace & Co., 39 S.E.C. 306 (1959); Kimball Securities, Inc., 39 S.E.C. 921 (1960).

their resources to protect the public from the fraud and deception practiced by respondents. Broker-dealers and investment advisers must be put on notice that such conduct will not be tolerated. Accordingly, it is believed that any sanction less than a bar would be ineffectual.

ORDER

Accordingly, IT IS ORDERED:

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

(2) The registration as an investment adviser of Dan King Brainard is revoked.

(3) National Executive Planners, Ltd., Dan King Brainard, Richard O. White and Henry Leroy Heybrock, and each of them, is barred from association with a broker-dealer, investment adviser or municipal securities dealer.[27/]

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

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of the initial decision upon him, filed a petition for review pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(d), determines on its own initiative to review

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

this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.[28/]

Ralph Hunter Tracy
Administrative Law Judge

Washington, D.C.
September 24, 1982

28/ All proposed findings, conclusions, and contentions have been considered. They are accepted to the extent that they are consistent with this decision.