ADMINISTRATIVE PROCEEDING
FILE NO. 3-3276

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

MIDWESTERN SECURITIES CORPORATION

(8-13821)

LLOYD D. SAHLEY
LOUIS GOLDBLATT

INITIAL DECISION

Sidney Ullman
Administrative Law Judge

Washington, D.C.
November 1, 1973

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APPEARANCES: Roger M. Deitz, Robert F. Vanderwagg, of the New York Regional Office of the Commission; Donald N. Malawsky, of the New York Regional Office, Of Counsel.

Costa L. Papson, of New York City, for Respondents Midwestern Securities Corporation, Lloyd W. Sahley and Dr. Louis Goldblatt.

BEFORE: Sidney Ullman, Administrative Law Judge

THE PROCEEDINGS

These public proceedings were instituted by order of the Commission dated September 29, 1971 ("Order") pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") against Midwestern Securities Corporation ("Midwestern" or "Registrant"), a broker-dealer firm then in New York City, Lloyd W. Sahley ("Sahley") and Dr. Louis D. Goldblatt ("Goldblatt"), officers of the firm, and the Exchange Bank & Trust Co., Dallas, Texas, ("Exchange Bank"). The proceedings were instituted to determine whether the respondents, as alleged by the Division of Enforcement [1/] ("Division") in the Order, had wilfully violated and wilfully aided and abetted violations of the Exchange Act and the Securities Act of 1933 ("Securities Act") and if so, what sanctions are appropriate in the public interest.

On August 7, 1972, the Commission issued an order accepting an offer of settlement submitted by the Exchange Bank and censuring it for wilfull violations of the Exchange Act and the Securities Act in having improperly released from escrow certain funds which it had received as escrow agent in connection with an underwriting of stock by Midwestern.[2/] Although the proceedings against the Exchange Bank were thus terminated, its involvement in the underwriting require certain findings herein which relate to its activities and participation therein. The activities of the remaining respondents in connection with that underwriting constitute the basis for significant charges, among others, in the Order.

1/ Formerly the Division of Trading and Markets.

2/ Securities Exchange Act Release No. 9708 (August 7, 1972).

In substance, the Division charges that during the period from about August 27, 1969 through December 1970, the remaining respondents wilfully violated and wilfully aided and abetted violations of the provisions of the Securities Act and the Securities Exchange Act and Rules thereunder by using the mails and means of interstate commerce,

(II D) in transmitting common stock of Transceiver Corporation of America ("Transceiver") without a required prospectus,

(II E) in selling Transceiver shares without required registration thereof, and

(II F) in selling said shares in fraudulent transactions and by means of fraudulent representations and omissions.

These respondents are also charged with wilfully violating and wilfully aiding and abetting violations of the said Acts and Rules by bidding for and purchasing Transceiver shares prior to completion of Midwestern's participation in a distribution of the shares (II G), and by releasing and distributing the escrowed funds contrary to the terms of the registration statement and prospectus relating to the offer and sale of such shares (II H).

In addition, they are charged with wilfull violations of the Commission's record-keeping, filing, and net capital requirements, and of its requirement for appropriately and timely amending Midwestern's broker-dealer registration filed with the Commission.

Pursuant to a motion of the Division, the Order was amended during the hearing to add an allegation that a court order of preliminary injunction had been issued against respondent Sahley in another matter (II C-1);[3/] to extend the period during which, and add to the number of times, Midwestern was allegedly in violation of the requirements for timely filing of financial reports (II K); to add the charge that Midwestern's broker-dealer registration form had not been amended to reflect the previously mentioned preliminary injunction against Sahley or to reflect changes of address of Midwestern's place of business.

Respondents filed answers denying the charges and they participated through counsel at the hearing. Post-hearing procedures included the successive filings of proposed findings, conclusions, and supporting briefs. The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon observation of the witnesses and evaluation of their testimony and demeanor.

FINDINGS OF FACT AND LAW

The Respondents

Registrant is a New York corporation with offices in New York City during the first part of the relevant period.[4/] The firm has been registered with the Commission as a broker-dealer under the Exchange Act since April 1968, and is a member of the National Association of

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3/ The Order as issued contained allegations of other court injunctions against Midwestern and its officers.

4/ Movement of registrant's offices is the subject of discussion, infra.

Securities Dealers ("NASD"). Respondent Sahley has been president and treasurer of Midwestern and during the relevant period was owner of between 25 and 50% of its stock. His activities as the operating head of the firm are discussed in detail in connection with all of the charges.

Respondent Goldblatt was Chairman of Midwestern's Board of Directors and also owned between 25 and 50% of its stock during the relevant period. Goldblatt was largely responsible for providing capital for registrant's operations. The funds came primarily from Goldblatt personally and from investments by his friends. Goldblatt is a practicing dentist in Cleveland, Ohio, with no prior background in the securities industry. His advice or consent was sought by Sahley on larger investments by the firm and he would sign checks in Sahley's absence or when large sums were involved. He also participated in private placements and was directly involved in the firm's borrowing, on occasion pledging his own stock as security for loans to registrant. He was involved to some extent in the Transceiver underwriting, as discussed later in detail, and on at least one occasion he represented registrant in soliciting interest in shares of an issue of stock for which Midwestern was a potential underwriter.

Midwestern as Underwriter of the Transceiver Offering

Transceiver was incorporated in Delaware in 1968 for the purpose of acquiring a Texas corporation created several months earlier. Its main office was in Dallas, Texas. The company was formed to establish and operate a national network of licensed centers for

the sending and receiving of graphic and documentary materials, utilizing facsimile transceiving machines.

On April 15, 1969 a registration statement on Form S-1 was filed with the Commission by Transceiver in order to raise capital required for the development and maintenance of its proposed network of transceiver centers and for other purposes set forth in the "Use of Proceeds" paragraphs of the prospectus. (These purposes are discussed later in connection with the improper diversion of proceeds of the sale of shares.) The registration statement and prospectus were thereafter amended, and on September 4, 1969 a final prospectus dated September 2, 1969 was filed. Midwestern was underwriter of an offering of 220,000 shares at $9 per share. The underwriting agreement between Transceiver and Midwestern was filed with and was a part of the registration statement. As agent of the issuer company, Midwestern was given the right to sell a maximum of 220,000 shares at $9 per share. However, the offering was on an "all or none" basis, and the registration statement and prospectus provided that if the underwriter had not sold at least 130,000 shares within 60 days from the commencement of the offering (or any extension thereof for a like period by mutual consent of the offeror and the underwriter), "all funds received from subscribers shall be promptly returned in full, without interest or any deduction." It was also provided that all amounts received by the underwriter for the shares would be promptly deposited into a separate bank account as agent for Transceiver, and that on the closing date payment for the

shares sold was to be made by "certified or official bank check or checks payable in New York Clearing House funds . . . ." Under an agreement with the Exchange Bank dated August 27, 1969, Midwestern opened an escrow account for the deposit of proceeds of the sale of the shares. (Div. Ex. 20).

