ADMINISTRATIVE PROCEEDING
FILE NO. 3-6738

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
ROBERT G. LEIGH	:
	:

INITIAL DECISION

July 1, 1987
Washington, D.C.

Max O. Regensteiner
Administrative Law Judge

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APPEARANCES: Bobby C. Lawyer and Daniel B. Harris, of the Commission's San Francisco Branch Office, for the Division of Enforcement.

David R. King, of Kruse, Landa & Maycock, for Robert G. Leigh.

BEFORE: Max O. Regensteiner, Administrative Law Judge.

In these proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), the issues for consideration are whether Robert G. Leigh engaged in misconduct as alleged by the Division of Enforcement and, if so, what if any remedial action is appropriate in the public interest. The Division alleged that in July 1984, Leigh, while employed as a securities salesman, willfully violated registration and antifraud provisions of the securities laws in connection with transactions in the common stock of Dynapac, Inc.

Following hearings, the parties filed proposed findings of fact and conclusions of law and supporting briefs, and the Division filed a reply brief. The findings and conclusions herein are based on the preponderance of the evidence as determined from the record and upon observation of the witnesses. 1/

The Allegations

The Division alleged that in July 1984, Dynapac, a publicly held company that had been inactive for several years, became reactivated through the acquisition

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1/ In Steadman v. S.E.C., 450 U.S. 91 (1981), the Supreme Court held that the Commission, in determining whether antifraud provisions of the securities laws had been violated, properly applied the preponderance of the evidence standard rather than the clear and convincing evidence standard. Hence, Leigh's reliance on earlier decisions by the Court of Appeals for the District of Columbia, which had reached a contrary conclusion, is misplaced.

of certain assets and a change in control. As amplified in a response to Leigh's motion for more definite statement, it was alleged that, at the direction of one James Van Treese, who was in a control relationship with Dynapac, Leigh executed four sale orders for Dynapac stock which he knew or should have known was unregistered and that he facilitated the unregistered distribution of other Dynapac stock, which was restricted and "legended," by causing it to be reissued without restrictive legend to persons participating in Dynapac's acquisition and change in control. The Division alleged that in these respects, Leigh willfully violated Sections 5(a) and 5(c) of the Securities Act of 1933.

With respect to alleged violations of antifraud provisions (Section 10(b) of the Exchange Act and Rule 10b-5 thereunder), the Division charged that Leigh made certain misrepresentations and failed to disclose material facts concerning various aspects of the Dynapac stock transactions in which he was involved.

The Respondent

Leigh, who is 34 years old, has been employed as a registered representative by Covey & Company, Inc. ("Covey"), a Salt Lake City broker-dealer, since September 1983. Prior to entering the securities business, he worked as a mining equipment salesman. In early 1984,

Van Treese opened three accounts with Covey, including one in the name of Wood Concepts, Inc. Leigh was the registered representative for those accounts.

The Transactions At Issue

As of early 1984, Dynapac, which had at one time engaged in the manufacture of various products, was a corporate shell. Its common stock was registered under Section 12(g) of the Exchange Act and was traded over the counter, and it had more than 3,300 public stockholders. John Margetts was Dynapac's president. Margetts owned 2.7 million shares, or about 62 percent of the outstanding common stock, and his brother owned 15 percent. Another block of stock which plays an important role in this case was a block of 483,443 shares that had been issued some years before to Hydro-Swift Corporation in exchange for the latter's assets and had subsequently been returned to Dynapac when the earlier transaction had been rescinded. These shares, referred to hereafter as the Hydro-Swift shares, were treated by Dynapac as treasury stock.

Margetts and Van Treese first met in late 1983 or early 1984, when Van Treese was exploring the possibility of taking a newly-formed company public through merger with a publicly held company and was focusing on Dynapac. Margetts was desirous of making Dynapac a viable company

again. The transaction under consideration did not materialize. However, as part of the proposed transaction, Van Treese caused Margetts and the latter's associates to resign as Dynapac's officers and directors on April 1, 1984. They were replaced by persons designated by Van Treese, who were associated with the newly-formed company.

