ADMINISTRATIVE PROCEEDING
FILE NO. 3-6150

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
HARBINE FINANCIAL SERVICE	:
(801-11538)	:
JESSE ROSENBLUM	:
	:

INITIAL DECISION

Washington, D.C.
April 11, 1983

Warren E. Blair
Chief Administrative Law Judge

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APPEARANCES: Charles E. Padgett and Leonard F. Wallace, of the New York Regional Office of the Commission, for the Division of Enforcement.

William S. Robertson, III and Judith M. Barzilay, of Williams, Caliri, Miller & Otley, for Harbine Financial Service and Jesse Rosenblum.

BEFORE: Warren E. Blair, Chief Administrative Law Judge.

These public proceedings were instituted by a Commission order dated July 8, 1982 which was superseded on July 29, 1982 by a Corrected Order for Public Proceedings ("Order") issued pursuant to Sections 203(e) and (f) of the Investment Advisers Act of 1940 ("Advisers Act"). The Order directed a public hearing be held to determine whether respondents Harbine Financial Service ("Harbine") and Jesse Rosenblum ("Rosenblum") had engaged in the misconduct charged by the Division of Enforcement ("Division") and what, if any, remedial action would be appropriate in the public interest.

In substance, the Division alleged that Harbine, wilfully aided and abetted by Rosenblum, had wilfully violated Sections 204 and 207 of the Advisers Act and Rule 204-1(b) thereunder by failing to file with the Commission certain amendments to Harbine's Form ADV, and wilfully violated Section 206(1), (2) and (4) of the Advisers Act and Rule 206(4)-1 thereunder by failing to disclose certain material facts to clients and prospective clients and by disseminating to those persons advertising materials which contained untrue statements or omitted statements of material facts concerning Harbine and its experience and investment advice. The Division further alleged that Harbine, wilfully aided and abetted by Rosenblum, wilfully violated Section 207 of the Advisers Act by filing an amended Form ADV in July, 1979 which contained misstatements and omissions of material facts, and also alleged that Rosenblum, doing business as Harbine, was enjoined in August, 1980 by the Superior Court

of the State of New Jersey from acting as an investment adviser until registered in accordance with New Jersey laws.

Rosenblum appeared pro se on his own behalf and for Harbine at the pre-hearing conference held August 19, 1982. At the hearings held on September 23, 1982, and January 14, 1983 respondents were represented by counsel. As part of the post-hearing procedures, successive filings of proposed findings, conclusions, and supporting briefs were specified. Timely filings thereof were made by the parties.

The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon observation of the witnesses. 1/

RESPONDENTS

Harbine became registered under the Advisers Act as a sole proprietorship in May, 1976. Its principal place of business is located in Closter, New Jersey.

Rosenblum, Harbine's sole proprietor, represents himself to be manager of Harbine and is the only person associated with registrant in any capacity.

According to Rosenblum, Harbine presently has 25 clients,

1/ In relying upon Collins Securities Corp. v. S.E.C., 562 F.2d 820 (D.C. Cir. 1977) as authority for requiring a clear-and-convincing standard of proof, respondents have overlooked the decision of the United States Supreme Court in Steadman v. S.E.C., 450 U.S. 91 (1981) in which that standard was specifically rejected and the preponderance-of-the-evidence standard of proof found appropriate.

3 of whom are public clients in the sense that they are neither personal friends nor relatives of Rosenblum. Harbine currently has $400,000 to $500,000 under management.

NEW JERSEY ACTIONS

Cease and Desist Order

On June 28, 1977 the Bureau of Securities of the State of New Jersey ("Bureau") entered a Cease and Desist Order under which Jesse Rosenblum, doing business as Harbine Financial Service, was ordered to cease and desist from committing certain acts and practices, including:

(1) Doing business as an investment advisor while not registered in violation of N.J.S.A. 49:3-56(a) and (c);

(2) Using misleading advertising in violation of N.J.S.A. 49:3-52(b); and

(3) Entering into or continuing to use investment advisory agreements in violation of N.J.S.A. 49:3-53(b)(1). 2/

The issuance of the Cease and Desist Order was followed by a hearing at which Rosenblum appeared pro se, and entry on April 14, 1978 of a Final Order to Cease and Desist ("Final Order"). The Final Order made the June 28, 1977 Cease and Desist Order final in all respects and assessed a penalty of $2,000.