The law firm of Arnold & Porter, Washington, D.C., was retained by Transceiver in 1968 in connection with the offering. Midwestern was represented by S. Herman Klarsfeld ("Klarsfeld"), an attorney in New York City. These counsel continued to represent their respective clients on September 19, 1969, on which date an aborted closing of the underwriting took place, giving rise to problems central to these proceedings.

The Transceiver registration statement was declared effective by the Commission on September 2, 1969. On or about that date, Sahley took certain action which indicated that the minimum of 130,000 shares had been sold. He advised Michael Jacobson ("Jacobson"), an employee of Transceiver and the largest of its shareholders, that 130,000 shares or more had been sold: he also advised Griffith C. Carnes ("Carnes"), senior vice president of the Exchange Bank, on either September 2 or September 3 that the issue was oversold (Tr. 343); and about the same time he advised Robert L. Carr ("Carr"), President of Transceiver, that 250,000 or 300,000 shares had been sold. (Resp. Ex. 11, pp. 53, 62). Sahley also spoke to other persons about the sale of the required minimum number of shares and on September 3, 1969

he caused a telegram to be sent in the name of Midwestern to nine broker-dealer firms in New York, Pennsylvania and Ohio. The message read: "Public Offering Transceiver Corporation of America sold. Trading restrictions terminated." (Div. Ex. 22). This meant, of course, that trading of the shares could be commenced by the broker-dealer firms.

Thereafter, in reliance on Sahley's representations, Transceiver filed a post-effective amendment to its registration statement withdrawing 90,000 shares ". . . not sold pursuant to the offering . . . ." [5/] In fact, however, the 130,000 share issue had not been sold.

Transceiver's efforts to effect a "closing" with Midwestern in order to obtain the proceeds from shares it believed sold were frustrated by requests for delay and change of locale by Sahley. Transceiver's officers and Jacobson, its large shareholder, were eager for the issuer to receive the proceeds for the sale of the 130,000 shares asserted to have been sold, and much pressure was put on Sahley for the money which the company needed. Sahley testified, as to conversations with Jacobson on and after September 2:

> "Well, I don't think that the discussion of closing dates came from him.
>
> It was more when do we get our money, right away kind of thing, and the closing date conversations were pretty much between our two attorneys -- I mean Bauman, Klarsfeld, their attorney and ours, and there was sort of a circuit...." (Tr. 714).

5/ The amendment also withdrew 6,000 shares ". . . not sold to the underwriter pursuant to the Underwriting Agreement."

Arnold & Porter, by Jeffrey D. Bauman ("Bauman"), representing Transceiver, ultimately telephoned Klarsfeld on September 10, and they agreed on the closing date of September 19 at Klarsfeld's office. Called as a witness for respondents, Bauman testified that on September 2nd he had participated in a conference telephone call with Sahley, Klarsfeld and Robert Winter, 6/ in which Sahley stated that 130,000 shares had been sold and that he did not intend to sell any additional shares, so that trading could commence the following day. (Tr. 907). Bauman had known of tentative discussions in which the closing was to be held in Dallas between September 16 and 19, but to his knowledge no firm date was fixed until his telephone conversation of September 10 with Klarsfeld. On that date he confirmed, by letter to Klarsfeld, the telephone conversation in which Klarsfeld had advised "that the earliest date upon which Bill Sahley is willing to have the closing for Transceiver is Friday, September 19." Bauman's letter expressed Transceiver's acquiesence in the date and place. (Resp. Ex. 2). Bauman knew that not all funds for the 130,000 shares had been received. He testified that Klarsfeld had told him in the telephone conversation that

> "Sahley was concerned about getting money to the company because the company at that point clearly needed funds, and that Sahley had suggested that a so-called partial closing be held in New York." (Tr. 928).

The "partial closing" took place on September 19, 1969 at Klarsfeld's office. The escrow account amounted to $309,955 rather than an amount

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6/ Robert Winter, an attorney in the Arnold & Porter firm, participated during a portion of the conversation. Jacobson was at Sahley's office and also participated in this conversation. (Resp. Ex. 11, pp. 33-39).

in excess of one million dollars which would represent the proceeds of the sale of 130,000 shares. All interested persons knew this on September 18, and were prepared to participate in a partial closing. (Resp. Ex. 11, p. 103).

On the 19th, Transceiver was represented, apart from Bauman, by James Wendover ("Wendover"), Chairman of the Board, Carr, its President, Martin W. Cohen, ("Cohen"), an officer, and Griffith C. Carnes ("Carnes"), director. Sahley continued to maintain that 130,000 shares had been sold, but stated that the proceeds of a large block of shares sold to a German mutual fund had not yet been received because of currency problems resulting from a revaluation of the mark. (Tr. 409-10; Resp. Ex. 11, pp. 108, 149). He assured those present that there was no reason for concern about these proceeds. Bauman believed this block was represented by Sahley to be approximately 50,000 shares.

Because both counsel knew prior to September 19 that not all funds had been received and deposited into the escrow account at the Exchange Bank, they had prepared, in advance, drafts of documents required for the partial closing. Division Exhibit 25 is a letter from Midwestern to Transceiver, signed by Sahley, which "certifies" that the 130,000 shares were sold. On the basis of this letter, among other documents and factors, there was presented to Sahley for signature as President of Midwestern a non-negotiable promissory note payable to Transceiver on November 9, 1969 in the amount of $735,549, representing the difference between the amount of $309,955 then in the escrow account and the total amount expected from the sale of 130,000 shares. (Div.

Ex. 26). The note provided for deposits by Midwestern into the account at the Exchange Bank of $150,000 on October 1, 1969 and on October 15, 1969, in default of which the note would become due. Default was also decreed in the event of indications of Midwestern's inability to pay, such as threat of insolvency or similar financial problems. In return for the promissory note it was agreed that Transceiver would place in escrow with the Exchange Bank 95,561 shares of the registered stock, to be released to Midwestern upon payment of the note.

At the same time, the Exchange Bank released to Transceiver the $309,955 held in escrow, and Midwestern received the 34,349 shares of Transceiver stock which had actually been sold and paid for with these funds. A new and superseding escrow agreement was signed by Transceiver and Midwestern, and accepted by the Exchange Bank, under which the latter was to receive into the escrow account the proceeds of the 95,561 shares as deposited by Midwestern. Each Friday, commencing September 26th, 1969, the Exchange Bank was to pay to Transceiver the proceeds deposited, and it was to deliver to Midwestern, in turn, certificates representing the number of shares paid for during that week out of the 95,561 shares which it also would be holding in escrow. 7/ (Div. Ex. 28). A "Receipt and Cross-Receipt" acknowledging the promissory note, the release of 34,439 shares to Midwestern and the new escrow agreement, was signed by Transceiver and Midwestern. (Div. Ex. 29).