Margetts asked Van Treese to make further efforts to find someone who would infuse assets into Dynapac. In June 1984, Van Treese informed Margetts that he had located a privately-held furniture company, Furniture U.S.A., Inc. ("FUSA"), which was interested in a merger with Dynapac. Van Treese's efforts led to an agreement in principle between Dynapac and FUSA dated June 29, but not signed on behalf of FUSA until July 12, under which Dynapac would acquire FUSA's general partnership interest in a limited partnership in exchange for more than 20 million shares of Dynapac stock. Van Treese signed this agreement on behalf of Dynapac. The agreement also provided for payment by FUSA of $75,000 to Margetts, apparently in payment for his shares. 2/ It appears that a final agreement on these

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2/ The agreement summarized above was attached as an exhibit to a Dynapac Form 8-K report filed with the Commission on July 17, 1984. (Resp. Ex. H). The record includes another signed agreement in principle of the same date, this one signed on behalf of Dynapac not only by Van Treese, but also by Dynapac's officers and directors. (Resp. Ex. I). This agreement also differed in its terms. Most notably, it provided for Dynapac's acquisition of (Footnote Continued)

terms was executed on July 12. On or about that date, Dynapac issued 5 million shares to FUSA; the balance was issued later. Margetts received a promissory note for $75,000 from FUSA. According to Dynapac's report on Form 8-K dated July 12, a "potential change in control" of Dynapac occurred on June 29 when it executed the agreement in principle, and control passed to FUSA on July 12, when the 5 million shares were issued to FUSA and directors and officers who were FUSA nominees replaced the incumbents.

On June 24, 1984, Van Treese told Margetts that, in order to consummate the deal with FUSA, Margetts had to turn over to him his Dynapac stock, his brother's stock and the treasury stock (consisting mostly of the Hydro-Swift shares), so that Van Treese could show the certificates to attorneys in a Denver law firm that was apparently representing FUSA. Margetts accordingly delivered to Van Treese the 2.7 million shares he owned; about 650,000 shares owned by his brother (with the brother's permission); the 483,443 Hydro-Swift shares; and 15,500 other treasury shares. Van Treese in return gave Margetts a promissory note for $80,000, which stated that it represented consideration for the holdings of Margetts

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2/ (Continued)
the outstanding shares of FUSA and FUSA's merger into a wholly-owned subsidiary of Dynapac. Van Treese was unable to explain why there were two agreements. In any event, it was the one cited in the text that was implemented.

and his brother. Margetts testified that it was his understanding that he had sold that stock to Van Treese for $80,000. Van Treese, on the other hand, testified that he acted only in the capacity of a finder; that the note was a kind of receipt for the stock; and that he was agreeing to purchase the stock only if the transaction with FUSA did not go through. Van Treese delivered the approximately 3.8 million shares that Margetts had given him to the Denver law firm. Those shares were subsequently distributed to the principals of FUSA and related parties; to another finder; and more than 700,000 shares to Van Treese.

On or about July 3, 1984, Van Treese told Leigh that he would receive about 730,000 shares of Dynapac stock for his services as a finder; that he would sell most of them to "private individuals" and some in "normal broker sales"; and that he would like Leigh to sell some stock for him. Leigh had had frequent contact with both Van Treese and Margetts in the preceding months and had frequently discussed Dynapac with them. He knew, among other things, that Margetts was (or had been) an officer and controlling stockholder and that, in a deal arranged by Van Treese, new interests had taken over or were in the process of taking over control of Dynapac.

Beginning on July 3 and over the next ten days, Leigh sold a total of 26,000 shares in four transactions on behalf of the Wood Concepts account that Van Treese had opened

at Covey earlier in 1984. In three of the transactions, Covey bought the Dynapac shares as principal for its trading account, from which they were presumably resold. The fourth transaction was an agency transaction. Van Treese also sold his other Dynapac shares in July.