In deciding the matter the Bureau entered findings that Rosenblum, doing business as Harbine, was an investment adviser

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2/ Division Exhibit 5.

within the meaning of New Jersey laws and that neither Rosenblum nor Harbine was registered with the Bureau as an investment adviser. The Bureau further found:

12. The advertising material distributed by Mr. Rosenblum contained the following misleading statements:

a. "We [Harbine] are an action organization..."

b. "In 1949 [Mr. Rosenblum] started investing in stocks and is now recognized as a leading figure in securities portfolio management."

c. "OVER 26 YEARS OF INVESTING EXPERIENCE."

13. The advertising material omitted to state the following material facts:

a. Harbine is a sole proprietorship with only one active individual.

b. Mr. Rosenblum is not recognized as "a leading figure in securities portfolio management" by anyone.

c. The "26 years investing experience" was as a part-time private investor and as a manager of family accounts until 1962 when one "non-family" account was added. 3/

Injunctive Action

Subsequent to the issuance of its Final Order, the Bureau filed an injunctive action in the Superior Court of New Jersey, Chancery Division - Bergen County against Rosenblum, doing business as Harbine. 4/ After a hearing at which

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3/ Division Exhibit 6.

4/ Bureau of Securities v. Rosenblum, No. C-4206-79E, (Super. Ct. Ch. Div. N.J. August 25, 1980).

Rosenblum appeared through counsel, the Court issued an injunctive order on August 25, 1980, in which findings were made that Rosenblum had been acting as an investment adviser and was not registered with the Bureau, in violation of New Jersey law. The Court ordered that:

> 1. Until such time as Defendant Jesse Rosenblum is properly registered with the New Jersey Bureau of Securities as an investment advisor, Defendant Jesse Rosenblum, individually, and doing business as Harbine Financial Service, is hereby enjoined from engaging in or committing any of the following acts or practices:
>
> (a) doing business as an investment advisor. This injunction shall be construed to mean that Jesse Rosenblum is hereby enjoined from accepting or demanding money, or any other thing of value, in exchange for the provision of investment advice, or the performance of any functions incident to the provision of investment advice. These incidental functions include, but are not limited to, the following: bank account maintenance; bookkeeping; United States tax summary; consultations; financial seminars; newsletter; or information digest.
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> (b) placing or causing to be placed in any newspaper, periodical, magazine, circular or pamphlet regularly circulating within the State of New Jersey, any advertisements for Harbine Financial Service that relate to the acts and practices which are enjoined by paragraph number 1(a) of the within Order; and
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> (c) forwarding, or causing to be forwarded, to any person literature or written material concerning Harbine Financial Service that relate to the acts and practices which are enjoined by paragraph number 1(a) of the within Order. 5/

5/ Division Exhibit 12.

VIOLATIONS OF ADVISERS ACT

Failure to Amend Form ADV

Rule 204-1(b), [6/] promulgated by the Commission pursuant to Section 204 of the Advisers Act, requires a registered investment adviser to promptly file an amendment on Form ADV correcting any information contained in its "application for registration or in any amendment thereto" which becomes inaccurate. The Division alleged and the record reflects that amendments to Form ADV required by Rule 204-1(b) were not promptly filed.

Although Harbine filed an amendment to Form ADV on July 27, 1979 which purported to furnish details regarding the Bureau's action, the information furnished under Schedule D, VII with respect to proceedings in which Harbine had been involved omits reference to the existence of the Bureau's initial Cease and Desist Order and to its Final Order, reflecting only that Harbine had filed an appeal from the "final order of the Chief of the Bureau of Securities" and that a decision had been rendered March 2, 1979. No details concerning the nature of the Bureau's initial or Final Order, the assessment of a monetary penalty of $2,000, or of the outcome of Harbine's appeal are included. Moreover, the amendment filed by Harbine nearly two years after the Bureau's initial Cease and Desist Order and over fifteen months after entry of the Final Order

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6/ 17 CFR 275.204-1(b).

to Cease and Desist was untimely, and cannot be accepted as compliance with the prompt filing requirement of Rule 204-1(b) [7]

Additionally, as admitted in respondents' answer, [8] Harbine failed to file an amendment to Form ADV to disclose the existence of the injunction entered on August 25, 1980 against Rosenblum, doing business as Harbine, by the Superior Court of New Jersey. Harbine's failure to file that amendment constituted a further wilful violation of Rule 204-1(b) by Harbine, wilfully aided and abetted by Rosenblum.