7/ In a rider to the escrow agreement the Exchange Bank acknowledged the receipt of 13,000 shares in the name of Midwestern and the latter's check for $1,300 in payment therefor, the release of these funds and shares to the respective parties to be made on payment of the $735,549.

Because the 130,000 shares had not been sold and never were sold, the funds called for by the several agreements and documents executed on September 19 were never deposited into the escrow account, except for some $90,000 received by Midwestern during the 2 week period following September 19. These funds were turned over to Transceiver by the Exchange Bank. (Resp. Ex. 11, pp. 115-116). The subscribers to the issue, whose funds were disbursed in contravention of the registration statement and prospectus, were never repaid. (Tr. 203). Moreover, although the "Use of Proceeds" section in the prospectus allocated the anticipated proceeds to such purposes as advertising programs, development and operating expenses and working capital, $100,000 of the escrowed funds were used to repay a loan previously made by the Exchange Bank to Transceiver which was payable on October 13, 1969. This loan had been made originally to Wendover, Carr, Jacobson and other individuals having interests in Transceiver. Several weeks later, on July 17, 1969, it was renegotiated as a loan to Transceiver and it was guaranteed by the individuals, by Midwestern, and by Wall Street Capital Corporation, a company which had purchased 27,000 shares of Transceiver for $30,500. (Prospectus, (Div. Ex. 19), p. 26). None of the documents filed with the Commission reflected the payment of the $100,000.

Neither Transceiver's use of the $100,000 nor the Exchange Bank's acceptance of these funds in contravention of the terms of the prospectus and of the clear language of the underwriting agreement is at issue in

these proceedings.[8/] Conversely, Sahley's participation in the repayment (which absolved Midwestern among others from liability on the guarantee of the loan) is entirely relevant. Granting, as he testified, that he expected the underwriting would be successful and would produce adequate funds for this repayment,[9/] there was nothing in the "Use of Proceeds" section which indicated that repayment would be made.[10/] However, the corporate debt was in fact expressly mentioned in the prospectus, and had Transceiver not paid the $100,000 to the Exchange Bank, it probably would have used it for other corporate purposes. The heinous aspect of the repayment lies in its having been made to the Exchange Bank and in the fact that it was made in satisfaction of an indebtedness on which Midwestern, among others, was obligated. Even more serious, of course, is Midwestern's failure to honor the "all or none" aspect of this underwriting under which the return of moneys had been promised and was due to the purchasers of shares. Sahley's breach of trust to his customers was gross.

8/ Nor are there at issue here questions concerning the actions of others who participated in the payment of the escrowed funds to Transceiver instead of assuring repayment, when ultimately called for, to purchasers of the shares.

9/ Tr. 133-139; see also the testimony of Carnes, senior vice-president of Exchange Bank and a director of Midwestern, to the effect that repayment of the $100,000 loan from proceeds of the underwriting had been discussed at Midwestern Board of Directors meeting(s). (Tr. 338). The testimony is credited.

10/ Conversely, as indicated infra, the prospectus reflected, in the Capitalization section, that the loan would not be repaid from proceeds of the offering but would continue to be outstanding.

More than this, Sahley had created the scenario for the unlawful activity. His testimony asserted that the offering had failed because of the unanticipated cancellation of indications of interest which Midwestern had received, [11/] suggesting that most of these indications of interest were false and fraudulent offers to purchase from persons recommended by officers or associates of Transceiver; and that prior to September 2nd he had received indications of interest for over 400,000 shares, of which he considered "at least 300,000 to be fairly secure", but they were not. (Tr. 699).

The settlement date for the transactions assertedly involving 300,000 shares, the sale of which was "fairly secure," was September 9, 1969. (Tr. 801-2). On that date payment had been received for substantially fewer than the 34,439 shares involved in the September 19 transactions. (Tr. 807). I conclude that even if (as Sahley testified), he was unduly pressured by the persons representing Transceiver to engage in the closing on September 19, a position which is contradicted by credible testimony, and even if fraud was practiced by Transceiver officers or associates as asserted, [12/] there would be no justification

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11/ An "indication of interest" is roughly tantamount to an offer to buy a security, but it cannot be accepted by an underwriter prior to the effective date and it may be withdrawn at any time prior to notice of its acceptance given after the effective date. Securities Act Rule 134. (Para. II D of the Order, discussed infra, in effect alleges premature acceptance of indications of interest by Midwestern, and thus, the unlawful sale of unregistered shares.)

12/ I find no evidence of fraud on Midwestern. As indicated by the previous footnote, even if persons recommended by officers or associates of Transceiver "indicated interest" or made inquiry of Midwestern concerning the issue and subsequently did not pursue the matter, this would not suggest fraud.

for his having participated in the closing in total disregard of the "all or none" aspects of the offering and in violation of his trust to his customers. Conversely, I find that Sahley suggested the partial closing and wilfully engaged in it despite the fact that 130,000 shares, to his knowledge, had not been sold. His testimony is substantially discredited, in my judgment, by the contrary testimony of others,[13/] by its inherent lack of consistency, precision and reliability, and by its vague and rambling character on the charge under discussion and on all other charges in these proceedings. It is for the most part rejected.

The Anti-fraud Violations (Par. II F)

The Order charges in paragraph II F that during the period from on or about September 2, 1969[14/] to on or about November 17, 1969, registrant wilfully violated and Sahley, the Exchange Bank and Goldblatt[15/] wilfully aided and abetted violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, commonly known as the "antifraud provisions" of the

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13/ In addition to the contrary testimony discussed or cited in the text, see Respondents' Exhibit 11, (depositions of Jacobson and Carr) at pages 52, 62-63, 136-7, 149-150.

14/ An erroneous date stated in the Order was amended during the hearing.

15/ Discussion of Goldblatt's participation in this and other violations is treated separately. As indicated above, because of the settlement of charges against the Exchange Bank, its alleged violations are not discussed as such.

securities laws.[16] I find wilfull violation by registrant and wilfull aiding and abetting by Sahley of these provisions. Sahley's acts in connection with the underwriting were intentional and deliberate, and fall clearly within the concept of "wilfull" as that term is used in the securities acts and rules thereunder.[17]

In complete disregard of the rights of his customers to have their money refunded, Sahley engaged in the closing which released the funds to Transceiver for its use and permitted Exchange Bank to be paid a debt of $100,000. There was, of course, no disclosure to these purchasers of the material information,[18] known to Sahley, that the provisions of the registration statement and prospectus were being and would continue to be disregarded and violated.[19]

I have concluded that the prospectus was inaccurate in failing to reflect an intention to use proceeds of the offering to pay the $100,000 loan. As pointed out by the Division, the prospectus reflected

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16/ The composite effect of these provisions, as applicable here, is to make unlawful the use of the mails or means of interstate commerce to engage in any fraudulent, deceptive or manipulative practice, to make any untrue statement of a material fact or omit to state a material fact necessary in order to make statements made not misleading, or in connection with any purchase of securities to engage in any act, practice or course of business which operates as a fraud upon any person.