When Van Treese placed his original sales order with Leigh, there were no Dynapac shares in the Wood Concepts account. Van Treese advised Leigh that the pertinent certificates were in Denver and would be delivered to Leigh shortly. On July 6, Van Treese, having received the Hydro-Swift share certificates, totalling 483,443 shares, from the Denver law firm, presented them to Leigh. The certificates had been endorsed by a Hydro-Swift principal in 1978, and the endorser's signature was guaranteed. Each certificate bore the legend "Restricted Stock" as well as a statement to the effect that the shares had not been registered under the Securities Act and could not be sold absent an effective registration statement or an opinion of counsel that registration was not required. Van Treese told Leigh that the shares were part of his finder's fee for "putting the deal together." (Tr. 333)

Van Treese asked Leigh to present the shares to Dynapac's transfer agent and to have new certificates issued as follows: Van Treese, 183,443 shares; Margetts, 200,000 shares; and National Financial Services, also a finder, 100,000 shares. Van Treese also provided Leigh with a letter from the Denver law firm, which now

identified itself as counsel for Dynapac, addressed to the transfer agent. The letter requested issuance of the new certificates as indicated above and stated that it was counsel's opinion that the issuance of the shares was exempt from the Securities Act's registration provisions. Leigh testified that he was concerned about the restrictive legends and understood that he had a duty to determine whether he was selling shares for a control person. He further testified that he "surmised" that Van Treese was not a control person because he had been told that someone else had taken over control of Dynapac. (Tr. 351) After discussing the matter with Covey's compliance officer, who testified that Leigh told him he had received assurances that there was no "control position" involved (Tr. 310), Leigh took the certificates to the transfer agent on July 6. On July 10, the shares came back from transfer, re-issued per Van Treese's and counsel's instructions and without restrictive legends. The shares in Van Treese's name were placed in the Wood Concepts account.

Without prior notice to Margetts, the 200,000 shares issued in his name were placed in his account at Covey. On July 12, Van Treese instructed Margetts to meet with Leigh in order to have those shares transferred from his account to the Wood Concepts account. Van Treese told Margetts that the shares were part of his commission. Margetts carried out Van Treese's instructions. He

expressed concern to Leigh about the legality of the transaction because he thought it might involve a sale of restricted securities, but Leigh assured him there was no problem because Margetts was no longer an officer of Dynapac and would be holding no stock after the transaction.

The record is not clear as to the source of the certificates used to cover the sale of the 26,000 shares, i.e., whether they came from the 183,443-share block originally placed in the Wood Concepts account, or from the 200,000-share block transferred from Margetts' account, or in part from each block. There is no need to resolve this question, however, because it is clear that the sales were covered out of the Hydro-Swift shares.

Violations of Registration Provisions

As of July 1984, no registration statement under the Securities Act had ever been filed with respect to Dynapac stock. Hence, the sales effected by Leigh for the Wood Concepts account violated Sections 5(a) and 5(c) of the Securities Act unless an exemption was available as to them. 3/ It is well settled that the burden of

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3/ As to the transactions in which Covey acted as principal rather than agent, it could be said that Leigh, as Covey's agent, purchased rather than sold the securities. In my view the sounder analysis is that Leigh sold the shares on behalf of his customer, regardless of the manner in which the transactions were executed. That is the way in which the parties have treated the issues.

proving entitlement to an exemption from the general policy of the Securities Act requiring registration rests with the person claiming the exemption. 4/

Leigh claims that the exemption provided by Section 4(1) of the Securities Act for "transactions by any person other than an issuer, underwriter or dealer" was available for the sales in question. He also relies on the exemption provided by Section 4(4) of that Act for certain brokers' transactions. The Division, on the other hand, contends that those exemptions were not available to Leigh, noting that they "cannot be used to exempt distributions by issuers or underwriters or the acts of other persons who engage in steps necessary to such distributions." 5/

Section 2(11) of the Securities Act defines "underwriter" to include any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security. For purposes of that definition, the term "issuer" includes, "in addition to an issuer," any person directly or indirectly controlling the issuer. The Division urges that Van Treese's

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4/ See Quinn and Company, Inc., 44 S.E.C. 461, 463-464 (1971), aff'd 452 F.2d 943 (10th Cir., 1971), cert. denied 406 U.S. 957 (1972).