Respondents argue that Form ADV is a "complex document, difficult for most laymen to understand," [9] and then, conceding that Harbine did not file an amended Form ADV disclosing the Bureau's Cease and Desist Order, refer to disclosure of that action on several occasions in correspondence with the Commission. The record reflects, as contended by respondents, that Harbine sent a letter dated April 20, 1978 to the Division of Market Regulation in which the Bureau's initial action of June 28, 1977 and its final order of April 14, 1978 were referred to, and addressed a letter dated July 25, 1978 to the then director of the Division of Investment Management regarding the Cease and Desist Order. In due course Harbine received replies to those letters. Respondents also call attention to a New York Regional Office

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7/ Cf. Marketlines, Inc., 43 SEC 267, 271.

8/ Answer to Corrected Order for Public Proceedings (September 23, 1982), ¶5.

9/ Respondent's Proposed Findings of Fact and Conclusions of Law and Memorandum in Support Thereof ("Respondents' Memorandum"), at 45.

Investment Advisers Examination Report, dated July 18, 1978 in which reference is made to the Cease and Desist Order. With respect to the failure to disclose the New Jersey injunction, respondents claim to have been confused regarding the difference between the Bureau's proceedings at the administrative level and at the judicial level and to have believed the injunctive action "merely an extension of the administrative proceedings which had resulted in the Final Cease and Desist Order...." 10/

Not one of respondents' arguments is persuasive. There is no evidence in the record or otherwise suggesting that Form ADV is so complex or causes such difficulty for investment advisers and those seeking to register as investment advisers that they cannot understand what information is required to be filed. Moreover, it must be assumed that if Rosenblum found Form ADV difficult to comprehend he would have, as he did in connection with the New Jersey injunctive action, engaged legal counsel. Nor does the fact that certain Commission staff members knew of the existence of the Bureau's action excuse the violation. Access to information required to be disclosed in Form ADV pursuant to Rule 204-1(b) must be possible by reference to an investment adviser's registration file. 11/

10/ Id., 46-47.

11/ Cf. Marketlines, Inc. v. S.E.C., 384 F.2d 264, 267 (2d Cir. 1967), cert. denied, 390 U.S. 947 (1968); Wendell Maro Weston, 30 SEC 296, 311-12 (1949).

As to any confusion in Rosenblum's mind regarding the separate identities of the New Jersey administrative and judicial actions, it is implausible that Rosenblum did not recognize the distinction, more so because counsel was representing him before the New Jersey court. Further, no ambiguity is found in the New Jersey court's decree; both the entitlement and the text of that order clearly reflect that an injunction had been issued against Rosenblum, doing business as Harbine, prohibiting his engaging in certain activities as an investment adviser.

Accordingly, it is concluded that Harbine wilfully violated, and Rosenblum wilfully aided and abetted violations of Section 204 of the Advisers Act and Rule 204-1(b) thereunder.

Fraud Violations

Section 206(1) and (2) of the Advisers Act [12/]

The Division charges and the record establishes that subsequent to August 25, 1980 Harbine made use of the means

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12/ Sec. 206. It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly --

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

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

and instrumentalities of interstate commerce and mails to disseminate false and misleading advertising brochures to its clients and prospective clients. As contended by the Division, those brochures should have and did not disclose that Rosenblum, doing business as Harbine, had been enjoined on August 25, 1980 by the Superior Court of New Jersey from doing business as an investment adviser. Without that disclosure other representations in the brochures concerning Harbine's operations and Rosenblum's business background became materially deficient, and solicitation of clients by means of a brochure which suppressed the fact of that injunction constituted a wilful violation of Section 206(1) and (2). 13/

Respondents take the position that a failure to disclose the New Jersey injunction was not an omission to state a material fact. The premises advanced are that the terms of the injunction are operative only until respondents become registered investment advisers in New Jersey, that Rosenblum was not registered because he did not pass a New Jersey examination, and that since the Commission does not recognize the validity of any examination as a precondition to registration under the Advisers Act, there was no omission to state a material fact within the purview of Section 206(1) and (2).

13/ Cf. S.E.C. v. Capital Gains Bureau, 375 U.S. 180, 200 (1963).