The evidence reflects use of the mails and means of interstate commerce in connection with all of Midwestern's activities which are the subject of or basis for violations found in this initial decision.

17/ Sutro Brothers & Co., 41 S.E.C. 470 (1963); Hughes v. S.E.C., 174 F. 2d 969 (D.C. Cir. 1949); Tager v. S.E.C., 344 F. 2d 5, 8 (8th Cir., 1965).

18/ The information was clearly material, as information to which "a reasonable man would attach importance in determining his course of action in the transaction in question." List v. Fashion Park, Inc., 340 F. 2d 457, 462 (2d Cir. 1965). Cf. Laser Nucleonics, Securities Act Release No. 5041, February 2, 1970.

19/ As indicated above, purchases were made and funds were received by Midwestern subsequent to the September 19 closing. The $90,000 so received was also paid to Transceiver by the Exchange Bank in accordance with the September 19 documents.

that this loan was not to be repaid from the proceeds of the offering. The "Capitalization" section therein indicated that as of July 28, 1969 the $100,000 obligation due October 13, 1969 was outstanding and that it would continue to be outstanding after giving effect to the offering.

Of course, the funds which were accepted by Sahley after the decision to hold a partial closing were received and subsequently released to Transceiver in fraud of purchasers. And the use of the promissory note as a basis for the release of funds and shares, as described above, violated the representation to purchasers that funds would be returned if 130,000 shares were not sold. It also contravened the language in the prospectus that payment would be by "certified or official bank check or checks". No post-effective amendment was filed to the registration statement to reflect the fraudulent acts, nor would such amendment have reformed the transaction.

From all of the evidence it is clear that the wilfull violations of the anti-fraud provisions by Midwestern and Sahley ~~secured~~ occurred as charged.

Violation of Section 15(c)(2) of the Exchange Act and Rule 15c2-4 Thereunder

The Order charges in paragraph II H that from on or about September 7, 1969 to on or about November 17, 1969, registrant wilfully violated and the other respondents wilfully aided and abetted violations of Section 15(c)(2) of the Securities Act and Rule 15c2-4 thereunder by remitting to Transceiver the proceeds of the offering.

In both the Order and the Division's brief, the Section and Rule which were violated are correctly referred to by their respective

numbers. However, in the Order the Act was erroneously referred to as the Securities Act rather than the Exchange Act. The section of the latter Act prohibits the use of the mails or means of interstate commerce to engage in any fraudulent act or practice to induce the purchase of a security. Rule 15c2-4 thereunder states that it shall constitute a fraudulent act or practice for a broker or dealer to accept any part of the sale price of a security in an "all or none" offering unless the money is deposited in a separate bank account as agent or trustee "until the appropriate event or contingency has occurred, and then the funds are promptly transmitted or returned to the persons entitled thereto. . . ."

As shown above, the transmission to the "persons entitled thereto" did not occur. Although these facts have already been found to constitute violations of the specific antifraud provisions discussed above, it is clear that they also constitute violations of this provision of the Exchange Act and the Rule thereunder. The inadvertent reference to the Securities Act in no way has prejudiced respondents, and no question was raised during the hearing or in post-hearing documents concerning that reference. Since the facts at issue constitute the significant criteria for my evaluation and since the violation is clearly established in my judgment, I shall herewith, on my own motion, amend the Order to conform with the proof by deleting "Securities Act" and inserting "Exchange Act." I find that the wilfull violation of the Section and Rule by Midwestern and the wilfull aiding and abetting thereof by Sahley occurred on and after September 19, 1969. I do not consider, at the same time, that the seriousness of the offense already labeled as violative of the anti-fraud provisions is substantially aggravated because this additional Section and Rule also have been violated by this illegal and highly reprehensible activity.

Violation of Section 5(a) of the Securities Act

The Order asserts in paragraph II E that from on or about August 27, 1969 to on or about September 2, 1969, respondents wilfully violated and aided and abetted violations of Section 5(a) of the Securities Act by using means of interstate commerce to offer, sell and deliver after sale shares of Transceiver prior to the effective date of the registration statement on September 2, 1969.

This charge is paraphrased in the Division's Conclusions of Law (paragraph B), and the Division's brief states at page 7: "In addition, it is alleged and Sahley has admitted that Midwestern solicited and received payment for Transceiver shares between on or about August 27, 1969 and September 2, 1969, prior to the date the registration statement was declared effective." However, no citation to the transcript or record is furnished to reflect any admission that such funds were received prior to September 2 from persons solicited by Midwestern, and I do not find this proposed as a finding of fact by the Division. Accordingly, although such transactions would constitute violations of Section 5(a) of the Securities Act,[20] the charge is dismissed.[21]

Alleged Violations of Section 5(b)(2) of the Securities Act

The Order alleges in paragraph II D that from on or about September 2, 1969 to on or about November 17, 1969, registrant wilfully violated and Sahley and Goldblatt wilfully aided and ~~abetted~~ abetted violations of Section 5(b)(2)

20/ See the definition of "indication of interest" in the margin at p. 13, supra. Cf. Armstrong Jones & Co., et an. v. S.E.C., 421 F.2d 359, 363-4 (C.A. 6, 1970); Otis & Co., 35 S.E.C. 650, 659 (1954).

21/ Nor is there in the Division's brief a table of cases as required by the Commission's Rules of Practice.

of the Securities Act by sending through the mails and in interstate commerce "the common stock of Transceiver for the purpose of sale and for delivery after sale without such security being accompanied or preceded by a prospectus meeting the requirements of subsection (a) of Section 10 of the Securities Act."

The Section prohibits such acts. Moreover, as the Division points out, the prospectus which is required to be sent either with or before the transmission of the shares must of course be accurate in order for it to serve its intended purpose of full and fair disclosure of material information concerning the character of the securities sold.[22/] As shown above in both text and margin, the indebtedness to Exchange Bank was reflected in the "Capitalization" section of the prospectus as an "Amount to be Outstanding" after giving effect to the offering, and the $100,000 was not listed in the Use of Proceeds section as an obligation to be repaid with proceeds of the offering. Nevertheless, on or prior to October 13, 1969, the loan was repaid with such proceeds. This was in accordance with the understanding of the interested parties reached prior to the effective date of the offering. (See fn. 9, p. 12). I find a wilfull violation of Section 5(b)(2) of the Securities Act by Midwestern and wilfull aiding and abetting thereof by Sahley on and after September 19, 1969, on which date, according to Sahley, share certificates were made available and were thereafter delivered (Tr. 165-166).[23/]

22/ Cf. Mon-O-Co Oil Corporation, 38 S.E.C. 833, 840 (1959); Carl M. Loeb, Rhodes & Co., 38 S.E.C. 843, 854 (1959); Section 10(a) of the Securities Act.