5/ Quinn & Company, Inc., supra, 44 S.E.C. at 466-467.

sales constituted a distribution by an underwriter or issuer and that Leigh was a participant in an underwriting and/or himself a statutory underwriter. The argument that Van Treese was an underwriter is predicated on the following analysis: (1) He "purchased" his Dynapac shares in the sense that he received them as consideration for "orchestrating" the takeover of Dynapac by FUSA; (2) he acquired them from an issuer, i.e., Dynapac, in that the Hydro-Swift shares had been maintained as treasury shares; 6/ and (3) he acquired them with a view to their distribution, as demonstrated by the short time that elapsed between his acquisition and the sales of the shares. The Division further contends that Van Treese was a controlling person of Dynapac and as such an "issuer" for purposes of Section 2(11). On this theory, it urges, Leigh could be deemed either a participant in a distribution by an issuer or a statutory underwriter.

6/ As an alternative theory, the Division suggests that since Van Treese initially obtained the Hydro-Swift shares from Margetts, and since at that time Margetts was a controlling shareholder, Margetts was also an issuer for purposes of Section 2(11) and Van Treese an underwriter. However, as the Division's reply brief appears to concede, Van Treese did not purchase the shares from Margetts, but merely collected the Margetts and treasury shares for delivery to the Denver law firm. Although, as noted, Margetts testified that it was his understanding that Van Treese had bought the Dynapac stock that was turned over to him, I find that Margetts was confused about the nature of the transaction.

Leigh addresses the question whether Van Treese was a statutory underwriter, but only from the perspective of whether he acquired the shares that he received by way of purchase from a controlling person of Dynapac. In particular, he argues that on June 29, 1984, "the date of the Dynapac-FUSA transaction," Margetts' Dynapac shares were transferred to others, including the shares transferred to Van Treese as a finder's fee. Leigh argues that at the moment Van Treese acquired his shares, Margetts ceased to be a control person of Dynapac, and that Van Treese was therefore not an underwriter. Leigh does not address the Division's principal argument on this point, namely, that Van Treese acquired the Hydro-Swift shares from Dynapac itself. He further contends, however, that Van Treese was only a finder and not himself a control person of Dynapac.

Leigh's argument regarding Van Treese's underwriter status is both factually and legally deficient. Had Van Treese purchased the Hydro-Swift shares from Margetts, he would have been a statutory underwriter even if Margetts had relinquished control as a result of that transaction and other contemporaneous dispositions. However, the Hydro-Swift shares which Van Treese received as part of his finder's fee and which were used to cover the sales in question were the property of Dynapac and therefore were purchased from Dynapac, the issuer. Consequently,

Van Treese was a statutory underwriter. [7]

Moreover, I agree with the Division that at the time of at least some of the transactions in question, Van Treese was a controlling person of Dynapac, which in turn made Leigh a statutory underwriter. The parties agree that the applicable definition of "control" is that contained in Rule 405 under the Securities Act. The rule defines "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise." [8]

Leigh seeks to portray Van Treese as acting simply in the capacity of a finder. He asserts that Van Treese did not negotiate the agreement between Dynapac and FUSA, but merely introduced the parties to the transaction and conveyed proposed terms to Margetts and the latter's acceptance of those terms back to the FUSA interests.

7/ For other cases finding Section 5 violations arising out of sales by issuers of reacquired shares, see, e.g., SEC v. Stanwood Oil Corp., 516 F. Supp. 1181, 1184 (W.D. Pa. 1981); Whitney & Company, 41 S.E.C. 699, 700 (1963).

8/ While Rule 405 pertains to registration statements filed under the Securities Act, the Commission has relied on this definition in other contexts as well.

Leigh also stresses that Van Treese was not an officer or director of Dynapac and asserts that he had no role in the company's operation or management. Further, citing an alleged "10 percent rule" used by the Commission as evidence of control, Leigh points out that on July 12, 1984, when Margetts transferred the 200,000 shares to the Wood Concepts account, Van Treese owned only about 7.5 percent of the outstanding shares.

It is clear that Van Treese performed the services normally performed by a finder. But his relationship with Dynapac and particularly his influence over Margetts, the controlling shareholder, was far more extensive than that. Van Treese had caused Margetts and the latter's associates to resign as Dynapac's sole officers and directors on April 1 and had replaced them with his own nominees. In addition to finding FUSA as a potential merger partner and conveying FUSA's proposals to Margetts, he signed the agreement in principle in Dynapac's behalf, only telling Margetts after the fact that he had done so. Moreover, it is clear from the record and from my observation of Margetts' testimony that Margetts, an elderly gentleman, was very much under the influence of and dependent on Van Treese as well as being confused about the disposition of his shares.