Respondents seriously understate the importance of the injunction and the need for disclosure. Not only does the injunction in and of itself constitute a basis for revocation of Harbine's registration,[14] it establishes that New Jersey authorities found it necessary to subject Harbine to an enforcement proceeding and that a New Jersey court was required to exercise its power to ensure compliance with New Jersey law. It is manifest that a person seeking investment advice would have a strong interest in knowing whether the adviser on whom he will rely has complied with statutes and regulations enacted for the protection of the investing public. Since the appropriate standard by which to gauge materiality is whether a reasonable man would attach importance in determining his choice of action,[15] respondents' silence regarding the injunction constitutes an omission of a material fact needed by prospective clients to evaluate the character and qualifications of Rosenblum before deciding whether to rely upon Harbine for investment advice.[16] Under the circumstances, the fact that the Commission has not seen fit to require an examination of persons applying for registration under the Advisers Act is completely irrelevant.

14/ Section 203 (e)(3).

15/ Cf. S.E.C. v. Texas Gulf Sulphur, 401 F.2d 833, 849 (1968), cert. denied, 394 U.S. 976 (1969); S.E.C. v. Blavin, CCH Fed. Sec. L. Rep. ¶99,126, at 95,423 and 95,427 (E.D. Mich. March 1, 1983).

16/ Cf. Marketlines, Inc. v. S.E.C., supra.

Accordingly, it is concluded that Harbine wilfully violated Section 206(1) and (2) of the Advisers Act. Inasmuch as Rosenblum admitted sole responsibility for the preparation of the false and misleading brochures, it is concluded that he wilfully aided and abetted Harbine's violations of Section 206(1) and (2).[17/]

Section 206(4) of the Advisers Act and Rule 206(4)-1

The Division also contends that violations of Section 206(4)[18/] of the Advisers Act and Rule 206(4)-1 thereunder[19/] were committed by the "failure to disclose

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17/ The Division also argues that "Rosenblum's failure to make full and accurate disclosure of the Cease and Desist Order in his advertising brochure constitutes a separate and distinct fraud upon his clients and prospective clients." Division's Memorandum, at 28, n. 9. Because the Order does not contain an allegation by the Division that wilful violations of Section 206(1) and (2) were committed by such omission, no consideration has been given to that contention.

18/ In pertinent part, Section 206 of the Advisers Act provides:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly --
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> . . . .
>
> (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive or manipulative.

19/ Under Rule 206(4)-1, advertisements by investment advisers which contain any untrue statement of a material fact or which are otherwise false and misleading fall within the purview of Section 206(4).

material facts concerning the performance history and experience of Harbine as an investment adviser, the projected appreciation of investments recommended, and the risks associated with investments recommended..." [20/] in brochures used by Harbine in attempts to attract clientele. Specifically, the Division complains about the latest brochure's claims to a 32-year track record, a 13% per annum growth, and the fact that the "tone and content" of that brochure are deceptive and misleading.

When Harbine's latest brochure, [21/] identified by a 1982 copyright mark, those used by Harbine in 1980 and 1981, [22/] and the earlier annual brochures used since 1976 are considered in the light of the record as a whole, it is beyond peradventure that the Division has sustained its burden of proof. Accordingly it is concluded that Harbine, wilfully aided and abetted by Rosenblum, wilfully violated Section 206(4) of the Advisers Act and Rule 206(4)-1 thereunder.

The claim of a 32-year track record and claims of 30 and 31-year track records in the two preceding years are accorded considerable prominence on the covers of Harbine's brochures, conveying an immediate impression that Harbine has been in existence and operating as an investment adviser since 1949. This initial impression is carefully nurtured by including a

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20/ Division's Memorandum, at 14.

21/ Division Exhibit 3.

22/ Division Exhibits 1 and 2.

bar graph in the brochure depicting in 5-year blocks since 1949 the purported growth of a $10,000 investment. Placed conspicuously on the middle of the chart in large heavy type is the legend:

> HFS WOULD LIKE TO FOCUS ON YOUR FUTURE
> MAY WE ARRANGE SOME BLOCKS FOR YOU?

Slightly below that legend appears the statement in lighter type:

> This chart shows the growth of a $10,000 cash investment based on the actual net earnings on capital of all stock portfolios under HFS supervision.

In fact, Harbine did not exist as an investment adviser in 1949, and did not have an outside client until 1962. Further, by his own admission, Rosenblum did not have a client who invested $10,000 with him in 1949.[23/]

Rosenblum's own testimony was that the first two years of the track record involved buying and selling securities for his small family account carried in his father's name.[24/] However, it appears that Rosenblum's recollection was faulty, as evidenced by the findings in the Bureau's Final Order to Cease and Desist that Rosenblum was a manager of family accounts until 1962 and that it was not until then that one "non-family account was added."[25/] A comparison of actuality to the brochures' portrayal of Harbine's

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23/ In 1950, Rosenblum was a minor aged 18.