23/ As indicated in the prospectus, for 90 days after the effective date all dealers were required to deliver a prospectus in connection with their transactions in Transceiver shares.

Violations of Section 10(b) of the Exchange Act and Rule 10b-6 Thereunder

Paragraph II G of the Order asserts that from September 2, 1969 to October 1, 1969, registrant wilfully violated and Sahley and Goldblatt wilfully aided and abetted violations of Section 10(b) of the Exchange Act and Rule 10b-6 thereunder. Under this Section and Rule it is unlawful for an underwriter or other person participating in a distribution to use interstate means to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of the distribution until after he has completed his participation therein.

The evidence shows that between the approximate dates September 4, 1969 to October 1, 1969, a period during which Midwestern was still participating in the underwriting, Midwestern bid for and purchased for its account approximately 5,400 shares of Transceiver at a price of approximately $9½ per share. (Tr. 157, 526-7; Div. Exs. 38, 39).

Sahley testified that these transactions were effected as stabilizing activity because the price of the shares started to drop soon after the effective date. Stabilization by Midwestern was authorized under the limited and restrictive conditions described in Rule 10b-7 of the Exchange Act. However, no effort was made in either the evidence or argument to justify the stabilization activity under this Rule. For example, there is no indication that the bids made by Sahley for the alleged purpose of stabilizing the issue were so described to the persons with whom they were placed or to whom they were transmitted, as required by Rule 10b-7.

Conversely, one trader who purchased Transceiver shares from Midwestern testified that he was advised by Sahley's assistant that the issue had been sold out. (Tr. 530-532). Moreover, Rule 10b-7(j)(5) provides that "No person shall stabilize a security at a price above the price at which such security is currently being distributed." The evidence shows that the trader previously mentioned was buying Transceiver shares at the distribution price of $9 and selling them to Midwestern at $9½.

It follows that registrant and Sahley have wilfully violated the Section and Rule of the Exchange Act as charged.

Books and Records Violations

The Order charges in paragraph II I that during the period from about September 2, 1969 to about December 1, 1970, "Registrant wilfully violated and Sahley and Goldblatt wilfully aided and abetted in the violation of Section 17a-3 of the Exchange Act and Rule 17a-3 thereunder, in that Registrant failed to make and keep current certain . . . books and records . . ."

The Section is an integral part of the pattern which Congress provided for the regulation of the securities industry, and the requirement that a registered broker-dealer make and keep current books and records relating to his business as provided in the Rule is an important part of the Commission's regulatory activity essential to the protection of investors.[24/]

24/ Bernard J. Johnson, 20 S.E.C. 429, 439 (1945); C. Herbert Onderdonk, 37 S.E.C. 847 (1957); Associated Securities Corporation, 40 S.E.C. 10, 18 (1960).

Following are the books and records which Midwestern failed to make and keep current in violation of the Rule:

> Customer ledger accounts. (Tr. 201, 640)
>
> Ledgers (or other records) reflecting securities failed to receive and failed to deliver. (Tr. 641).
>
> A record or ledger reflecting separately for each security owned by registrant the "long" and "short" positions, including securities in safekeeping. (Tr. 642).

Paragraph II J asserts that during the same period "Registrant wilfully violated and Sahley and Goldblatt wilfully aided and abetted in the violation of Section 17(a) of the Exchange Act and Rule 17a-4 thereunder" in failing to preserve certain records as required by that Rule.[25/] Some of the records required by Rule 17a-3 to be made and kept current are also included in the requirement of Rule 17a-4 that they be preserved. To the extent such records have been found above not to have been made and kept current, i.e., customer ledger accounts and securities failed to receive and deliver, the charge that they were not preserved is duplicative rather than a separate and additional infraction, and accordingly is dismissed. Cf. In the Matter of the Application of L. C. Fisher Company, Inc., Securities Exchange Act Release No. 10259, June 29, 1973; In the Matter of the Applications of Adolph D. Silverman, et al., Securities Exchange Act Release No. 10327, August 6, 1973. However, the following records, assuming they had once been created, in any event were not preserved for the requisite period, as charged:

25/ Under Rule 17a-4 such records must be preserved for at least six years, the first two years in an easily accessible place.

A record of the proof of money balances of all ledger accounts in the form of trial balances and a record of the computation of aggregate indebtedness and net capital as of the trial balance date (Tr. 649).

A record of securities borrowed and securities loaned. (Tr. 263, 348, 644).

A record of securities in transfer. (Tr. 642-3).

Sahley testified that he had brought to the hearing all of Midwestern's books and records.[26] (Tr. 113). These were examined by an experienced Commission investigator, who testified with regard to the missing records and the chaotic condition of those which were made and preserved by Midwestern.[27] (Tr. 631-678). On the basis of this testimony I conclude that to the extent indicated above, registrant wilfully failed to make and keep current and to preserve books and records required by the statute and Rules 17a-3 and 17a-4 during the period September 2, 1969 to December 1, 1970, and that Sahley wilfully aided and abetted said violations.

Form X-17A-5 Reports

Paragraph II K of the Order charged that from about December 1969 to December 1970, Registrant wilfully violated and Sahley and Goldblatt

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26/ Sahley testified as to his responsibility for maintaining the records of Midwestern. (Tr. 162).

27/ The Commission investigator testified at length regarding the impossibility of ascertaining the nature and date of numerous transactions because of incomplete and inadequate postings of ledgers, journals, and other records. Even the promissory note of $735,549 executed on September 19, 1969 was not posted or noted in any of the firm's books or records. (Tr. 648).

wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17a-5 thereunder in that "Registrant failed to file with the Commission a report of financial condition duly certified containing the information required by Form X-17a-5 for the calendar years 1969 and 1970 within the time required by Rule 17a-5."[28/] During the hearing an amendment of the Order was permitted on motion filed by Division counsel to change the dates of the violations to the period December 1969 to April 1972, and to add a charge that no Form X-17A-5 had been filed as required for the calendar year 1971. (Tr. 21).

The testimony of the Division investigator supports the charges in the Order, as amended. (Tr. 651). His testimony, in turn, is supported by examination of registrant's broker-dealer file, official notice of which was taken early in the hearing.[29/]

Accordingly, it is concluded that Midwestern wilfully violated Section 17A-5 of the Exchange Act and Rule 17a-5 thereunder during the period December 1970 to April 1972 and that it was wilfully aided and abetted by Sahley in these violations.