There are indications in the record that the assumption of control by the FUSA interests, with a resultant termination of Van Treese's control relationship, occurred earlier than July 12, the date on which 5 million shares were apparently issued to FUSA and which Dynapac reported as the date on which a change in control occurred. For example, the Denver law firm that represented the FUSA interests wrote the July 4 letter to the transfer agent as counsel for Dynapac. And, as evidenced by the turning over of the Hydro-Swift shares to Van Treese on or about that date, the distribution of the shares that Margetts had delivered to Van Treese began well before July 12. But at least on July 3, when he placed his first sell order with Leigh, and possibly later, Van Treese was still in a control position.

Section 4(4) of the Securities Act exempts from the provisions of Section 5 "brokers' transactions, executed upon customers' orders . . . but not the solicitation of such orders." That exemption is unavailable, however, to any broker (or salesman) acting as agent who knows or has reasonable ground to believe that his principal is an underwriter. 9/ The Commission has further stated that

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9/ See Evans & Company Incorporated, Securities Exchange Act Release No. 21696 (January 30, 1985), 32 SEC Docket 577, 583 and cases there cited. The same principle applies when the broker-dealer or salesman knows or has reasonable ground to believe that the principal is a "statutory issuer."

a broker (or salesman) relying on Section 4(4) cannot act as a mere order-taker, but must make whatever inquiries are necessary under the circumstances to ensure that his customer is not a statutory underwriter or issuer.[10/] Here, the record shows that Leigh had reasonable grounds to believe that Van Treese was an underwriter and failed to make the further inquiries called for under the circumstances.

While Leigh was apparently concerned as to Van Treese's possible control status, he failed to consider and inquire into the even more obvious likelihood that Van Treese had obtained the Hydro-Swift shares from the issuer with a view to their distribution, and was therefore an underwriter. The certificates that Van Treese presented to Leigh indicated on their face that they represented treasury stock. Moreover, Leigh admittedly knew that Van Treese received the shares as a finder's fee. This should at least have suggested to him that Van Treese may have received them from the issuer. In addition, the circumstances known to Leigh were such that he was not warranted in sloughing off as readily as he did the possibility that Van Treese was a controlling person of Dynapac.

10/ See Evans & Company Incorporated, supra, n. 9 . See also Owen V. Kane, Securities Exchange Act Release No. 23,827 (November 20, 1986), 37 SEC Docket 35, 39-40, app. pending (8th Cir.)

Insofar as Leigh relied on others, such reliance may under certain circumstances be a mitigating factor but cannot excuse his own failure to conduct a searching inquiry. Thus, his failure to inquire into the circumstances surrounding Van Treese's sales is not excused by his consultation with Covey's compliance officer. In Paul L. Rice, 45 S.E.C. 959 (1975), the Commission rejected the argument of a salesman that the responsibility for complying with the Securities Act's registration provisions rested wholly on his superiors. The Commission said:

> Salesmen also have some measure of responsibility in these matters. [Footnote omitted] This is not to say that they must be finished scholars in the metaphysics of the Securities Act. But familiarity with the rudiments is essential. 45 S.E.C. at 849. 11/

Leigh also cannot derive comfort from the attorney's opinion which Van Treese brought with him. Reliance on an attorney's advice does not excuse a broker's own lack of investigation.[12/] And while reliance on advice of counsel is a fact that may be taken into account in determining

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11/ See also Strathmore Securities, Inc., 43 S.E.C. 575, 582 (1962) ("... salesmen, no less than broker-dealers, should be aware of the requirements necessary to establish an exemption from the registration requirements of the Securities Act, and they should be reasonably certain such an exemption is available..." before engaging in the sale of unregistered securities.

12/ Sorrell v. S.E.C., 679 F.2d 1323, 1327 (9th Cir. 1982).

what sanction is appropriate in the public interest, it does not excuse a failure to comply with applicable provisions of law.[13/] Here, counsel's opinion was a particularly weak reed to rely upon. It was conclusory in nature, giving no indication of the facts on which it was based. And it referred only to the legality of the reissuance of the Hydro-Swift shares in the names of Van Treese and others and not to the legality of sales of those shares by Van Treese.