24/ The record is silent with respect to the value of the holdings of the family account.

25/ Rule 803(8) of the Federal Rules of Evidence creates an exception to the hearsay rule for factual findings from an investigation made pursuant to authority granted by law. For discussion of the scope and requisites of Rule 803(8), see Zenith Radio Corp. v. Matsushita Elec. Ind. Co., 505 F. Supp. 1125, 1143 (E.D. Pa. 1980).

investment advisory experience can lead only to the conclusion that Harbine's representations reach far beyond mere puffery and into the realm of material misstatements.

Similarly, the cover-page legends claiming 12% and 13% per annum compounded growth are deceptive when read in context because of the implications left with the reader that Harbine achieved those results as an investment adviser over 32 and 33-year periods and will continue to do so. Further, although Rosenblum has brief disclaimers in Harbine's brochures about the certainty of accomplishing past performance, the references are buried amidst offsetting prose designed to cause prospective clients to ignore those disclaimers. Rosenblum ends his false depiction of the risks and profits entailed in Harbine's advisory service by devoting the entire closing page to the following emphasized points:

> THE ONLY FINANCIAL SERVICE TO OFFER:
>
> HIGH YIELDS
>
> SAFETY
>
> CONVENIENCE
>
> EXPERT MANAGEMENT
>
> PERSONAL STEWARDSHIP
>
> DOUBLING YOUR MONEY EVERY 6 YEARS CAN ACHIEVE FINANCIAL PEACE OF MIND

Most offending in the brochures is what the Division has called the"tone and content" of the way in which Harbine's performance history and investment history are described. Rosenblum adroitly prepared Harbine's presentation to mislead the reader into believing that Harbine was much more than what it really was, a sole proprietorship without employees whose owner then was a part-time investment adviser employed full time during ordinary business hours as a buyer of spare parts for heavy machinery. At the outset of the 1982 brochure Rosenblum refers to himself as "the manager of HFS," and thereafter uses the plural of nouns and pronouns in describing Harbine's services and activities. For example, from the latest brochure: 26/

p. 2: Our first client account was accepted in 1962.

p. 3: We do our own exclusive stock research and analysis....

p. 3: Our investigatory findings are confidential and never published in market letters or tip sheets.

p. 3: We have developed proprietary indicators and charts....

p. 4: We can effect a transfer of funds from the Broker....

p. 5: As personal managers, HFS maintains a unique fiduciary relationship with its clients....

p. 5: HFS provides in depth management, thoroughness, and business knowledgeability in guiding investment decisions.

p. 6: From our extensive experience, very few companies go out of business....

26/ Division Exhibit 3.

While these illustrative excerpts suffice to indicate the tenor of Rosenblum's writing, only a reading of the entire brochure brings into focus the illusory Potemkin village he created to delude prospective clients. That Harbine has had little success in accomplishing that purpose in no wise mitigates the blatant deception Rosenblum foisted upon the investing public nor his deliberate disregard of the standards for advertising promulgated by the Commission.

Respondents' attempt to justify the brochures' misleading presentations of Harbine's performance record by claiming to have followed "the lead of several large advisers" is of no avail. The issue here is not the adequacy of the brochures or advertisements of other advisers; the issue is whether Harbine's brochures or advertisements meet the required standards. Moreover, assuming arguendo that the advertising materials of other advisers were as deficient as Harbine's, there would be no reason to forego action against respondents on that account. 27/

Similarly, respondents' use of the 13% appreciation figure cannot be defended. The issue is not, contrary to respondents' suggestion, whether Rosenblum accurately kept track of capital gains and losses and unrealized appreciation over the years, but whether that representation has been

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27/ Cf. Augion-Unipolar Corporation, 44 SEC 613, 615, n. 6 (1971), and cases there cited.

fairly and accurately portrayed in Harbine's solicitations. As noted before, the track record presented is fatally deficient.