28/ The contents of the Form X-17A-5 report and the required time of filing are spelled out in the Rule in detail.

29/ The testimony indicated that an improperly prepared and uncertified Form X-17A-5 was submitted to the Commission for the year 1970, but this was rejected. (Rule 17a-5, as applicable here, requires such reports to be certified by an independent accountant).

The importance of filing the Form X-17A-5 financial report has been asserted on numerous occasions by the Commission, and the gravity of a wilfull violation by failure to file is demonstrated by such severe sanctions as the revocation of a broker-dealer's registration and his expulsion from membership in the NASD. See, for example, Thomas Lee Jarvis, 40 S.E.C. 692 (1961).

Net Capital Violations

Paragraph II L of the Order alleges that from about September 7, 1969 to December 1, 1970, Registrant wilfully violated and Sahley and Goldblatt wilfully aided and abetted Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder in that they used interstate means to effect transactions in and to induce the purchase and sale of securities over the counter while in violation of the Commission's net capital rule.

The exhibits which reflect the net capital status and the credible testimony of Frank Di Dio, ("Di Dio"), a Division investigator, leave no room for doubt that on October 24, 1969 Midwestern was in violation of the Commission's net capital requirements.[30/] However, because of the incomplete and deficient condition of registrant's financial records discussed above, it is not possible to fix the amount

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30/ Rule 15c3-1, as pertinent here, requires that the aggregate indebtedness of a broker-dealer "shall not exceed 2,000 per centum of his net capital" and that his net capital shall not be less than $5,000.

of the deficit with precision.[31]

Midwestern's trial balance as of October 24, 1969 submitted to the Commission reflects a deficit in net capital of $975,568.81. (Div. Ex. 42; Tr. 632). The analysis of this trial balance by Di Dio reflected a somewhat smaller deficit of $788,934.96. (Div. Ex. 43; Tr. 633).[32]

Midwestern submitted to the Commission a second trial balance as of the same date, October 24, 1969, which it contends will support its argument that it was not out of ratio for net capital requirements. (Div. Ex. 44). The very substantial difference between the two trial balances submitted by Midwestern, the first showing a net capital deficit of $975,568.81 and the second showing a net capital of $698,841.27 and a "required net capital" of only $73,756.50, was explained by Di Dio.[33]

31/ Pertinent to the inadequate condition of registrant's books and its effect on the issue of net capital compliance is a comment by Judge Weinfeld, of the United States District Court for the Southern District of New York:

> "More important than the violation (of the Bookkeeping Rule) itself is that it prevented a determination of whether there was compliance with the Net Capital Rule." S.E.C. v. Mainland Securities Corp., et an., 192 F. Supp. 862 (S.D.N.Y. 1961).

32/ The witness testified that Midwestern had erred by twice "haircutting" an item (deducting 30% of its market value). (Tr. 234).

33/ Sahley testified as to the preparation of the second trial balance and the alleged errors in the first document. (Tr. 765-767).

Substantial differences occurred because the second net capital calculation improperly included as assets, among other items, notes and loans receivable and an item called "Advance & Unreimbursed Travel expense," none of which had been included in the first calculation. Nor should they have been included in the second.[34/] (Tr. 638). Moreover, the second computation evaluated Midwestern's securities on their cost rather than on their market value, and it failed to include an item of "Stock Sold Short" as a liability in the amount of $420,073, the very item on which it had erroneously twice taken a haircut on the first trial balance, as noted in footnote 32, page 26, supra. (Tr. 638). Based on Di Dio's acceptance of the raw figures in the second of Midwestern's computations, but with required adjustments, the net capital deficiency of Midwestern on October 24, 1969 was $122,467.09. (Div. Ex. 45; Tr. 639).

Sahley prepared during the hearing sessions and introduced into evidence a further computation of Midwestern's net capital position as of October 24, 1969. (Resp. Ex. 8). Although this computation purported to show a "Net Capital Excess over Minimum" in the amount of $104.547.12, it is not credited as an accurate representation of Midwestern's financial position as of October 24, 1969. Firstly, it includes as a current asset

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34/ The total of these three amounts improperly included is $590,782.55. Rule 15c3-1(c)(2)(B) provides for computation of net capital by deducting assets which cannot be readily converted into cash, including unsecured loans and advances. None of these items was shown to be secured.

an item called "Notes Receivable - Secured by Real Estate Lien on Bldg (Value $1,240,000)," and the value assigned to the notes is $117,859. In support of his contention that the notes should be included as current assets, Sahley introduced a letter from the Ohio Title Corporation dated August 10, 1971, addressed to an attorney in Cleveland. The letter reports, subject to express caveats, that title to a parcel of land in Cuyahoga County, Ohio, is good in U. H. Inc., a Delaware corporation, subject to mortgages totalling $475,000 and a recorded "Financing Statement" from U. H. Inc. covering "goods, chattels and equipment" in the building, and subject also to judgment liens in favor of Lloyd W. Sahley and [his wife], Harriet Sahley, dated April 30, 1969 in the total amount of $117,859. These judgment liens in favor of the Sahleys can in no sense be regarded as current assets of Midwestern which, on October 24, 1969, could be readily converted into cash. Nor could the notes receivable, even assuming they survived the judgment, be considered as assets of Midwestern for net capital purposes.[35/] (Sahley testified that the liens were "second in position to a first mortgage: that they could be collected by foreclosure action but none had been instituted; that he had once owned the mortgaged building but had exchanged it for stock and notes of U. H. Inc., and that he had pledged that stock to a mortgage lender).

35/ Cf. Don D. Anderson, Securities Exchange Commission Release No. 8447 (December 26, 1968); John W. Yeaman, Inc., Securities Exchange Act Release No. 7527, pp. 4-5 (February 10, 1965).

Sahley's computation also deleted from the Division's computation in its Exhibit 45, an item of $109,155 in "Fails," which represented liabilities of Midwestern as of October 24, 1969 on 11,490 Transceiver shares at $9½ per share. (Div. Exs. 44, 45; Tr. 677).[36/] Even under Sahley's capital calculation, Midwestern was in net capital violation on October 24, 1969, because the asserted "excess" figure of $104,597.12 reflected on respondent's Exhibit 8 should be offset at least by the $117,859 and the $109,155.

The evidence indicated that on October 24, 1969 registrant was still conducting its securities business and was using interstate means to induce the purchase of Transceiver shares. (Tr. 234, 693-695; Div. Ex. 30). It is concluded that registrant, wilfully aided and abetted by Sahley, wilfully violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.