Leigh contends that he reasonably relied on the transfer agent's determination that the shares could be re-issued without restrictive legend, particularly since the transfer agent had demonstrated in the past that it understood that it had responsibility for determining whether restrictive legends could be removed. However, the actions of a transfer agent cannot take the place of the broker's own duty as a professional in the securities business to make reasonable inquiry to assure himself that he is not participating in an illegal sale of unregistered securities.[14/] Moreover, the re-issuance of the Hydro-Swift

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13/ Kidder, Peabody & Co., Incorporated, 43 S.E.C. 911, 914, n. 1 (1968).

14/ See, e.g., Stone Summers & Company, 45 S.E.C. 105, 109 (1972); Butcher & Singer, Inc., Securities Exchange Act Release No. 23990 (January 13, 1987), 37 SEC Docket 790, 793, app. pending (3rd Cir.); "Sales of Unregistered Securities by Broker-Dealers," Securities Act Release No. 5168 (July 7, 1971).

shares without restrictive legends did not mean that they could be freely traded.

Leigh further contends that the sale of only 26,000 shares did not constitute a distribution. He refers to former Rule 154 under the Securities Act (rescinded in 1973) which, for purposes of Section 4(4) and brokers' transactions for the account of controlling persons, defined the term "distribution" to exclude transactions involving amounts not substantial in relation to the number of shares outstanding and the volume of trading in the security. Leigh asserts that the 26,000 shares represented only about 1/2 of 1 percent of the shares outstanding at the time of the first three sales and an even lesser percentage at the time of the last sale. Leigh also contends that if Van Treese's sales did not constitute a distribution, Van Treese was not an underwriter under Section 2(11) of the Securities Act.

It is clear, however, that the fact that only a relatively small amount of stock was involved does not make sales by one who acquired the stock from the issuer any the less a public distribution.[15/] Moreover, Leigh

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15/ See e.g., Quinn and Company, Inc. v. S.E.C., 452 F.2d 943, 946 (10th Cir. 1971), cert. denied 406 U.S. 957 (1972); Merrill Lynch, Pierce, Fenner & Smith, 45 S.E.C. 185, 188 (1973). In the latter case, the Commission also stated as follows: "Respondents' citation of former Rule 154 under the Securities Act pertaining to certain distributions on behalf of controlling persons is inapposite." (p. 188, n. 4)

was aware that Van Treese was selling not only the 26,000 shares, but most or all of the more than 700,000 shares that he had received as a finder's fee.

On the basis of the above findings, it follows that Leigh willfully violated Sections 5(a) and 5(c) of the Securities Act.[16/]

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As noted, the Division alleged that Leigh committed additional Section 5 violations by causing the Hydro-Swift shares to be reissued without restrictive legends and thereby facilitating additional unregistered distributions. However, in its reply brief (p. 13, n. 28) the Division now states that it is not advancing Leigh's participation in dispositions of Dynapac stock other than the sales of the 26,000 shares for Van Treese as an independent basis for finding registration violations, but rather to place his role in the proper context. Hence, I do not reach the question whether on the facts in this case additional findings of violations of Section 5 would be warranted.

16/ Cf. Quinn and Company, Inc. v. SEC, supra, 452 F.2d at 947: "Brokers and securities salesmen are under a duty to investigate, and a violation of that duty brings them within the term 'willful' of the Securities [Exchange] Act."

Alleged Violations of Antifraud Provisions

The order for proceedings alleged that Leigh willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. While the allegation recited the terms of that Rule, the specific misconduct alleged was that Leigh made misrepresentations and failed to state material facts concerning, among other things, his participation in, and knowledge about, Dynapac's transformation and change in control and his execution of sales transactions on behalf of control persons with whom he was acting in concert. In its "more definite statement," the Division set forth its allegations in more detail, as follows: Leigh misrepresented to Margetts that the transfer of the 200,000 shares to the Wood Concepts account comported with the registration provisions of the securities laws. And he failed to disclose to purchasers of the Dynapac stock he sold (a) Van Treese's control relationships with Dynapac and Margetts; (b) that the shares sold for Wood Concepts had been obtained by Van Treese from Margetts in a private transaction, at a time when Margetts was Dynapac's controlling shareholder; (c) that Van Treese was the impetus behind Dynapac's transformation and change in control and obtained the above shares as compensation; (d) that by executing the sales for Wood

Concepts and directing the private transaction between Van Treese and Margetts, Leigh facilitated Dynapac's transformation and change in control; and (e) that the sales violated the registration provisions.

