ADMINISTRATIVE PROCEEDING
FILE NO. 3-6985

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
RICHARD E. MOYER T. MARSHALL SWARTWOOD SWARTWOOD, HESSE, INC.	:

INITIAL DECISION

Washington, D.C.
March 6, 1989

Brenda P. Murray
Administrative Law Judge

ADMINISTRATIVE PROCEEDING
FILE NO. 3-6985

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
RICHARD E. MOYER T. MARSHALL SWARTWOOD SWARTWOOD, HESSE, INC.	:	INITIAL DECISION

APPEARANCES: David E. Dearing and Thomas V. Sjoblom for the Division of Enforcement, Securities and Exchange Commission.

Stuart M. Gerson of Epstein Becker & Green P.C., for Richard E. Moyer.

Ira A. Finkelstein of Tenzer, Greenblatt, Fallon & Kaplan for T. Marshall Swartwood and Swartwood, Hesse, Inc.

BEFORE: Brenda P. Murray, Administrative Law Judge.

I. Facts

This Commission's March 31, 1988 order details allegations made by the Commission's Division of Enforcement (Division) that (1) Richard E. Moyer (Moyer) willfully aided and abetted violations of Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-6 from on or about October 13, 1983 to on or about October 20, 1983 and that he willfully violated Section 10(b) and Rule 10b-5 during the period November 1, 1983 through December 6,1983, and (2) Swartwood, Hesse, Inc. (Swartwood Hesse) and T. Marshall Swartwood (Swartwood) failed reasonably to supervise Moyer as specified in Sections 15(b)(4)(E) and 15(b)(6) of the Exchange Act in the period November 1, 1983 through December 6, 1983.

T. Marshall Swartwood and Robert Hesse organized Swartwood Hesse, a registered broker-dealer with a principal office in New York City, in 1981. The firm was incorporated in 1983. Mr. Swartwood and Mr. Hesse were firm principals. Mr. Swartwood was President and Mr. Hesse was Executive Vice-President. They each held about 40 percent of the firm's shares. Mr. Swartwood specialized in the corporate finance and investment banking side of the business, and Mr. Hesse's expertise was in trading and sales. Commission Form BD-Application for Broker-Dealer Registration filed by Swartwood Hesse lists Mr. Swartwood as the person to receive and disseminate compliance information. In 1983 Swartwood Hesse employed a total of 15 or 16 people including one trader and

six to eight registered representatives. Its primary source of revenue was from trading or the sale of securities. Underwriting accounted for 10 to 15 percent of total income. Mr. Swartwood was an extremely conservative principal and the Swartwood Hesse trader understood that inventory in the firm's proprietary trading account was not to exceed 5,000 to 10,000 shares or a value of $25,000 (Tr. 1319, 1567).

Swartwood Hesse acted as the sole firm commitment underwriter for the initial public offering (IPO) of Software Services of America, Inc. (Software) that went effective October 12, 1983. It estimates that it made a quarter of a maillion dollars on the deal (Tr. 1788). The IPO was a unit offering priced at $5.50 per unit. Each of the offering's 400,000 units, plus 60,000 units subject to an overallotment option, consisted of a share of common stock and a warrant good if exercised before October 11, 1986 to purchase one-half share of common stock. The IPO at issue here followed a decision by Swartwood Hesse in August 1983 not to go forward with a proposed 600,000 share offering at $6.50 per share because of market conditions.

During the period October 13 through December 6, 1983, Moyer was a senior vice president, a minority shareholder, and a registered representative with Swartwood Hesse. Moyer did the due diligence work leading up to the Software IPO, he assisted in drafting and reviewing the Software registration statements, he signed the letter of intent that Swartwood

Hesse issued to Software, and he sold 159,950 units or 66 percent of Swartwood Hesse's total unit sales. Moyer received $24,000 as his share of the underwriter's fee.