36/ Sahley's testimony regarding the "Fails" item is not supported by documents and is not credited as a basis for excluding the liability as one which existed on October 24, 1969. In any event, as the Division points out in its proposed finding No. 137, even if Midwestern had cancelled the trades, as Sahley testified, (and even if cancellation had occurred on or prior to October 24, 1969, which he did not testify), the shares would not then have been included on Division Exhibit 45 as assets worth $109,155 (less the haircut).

Failure to Amend Form BD

Paragraph II M of the Order alleges that from on or about November 1, 1969 to September 29, 1971 registrant wilfully violated and Sahley and Goldblatt wilfully aided and abetted violations of Section 15(b) of the Exchange Act and Rule 15b3-1 thereunder by failing to promptly file with the Commission an amendment to its Form BD reflecting the issuance of two injunctions against registrant and its officers and directors, including Sahley. The Order was amended during the hearing to include a charge of failure to amend the Form to reflect an additional injunction against Sahley and to reflect movements or changes of the address of registrant's office.

There is little or no factual dispute concerning the injunctions. The United States District Court for the Southern District of New York issued an order of permanent injunction on November 19, 1969, enjoining registrant, Sahley, and registrant's officers and directors from doing business as a broker or dealer in securities while in violation of specified sections of the Exchange Act and Rules thereunder. (Div. Ex. 2). On December 16, 1969, the same Court permanently enjoined these defendants and Transceiver from violating specified sections of the Securities Act and the Exchange Act and Rule 10b-5 under the latter Act in connection with the offer and sale of Transceiver stock. (Div. Ex. 1). Midwestern and Sahley consented to these orders without admitting or denying the allegations in the complaints filed by the Commission.

On January 17, 1972, the same Court issued an order of preliminary

injunction in an action entitled Securities and Exchange Commission v. Leisure Inns & Resorts, Inc. et al., enjoining Sahley, pending final determination, from using the mails or interstate means for fraudulent purposes in connection with the securities of Leisure Inns or any other company or person associated or acting with it.

Rule 15b3-1(b) provides that if the information contained in any application for broker-dealer registration becomes inaccurate, an amendment on Form BD shall be promptly filed. No amendments were filed to reflect either the injunctions or the changes of address discussed below. In Roberts Securities Corporation, 38 S.E.C. 63 (1957), the Commission said, at 65:

> "Registrant's failure to file promptly after entry of the injunction an amendment correcting the answer to item 8(b) constituted a willfull violation of Rule 15b-2. 37/
>
> . . . .
>
> Registrant also willfully violated Rule 15b-2 by failing to file an amendment promptly after it was no longer located at the New York address given in [prior amendments]."

Cf. Ralph C. Kent, d/b/a Ralph C. Kent & Co., 4 S.E.C. 204 (1938).

An issue of fact is raised by respondents with regard to the asserted changes of address. Midwestern's application for registration as a broker-dealer listed its address in care of its attorney. Thereafter, an amendment filed on November 15, 1968 described its business address as 1 Maiden Lane, New York, New York. This address has not been changed by amendment to the

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37/ Renumbered 15b3-1(b) by Release 34-7700, dated September 10, eff. September 24, 1965.

Form BD.

The evidence indicates that Midwestern changed its business address at least four times - initially to an address in New York City in early 1970, thereafter to another address in that City and ultimately to two different addresses in Cleveland, Ohio. Sahley testified that he notified the Commission of the first change of address "By letter and orally," but no confirmation of the testimony and no required Form BD appears in Midwestern's file. He mentioned two addresses in Cleveland to which registrant's books and records were removed in the latter part of 1970, and contended that counsel for the Division were informed of the addresses both orally and in writing, but did not recall sending a Form BD to the Commission. (Tr. 260).

Perhaps there is an element of mitigation in Sahley's testimony that "I assumed, without counsel, that because I had been enjoined by the SEC that they knew I was enjoined." (Tr. 104); and in the fact that he sent to Division counsel letters (relating to problems of Midwestern with the Commission) which indicated registrant's several addresses.[38/] But it is clear that the failure to file required amendments constituted wilfull aiding and abetting by Sahley of wilfull violations of the Section and Rule by Midwestern, as charged.

38/ Div. Exs. 14, 16, 18.

Goldblatt

Although Goldblatt's participation in the every-day operations of Midwestern appears to have been extremely limited, he has been charged with wilfully aiding and abetting each of registrant's violations, including those relating to the preparation and preservation of its books and records, its failure to amend its Form BD and to file its Form X-17A-5 reports, its transmission of Transceiver shares without the required prospectus, its distribution of the proceeds of the offering in contravention of the "all or none" limitation, its unlawful participation in trading in Transceiver shares prior to the completion of the underwriting, and the broad anti-fraud violations alleged in paragraph II F. The evidence falls short of proving Goldblatt's responsibility for wilfully aiding and abetting several of these violations. As indicated above, Sahley was not only the chief operating officer of the firm, he was, in fact, the only active operating principal of the firm. In effect, he was the firm itself, except for Goldblatt's financing of its operations and efforts with respect to other underwritings, and except for certain activities of Goldblatt which related to the Transceiver transaction, which activities are discussed below.

There is no evidence indicating that Goldblatt had responsibility for the supervision of registrant's record-keeping, or that he at any time personally engaged in such activity. No connection or relationship between Goldblatt and the filing of reports or the creation or maintenance of ledgers or other records has been demonstrated: nor is there evidence

of his participation in the normal trading activities of Midwestern. His position as Chairman of the Board did not impose upon this dentist who had little or no experience in the securities industry a duty to supervise or control the everyday operations of a broker-dealer firm which were assumed and carried out by Sahley, its president and chief operating officer. In H. C. Keister & Company, et al., Securities and Exchange Act Release No. 7988 (November 1, 1966), the Commission said at 6:

> "We have exonerated officers who did not have responsibility in the area where the violations occurred,* and in proceedings brought by us against broker-dealer partnerships, we have named as respondents only the particular partners charged with affirmative participation in the alleged violations or with failure to exercise adequate supervision.**
>
> *citing Midwest Planned Investments, Inc., Securities Exchange Act Release No. 7564 (March 26, 1965).
>
> **citing Shearson, Hammill & Co., Securities Exchange Act Release No. 7743 (November 12, 1965); Reynolds & Co., 39 S.E.C. 902 (1960).

See also Schmidt, Sharp, McCabe & Company, Incorporated, Securities Exchange Act Release No. 7690, (August 30, 1965); Security Planners Associates, Inc., Securities Exchange Act Release No. 9421, (December 17, 1971), p. 4, 5.