Respondents vainly attempt to excuse their deficiencies by asserting their willingness to make changes in Harbine's publications whenever Rosenblum could ascertain what was required of him. That approach is tantamount to shifting the burden for compliance with the anti-fraud provisions of the Advisers Act from respondents to the staff of the Commission. This respondents cannot do. The burden of compliance is upon those doing business as investment advisers and the responsibility for carrying that burden cannot be evaded by purported reliance upon the Commission staff.[28/] But were willingness to accede to the Division's recommended changes to be accepted even as mitigation, it would avail respondents nothing, for the record belies the claim. Rosenblum's testimony makes abundantly clear throughout that the only staff recommendations he was willing to accept were those with which he had no quarrel. That attitude is well-evidenced and his views well-summarized by the following responses appearing toward the conclusion of his testimony:[29/]

> Q: Are you willing to confer with the S.E.C. or through me to revise this literature, provided we can work out some specific language that is objected to and attempt to clarify that?

28/ Cf. Harry L. Whitmer, Jr., Securities Exchange Act Release No. 18734 (May 12, 1982), 25 SEC Docket 456, 459; Apex Financial Corporation, Securities Exchange Act Release No. 16749 (April 16, 1980), 19 SEC Docket 1221, 1222.

29/ Tr. 252-53.

A. Yes, no problem.

Q. You're not adamantly opposed to adhering or to changing this?

A. No. I'll do anything that's in the investors' interests, because that's what I wanted to do in the very beginning.

Q. And all along, you've merely been trying to get clarification of the manner in which to make these changes?

A. Right. Well, basically, as I stated, most of the things that were brought up were contrary to the investors' benefit. In other words, they want me to do something that's contrary to my moral obligation, not only to myself, but to my clients.

MR. ROBERTSON: That's all, Your Honor.

. . . .

Section 207 of the Advisers Act

Under the provisions of Section 207 of the Advisers Act it is unlawful for any person wilfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under Section 203 or 204, or wilfully to omit to state in any such application or report any material fact which is required to be stated therein. By virtue of Rule 204-1(d), [30/] a Form ADV amendment is a "report" within the meaning of Section 207.

As found earlier herein, the amendment to Form ADV filed by Harbine on July 27, 1979 failed to disclose details concerning

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30/ 17 CFR 275.204-1(d).

the Bureau's Cease and Desist Order as required by the provisions of Section 204 of the Advisers Act. Since those details were material to an understanding of the nature of the Bureau's action, it follows that Harbine omitted to state material facts in a report filed with the Commission. Accordingly, it is concluded that Harbine, wilfully aided and abetted by Rosenblum, wilfully violated Section 207 of the Advisers Act.

OTHER MATTERS

Due Process

Respondents complain that due process was denied by reason of (1) a denial of their motion for more definite statement prior to the commencement of the hearing, (2) the admission in evidence of copies of four New York Regional Office reports relating to the examinations of Harbine in 1976, 1978, 1980 and 1982, and (3) the denial of respondents' motion to review Commission files relating to Harbine. In particular, they rely upon Collins Securities Corp. v. S.E.C., supra, as authority for the proposition that a clear-and-convincing standard of proof must be adhered to in deciding the issues presented here and, using that decision for their foundation, argue:

> It is entirely possible that one or two small evidentiary factors exist in the SEC files on Respondent which might be exculpatory or helpful to Respondent's position. Such factors might on balance make a difference under Collins standard in the overall mix relating to findings of fact, conclusions of law, and/or remedial action (if any) against Respondent.

> As a result of these serious due process issues, no sanctions should be imposed upon Respondent. 31/

Respondents' complaint is wholly devoid of merit. As reflected in the transcript of the hearing, a considerable fleshing out of the Division's allegations in the Order was provided at the outset of the hearing in response to respondents' motion for a more definite statement. What were denied respondents were evidentiary details to which they were not entitled. 32/

The four investment adviser examination reports were admitted into evidence to the extent that those reports as business records might establish relevant facts covered therein. 33/ As stated on the record, the opinions of the authors of those reports, including whether they believed violations had been committed by respondents, were not to be considered. In keeping with the rulings made at the time the reports were admitted, no consideration has been given to other than factual matters

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31/ Respondents' Memorandum, at 50.

32/ M.J. Reiter Co., 39 SEC 484 (1959); Keith Richard Securities Corp., 39 SEC 240 (1958).

33/ It is also noted that Rule 803(8) of the Federal Rules of Evidence provides an exception from the hearsay rule for public records and reports and that the four reports in question are within the intent of that exception. See Zenith Radio Corp. v. Matsushita Elec. Ind. Co., supra.

in those reports in reaching findings and conclusions in this decision.