Mr. Swartwood viewed Software as Moyer's "deal" (Tr. 1563). Moyer had primary corporate responsibility for Software, he took an active role in the aftermarket in Software, and he was Swartwood Hesse's liaison with the street for the most part. In his capacity as registered representative Moyer filled out and presented the Swartwood Hesse trader with order tickets for Software transactions. Moyer bought and sold Software common stock in at least 28 accounts for which he was registered representative at Swartwood Hesse and in two accounts he opened at M.W. Jenkins, a Texas brokerage firm which was part of the selling group. Moyer also traded in accounts in the name of Vivian Andrietta at M.W. Jenkins and Bear Stearns. Moyer claims that he conducted Software transactions in these accounts pursuant to oral authority from the person whose name was on the account to purchase shares within specified price ranges; he did not have written authorization for these transactions. Moyer knew that Sartwood Hesse did not allow discretionary accounts, i.e. where action was taken in the account without consultation or instructions from the customer (Exhibit 290, Paragraphs 242, 243; Tr. 1573-74). Mr. Swartwood does not consider a situation where a registered representative has authority to purchase shares within a specified price range

to be a discretionary account (Tr. 1685). Moyer did not check a block on the new account form to indicate that he, the registered representative, had discretionary trading authority. The rules of the National Association of Securities Dealers, Inc. (NASD) require that members or registered representatives have prior written authorization before exercising discretionary power in a customer's account (Rules of Fair Practice, Article III, Section 15(b)).

Moyer did not inform the principals at Swartwood Hesse that he opened accounts at M.W. Jenkins for his wife and daughter, and that he treated these accounts as his own. 1/ According to Mr. Swartwood, in 1983 Swartwood Hesse prohibited a registered representative from opening an individual or spouse account at another broker-dealer (Tr. 1617-18), and the rules required that Swartwood Hesse receive copies of confirmations where its employees had accounts with other broker-dealers so it could be aware of the employee's trading activities (Tr. 1568-69). Swartwood Hesse did not receive confirmations about transactions in the accounts Moyer established at M.W. Jenkins.

In addition to all these accounts, which traded in Software, Moyer was the registered representative on a number of accounts at Swartwood Hesse in which Joseph P. Immitt

---

1/ Outside the time frame when the alleged violations occurred, Moyer established accounts for his wife and daughter with Prudential Bache. He did not inform Swartwood Hesse that he was doing so (Exhibits 90, 91).

(Immitt) of Danville, New Jersey authorized the transactions. In 1984 Immitt pled guilty to one count of mail fraud and one count of aiding and abetting the filing of a false income tax return based on his investment activities. He served one year and a day at the Allenwood Federal Penitentiary. Mr. Immitt received a grant of immunity against further prosecution from the United States Attorney in Newark, New Jersey and this Commission (Tr. 59).

Testifying pursuant to subpoena, Immitt claimed that he and Moyer agreed in about 1979 or 1980 to act together to maximize their investment profits and to share those profits. By arrangement Immitt allegedly provided most of the capital and Moyer provided the investment advice for the buying and selling of securities including Software units and common stock. According to Immitt, money was kept in a common pool and used for investments which Moyer and Immitt agreed upon. As part of the scheme Immitt contended that he and Moyer agreed that he would open accounts at a number of other brokerage houses which would give them the ability to control more stock by trading among accounts. Their first goal in the Software aftermarket was to keep the price of Software common at $5.00 or above so that it would be marginable and then to move it to a target in the $7.00 or $7.50 range (Tr. 105-114).

Immitt placed orders in approximately 28 accounts at Swartwood Hesse for which Moyer acted as registered represen-

tative. Moyer did not request that Immitt show written documentation to support his purported authority to trade in these accounts even though Moyer knew it was required (Tr. 2111-13).

Swartwood Hesse was a member of a 16-member selling group for the Software IPO. Swartwood Hesse represents that it sold 240,950 units or 56 percent and the other members of the selling group sold 189,500 units for a total of 430,450 units (Tr. 1657-58). One member of the selling group cancelled after it sent an "all sold" wire for 10,000 units. This cancellation, which occurred before settlement but after October 12, 1983, caused Swartwood Hesse to reduce its short position in an account it established separate from the trading account called the syndicate account (Tr. 1661, 1712-13). Swartwood Hesse maintains that even with this 10,000 reduction in units sold, it oversold the IPO by 30,450 units (Tr. 1714-15).