In its briefs, the Division sought to enlarge the bases for finding fraudulent conduct. It pointed out that Section 10(b) and Rule 10b-5 cover not only misrepresentations and non-disclosures, but fraudulent schemes and practices as well. And it argued that Leigh knowingly participated in a scheme to distribute Dynapac securities illegally. Even were it appropriate to make findings that go beyond the specific misconduct alleged in the order for proceedings, it appears to me that the antifraud charges in their entirety represent a "piggybacking" of those charges on top of the registration violations. Under the Division's approach, almost any violation of the registration provisions would give rise to violations of the antifraud provisions. That has not been the Commission's position. 17/

17/ The Division has cited no authority directly in point in support of its proposed findings and conclusions on the fraud allegations.

Cf. Fox Securities Company, Inc., Securities Exchange Act Release No. 10475 (November 1, 1973), 2 SEC Docket 667, 671, n. 13, where the Commission held that a broker-dealer's doing business while in violation of the record-keeping or net capital requirements, by itself, simply violates the specific sections of the the Exchange Act and applicable rules thereunder and not, in addition, the antifraud provisions. Presumably the Commission's conclusion in that case would encompass the nondisclosure to customers of the record-keeping or net capital violations.

There is one instance that arguably is of a different and distinct character because it involves an affirmative representation. That relates to Leigh's implied representation to Margetts regarding the legality of the latter's transfer of the 200,000 shares to the Wood Concepts account. However, assuming that transfer was, as the Division urges, a step in the distribution of unregistered Dynapac stock, it would be far-fetched to attribute illegal conduct to Margetts. The reality of the situation was that Van Treese had "parked" those shares in Margetts' account and continued to control their disposition.

Public Interest

In light of my finding that Leigh willfully violated Section 5 of the Securities Act, the remaining issue concerns the remedial action that is appropriate in the public interest. The Division proposes that Leigh be suspended from association with a broker-dealer for a period of six months. It urges that he could have prevented the illegal distribution scheme by fulfilling his obligations, but that he flagrantly disregarded his responsibilities and in addition engaged in fraudulent conduct. The Division also contends that the proposed sanction is necessary as a deterrent not only to Leigh, but also to other brokers who may be tempted to engage in similar misconduct.

Leigh, while denying that he committed any violations, contends that even if violations are found the proposed sanction would be unduly harsh. He stresses the facts that he was relatively new to the securities business at the time of the Dynapac transactions, that these represented his first encounter with restricted securities, and that he has no prior record of securities violations. Leigh also points out that the total amount of money involved in the sale of the 26,000 shares was only about $12,500. 18/

As discussed above, the record shows that when the Hydro-Swift share certificates were presented to him by Van Treese, Leigh realized that he was dealing with an extraordinary situation. While taking some steps to satisfy himself that those shares could legally be sold, he did not face up to what was obvious, that the shares emanated from Dynapac itself. And notwithstanding various "red flags," he made no inquiry to speak of to explore the possibility that Van Treese was a controlling person. The consequence

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18/ Both parties cite the sanctions imposed (or, in Leigh's case, the absence of sanctions) in other proceedings in support of their respective positions regarding an appropriate sanction. As the Commission has pointed out on numerous occasions, however, the appropriate remedial action depends on the facts and circumstances of each particular case and cannot be precisely determined by the action taken in other proceedings.

was that a basic requirement for the protection of investors was violated. Nevertheless, taking into account some of the mitigating factors referred to by Leigh, as well as his reliance on Covey's compliance officer and the fact that I have rejected the Division's fraud charges, the sanction proposed by the Division appears excessive. Under all the circumstances I conclude that it is appropriate in the public interest to suspend Leigh from association with a broker or dealer for a period of 30 days.

IT IS SO ORDERED. 19/

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

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

that 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.

Max O. Regensteiner
Administrative Law Judge

Washington, D.C.
July 1, 1987