As indicated by their argument on this question, respondents' insistence upon an opportunity to review the Commission's files relating to respondents is predicated upon sheer conjecture. The Division has denied possession of exculpatory material and respondents have pointed to nothing that would indicate the contrary.[34/] But not content with the Division's denial, they persist in a demand equivalent in nature to a motion for discovery of the Commission's files.

In United States v. Agurs,[35/] on review of a second-degree murder conviction, the United States Supreme Court in its consideration of the question of lack of due process because of the prosecutor's non-disclosure of certain information, observed:

> If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.

34/ Respondents argue that introduction of a letter dated August 15, 1980 from respondents' counsel to a staff member of the New York Regional Office (Respondents' Exhibit NN) was notice of the New Jersey injunctive action and constituted exculpatory material sufficient to overcome the Division's denial and to warrant opening of the Commission's files. But as observed earlier, the knowledge of the Commission's staff cannot excuse respondents' failure to file an amended Form ADV, nor does it excuse omission of information regarding that injunction from Harbine's advertising material. It follows that the letter in question does not have an exculpatory impact.

35/ 427 U.S. 97 (1976)

> Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much. 36/

If the Constitution does not require that a prosecutor's files be opened to the defense in order to afford due process where a person's liberty is at stake, there can be no denial of due process in refusing access to the Commission's files in these proceedings.

Wilfulness

Respondents attempt to overcome the Hughes 37/ and Tager 38/ cases cited by the Division in support of its argument that respondents' violations were wilful, contending that the cited cases were taken out of context and involved quite different facts. Specifically, respondents refer to nondisclosure of material facts and to the resulting financial loss to investors in each instance as significant differences.

Respondents clearly cannot prevail. Financial loss was not a factor taken into consideration in either the Hughes or Tager cases on the question of the meaning of wilfulness. Nor was the fact that information was or was not disclosed relevant in that context. The Hughes and Tager decisions reached the "wilfulness" aspect of the controversies only after conclusions were reached that the records supported the Commission's findings

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36/ Id. at 109.

37/ Hughes v. S.E.C., 174 F.2d 969 (D.C. Cir. 1949).

38/ Tager v. S.E.C., 344 F.2d 5 (2d Cir. 1965).

of violations. Quite clearly, the Hughes and Tager courts rejected the notion that "wilful" for the purposes of the Exchange Act and Advisers Act means anything more than "the person charged with the duty knows what he is doing" [39/] or "intentionally committing the act which constitutes the violation." [40/] Respondents' violations were unquestionably "wilful" within the meaning attributed to that term in Hughes and Tager.

First Amendment

Respondents contend that a revocation of Harbine's registration as an investment adviser would be a "clear violation" of rights guaranteed under the First Amendment of the United States Constitution. For support, respondents rely upon S.E.C. v. Lowe, [41/] in which the court declined to enjoin the defendant from publication of impersonal investment advisory material.

Harbine does not publish a newsletter, but respondents seek to come within the ambit of the Lowe decision by reference to the criteria governing restraint of commercial speech enunciated in Central Hudson Gas & Electric v. Public Service Commission [42/] which were utilized in Lowe. Respondents

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39/ 174 F.2d at 977.

40/ 344 F.2d at 8.

41/ S.E.C. v. Lowe, CCH Fed. Sec. L. Rep. ¶99,075 (E.D.N.Y. February 1, 1983).

42/ 447 U.S. 557 (1980).

also suggest that because Harbine does not charge for its investment advice, commercial speech is not at issue.

Extended consideration of the First Amendment and its implications insofar as respondents are concerned is not necessary. As Lowe went to some pains to point out:

> The SEC has the authority to deny or revoke the registration of broker-dealers, 15 U.S.C. §78o(b) (1976), and it is uncontested that the Commission has similar authority under Section 203 of the Advisers Act, 15 U.S.C. §80b-3 (1976), with respect to investment advisers who render personal investment advice. The direct contact that these professionals have with clients and the control they may exercise over client funds justify strong sanctions in the way of prior restraints against those among them who have been guilty of misconduct. 43/

The limitation of the First Amendment analysis in Lowe to a situation involving impersonal investment advice was specifically noted with approval in S.E.C. v. Blavin. 44/

Inasmuch as Harbine represents in its advertising material that it will become a client's "personal manager, by your signing a standard securities industry form called a limited power of attorney," 45/ and in fact carries on business that way, respondents cannot avoid the regulatory restraints which have been found appropriate where personal advisory services are offered and furnished by an investment adviser.