However, Goldblatt was to some extent involved in the Transceiver transaction. He knew of Transceiver's urgent need for money to develop its proposed network of transceiver centers and had assisted in its financing prior to the underwriting. (Tr. 205-206). As Chairman of Midwestern's Board of Directors he had a responsibility in connection with

the underwriting and he participated, as Midwestern's representative, in at least two meetings relative to the underwriting.[39/]

Other activities of Goldblatt in relation to financing the activities of Midwestern were the subject of testimony and documentary evidence. They related generally to his subordinated loans to Midwestern and to efforts to arrange other business activities or underwritings. But they are unrelated to the fraud under discussion in the Transceiver transaction. As to this fraud, I conclude that Goldblatt was sufficiently involved in the underwriting by his personal participation and by his encouragement and assistance to Sahley, as well as by his position as Chairman of the Board and status as substantial shareholder, to have had responsibility for assuring that purchasers of the shares would be protected by the assurances given them in respect of the "all or none" underwriting. Cf. Aldrich, Scott & Co. Inc., 40 S.E.C. 775 (1961); Luckhurst & Company, Inc., 40 S.E.C., 539 (1961). It was his duty to remain aware of the posture of the underwriting and of its financial

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39/ Jacobson testified that he met Goldblatt in New York City prior to the effective date of the underwriting and that they discussed the financing of Transceiver through the contemplated sale of shares and "additional financing down the line." (Tr. 426-430).

The second meeting took place at the office of Arnold & Porter when Sahley was apparently sick and unavailable several days after the September 19 closing. Goldblatt expressed the view that the money to pay Midwestern's note would be forthcoming. (The basis for this expression was not indicated). (Tr. 433).

status, and to take steps which would prevent the defrauding of Midwestern's customers who subscribed to the offering.[40/] I conclude that he wilfully aided and abetted Midwestern's violations of the anti-fraud provisions charged in paragraph II H, and the violations of Section 15(c)(2) of the Securities Act and Rule 15c2-4 thereunder by not preventing the payment of funds to Transceiver and by not taking steps to assure repayment of the subscribers. The other charges against him are dismissed.

Public Interest and Sanctions

The Division urges that the public interest requires that the registration of Midwestern be revoked, that it be expelled from the NASD, and that Sahley and Goldblatt be barred from further association with any broker or dealer. Counsel for the respondents urges that Midwestern be permitted to withdraw its registration "without prejudice to re-application at some future date" and that "the Respondents be suspended" for a period deemed appropriate, with a subsequent lifting of the suspension upon "appropriate preconditions."

The flagrant nature of the wilfull violations by Sahley and Midwestern have been carefully evaluated, as have the several factors

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40/ Cf. F. S. Johns & Company, Inc., Securities Exchange Act Release No. 7972 (October 10, 1966), where the Commission said, at 6: "While these men were 'silent partners' who never actively participated in the business of F. S. Johns, they had a duty, as principal officers, directors and stockholders, to take appropriate steps to prevent or guard against such a pervasively fraudulent operation as existed here [a high pressure 'boiler-room' sales campaign]."

urged in mitigation of Sahley's conduct.[41] It is urged, for example, that Sahley relied on the opinion letter of Arnold & Porter given him at the partial closing of September 19, 1969, (Respondents' Exhibit No. 1), as assurance that Midwestern's release of the funds was proper. As the Division responds in its Reply Brief, the asserted reliance on counsel for the issuer (rather than asserted reliance on advice of its own counsel) is irrelevant to these proceedings.[42] Moreover, although evaluation of the conduct of Transceiver's counsel is not here an issue, it should be noted that, as found above, Sahley represented that his receipt of the balance of the proceeds of the sale of the 130,000 shares was imminent, and this false representation undoubtedly constituted a significant part of the basis for the September 19 transactions. But even if the representation were disregarded in evaluating Sahley's conduct, his action reflected an indifference to the promise made in the prospectus and was a fraudulent and reprehensible breach of trust entirely inconsistent with the responsible relationship between a broker-dealer and his customers.[43]

41/ It is interesting to note that despite the many charges asserted against Goldblatt and urged in the Division's proposed findings, conclusions and brief, neither mitigation nor argument against Goldblatt's involvement in any of the specific violations is urged in respondents' post-hearing filing. Perhaps this results from a total disinterest by Goldblatt in continuing in any aspect of the securities industry: this is conjective only.

42/ Reliance on counsel has been found to be a mitigating factor under certain circumstances. D. F. Bernheimer & Co. Inc., 41 S.E.C. 358, (1963). However, as the Commission explained a number of years ago, "an attorney's opinion . . . is worthless if the facts are not as specified."

43/ N. Pinsker & Co. Inc., 40 S.E.C. 285 (1960); Arleen W. Hughes, 27 S.E.C. 629 (1948), aff'd 174 F. 2d 969 (C.A.D.C., 1949).

Beyond the serious violations by Midwestern and Sahley in the Transceiver activity are the several pervasive violations of the Commission's rules. Consideration has been given to Sahley's contention that he was unable to file Form X-17A-5 reports without knowing the extent of Midwestern's obligation on its promissory note to Transceiver; to the contention that some books and records were kept by Midwestern, and that certain members of the Commission staff knew where Sahley could be located. But the evidence and the testimony of Sahley, considered in relation to the violations found, indicate strongly that he has neither sufficient responsibility nor respect for Commission's requirements directed toward protection of the public to support a determination that Midwestern or Sahley should be permitted to continue in the securities industry. It does not appear, nor does it seem possible, that adequate and appropriate safeguards would or could be established and maintained to guard against further violations of the securities laws.[44/] After evaluation of the violations and with some consideration given to the significance of the injunctions on the public interest, it is appropriate that Midwestern's registration be revoked and that it be expelled from the NASD and that Sahley be barred from association with a broker or dealer. Such action is deemed necessary and appropriate in

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44/ Contrast the findings and conclusions in Smythe, Bowers, Hilliard & Co., Inc., Securities and Exchange Act Releases Nos. 7312 (May 11, 1964), and 7413 (September 14, 1964).

the public interest.

Goldblatt did not testify at the hearing and may no longer be interested in continuing in the securities industry. In any event, the public interest requires the imposition of a severe sanction for his participation and lack of responsible action in the Transceiver matter. He should be barred from further association with a broker or dealer. However, it also appears appropriate that after the expiration of six months he should be permitted to apply to the Commission for permission to become so associated in a non-supervisory position upon a satisfactory showing that he will be properly and adequately supervised in any activities in which he may engage.

ORDER

Accordingly, IT IS ORDERED that the registration of Midwestern Securities Corporation as a broker-dealer is revoked and that it is expelled from membership in the NASD; that Lloyd W. Sahley is barred from association with a broker or dealer; and that Louis Goldblatt is barred from association with a broker or dealer, provided that after six months from the effective date or this order he may apply to the Commission for permission to become associated with a broker-dealer in a position or capacity in which he will be adequately supervised.

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 (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. 45/

Sidney Ullman
Administrative Law Judge

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