43/ S.E.C. v. Lowe, supra, note 41, at 91,105-06.

44/ Supra, note 15, at 95,422.

45/ Division Exhibit 3, at 4.

Whether Harbine has, in keeping with the terms of the New Jersey injunction, stopped charging advisory fees is immaterial inasmuch as new clients for the personal advisory services offered by Harbine are still being sought through advertisements in the Wall Street Journal and The New York Times. Moreover, the probable temporary nature of Harbine's billing methods is evident from Rosenblum's claim that he at no time gave up the right to go into court to lift the restraint against charging a fee for Harbine's advisory services. 46/

PUBLIC INTEREST

Having found that Rosenblum, doing business as Harbine, was permanently enjoined on August 25, 1980 by the Superior Court of New Jersey from engaging in business as as investment adviser, 47/ and that Harbine, wilfully aided and abetted by Rosenblum, wilfully violated regulatory and anti-fraud provisions of the Advisers Act and rules thereunder, it is necessary to consider the remedial action appropriate in the public interest.

The Division recommends revocation of Harbine's registration as an investment adviser and a bar against Rosenblum's association with an investment adviser. In support of those recommendations, the Division points to the use of the deceptive advertising for over six years, respondents' inability to recognize or appreciate the nature of their misconduct, and the failure for over three years to amend Harbine's Form ADV in

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46/ Tr. 346.

47/ Bureau of Securities v. Rosenblum, supra, note 4.

compliance with the requirements of the Advisers Act.

Respondents' position is that no sanction is appropriate. They argue that the Division has not met its burden of clear-and-convincing proof that respondents are guilty of fraudulent, deceptive, or misleading advertising, that they continually sought S.E.C. comment on specific literature and expressed willingness to alter it to conform to S.E.C. suggestions, and are willing to make all appropriate amendment to Harbine's Form ADV.

Upon careful consideration of the record and contentions of the parties, it is concluded that in the public interest the registration of Harbine should be revoked and that Rosenblum should be barred from association with an investment adviser. While not unmindful of the harshness of the remedial action, it is manifest from the record, including the public files relating to Harbine's registration, that lesser sanctions would not alleviate the adminstrative burden placed upon the Commission's resources by respondents' activities since Harbine's registration in 1976, nor adequately protect the investing public.

Were respondents' protestations of responsiveness to criticism by the Commission's staff and willingness to alter Harbine's literature accordingly credible, lesser sanctions could be considered. However, as argued by the Division, the inferences to be drawn from Rosenblum's past actions, his attitude toward

regulatory authority, and his testimony strongly suggest that respondents will not comply with rules applicable to investment advisers nor refrain from continuing to commit frauds similar to those in which they have engaged for over six years.

It is beyond question from a review of Harbine's Form ADV and of the testimony and documentary evidence introduced in these proceedings that the recalcitrance of Rosenblum and his outright refusal at times to accede to regulatory authority is traceable to his abiding conviction that applicable laws and their implementation are so defective or meaningless he will not accord them recognition except as they may happen to meet his personal approval. That attitude permeates not only Harbine's literature, which Rosenblum has stated he would correct only to the extent that the Commission staff's suggestions were not contrary to his "moral obligation," but taints his approach to compliance with filing Form ADV amendments which he felt were unnecessary because the Commission had otherwise received the correcting information. Obviously respondents cannot or will not recognize the importance of the application for registration which the Commission has declared "is a basic and vital part in our administration of the Act, and it is essential in the public interest that the information required by the application form be supplied completely and accurately." 48/

In brief, the extent and character of the wilful violations of the Advisers Act and the activities which made

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48/ Justin Stone Associates, Inc., 41 S.E.C. 717, 723 (1963).

necessary the actions of New Jersey regulatory and judicial authorities establish that respondents do not meet and are not likely in the future to meet the high standards that are requisite for an investment adviser or an associate of an investment adviser [49] in order to be a fiduciary in whom clients could put their trust.[50]

ORDER

Accordingly, IT IS ORDERED that the registration of Harbine Financial Service as an investment adviser is revoked; and

FURTHER ORDERED that Jesse Rosenblum is barred from association with an investment adviser.

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

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

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49/ Joseph P. D'Angelo, 11 SEC Docket 1263 (1976).

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

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.

Warren E. Blair
Chief Administrative Law Judge

Washington, D.C.
April 11, 1983