In the October 13 through December 6, 1983 period, Software stock could not be purchased on margin at Swartwood Hesse because Bear Stearns, the clearing broker, did not allow purchases on margin until 30 days after the IPO, provided that the stock's per share price was above $5.00 (Exhibit 20, Paragraph 48). M.W. Jenkins did allow Software purchases on margin during this period. Swartwood Hesse closed with Software on October 20, 1983.

The Boston Exchange and the automated quotation facilities of the NASD (NASDAQ) serving the over-the-counter (OTC) market began listing Software units and common stock on October 13, 1983 and Software warrants on October 14, 1983. Swartwood Hesse opened secondary trading on the NASDAQ system in Software common stock at 11:41 a.m. on October 13 with a quote of $4 1/2 bid, $5 1/2 asked. Its first purchase for its trading account occurred at 12:06 p.m. The price of the stock fell and on October 27, 1983 Swartwood Hesse's bid price reached a low of $3 1/4. The inside close on this date (highest bid and lowest asked) was $4 bid, $4 1/4 asked. By December 6, 1983, the price of Software stock rebounded and the inside close was $7 bid, $7 1/2 asked. No significant developments occurred to the company or to the software industry in the period November 1 through December 6, 1983.

During the entire period at issue, October 13 through December 6, 1983, Swartwood Hesse's activities in Software shares were competitive only on the buy side where it consistently had the highest bid for Software, generally by half a point, and it was the only active participant of the five market makers in Software common stock (Tr. 644-45, 708). Most of the transactions at issue were principal trades which means that shares went through Swartwood Hesse's trading account which the company treated as a profit center (Tr. 1300). Moyer as the registered representative earned money on these trades (Tr. 466-67), and told the trader the type of

trades to execute and the price to be charged or paid (Tr. 1300, 1370). Moyer directed that some of the Software transactions were no gross (NG) trades which meant no commission to him and a lower profit to the trading account (Tr. 1303, 1315).

At the conclusion of the Division's case, respondent's counsel moved to dismiss the charges against Moyer. Counsel contends that the Rule 10b-6 charge cannot be successful as a matter of law because the Division did not prove a Rule 10b-6 violation for Moyer to have aided and abetted (Tr. 1723). Counsel contends that the Software units had come to rest before Swartwood Hesse began trading shares on the NASDAQ because Swartwood Hesse sold at least 430,300 IPO units which were ultimately were paid for by the initial nominees. The Division responds that sale or payment is not the decisive factor in deciding whether the units had come to rest.

Counsel for T. Marshall Swartwood and Swartwood Hesse moved to dismiss the charges against his clients because he contends the evidence shows that Swartwood Hesse had procedures in place and a system for applying such procedures which would reasonably be expected to prevent and detect, insofar as practicable, any such violation, and Swartwood Hesse had no reasonable cause to believe such procedures and system were not being complied with (Tr. 1747). Counsel contends that the Division did not produce evidence that the conduct asserted against Moyer was detectable by a reasonable

compliance system. These respondents also rely, among other cases, on Matter of Juan Carlos Schidlowski, 48 SEC 507 (1986) and Matter of Richard C. Spangler, Inc., 46 SEC 238 (1976). I deny these motions for the reasons set forth in this decision.

On December 20, 1988, Moyer's counsel filed a motion for leave to file a supplemental pleading. Counsel objects to a portion of the Division's Reply Brief pp. 2-3 where Division counsel claims that an August 29, 1988 letter he wrote, Attachment A to Moyer's Initial Brief, is inadmissible under Rule 408 of the Federal Rules of Evidence. The Division filed a memorandum in opposition to Moyer's motion for leave to file, or, in the alternative, a reply to the supplemental pleading. Moyer's counsel filed a reply on the pending motion.

I grant Moyer's motion for leave to file. No one has moved to strike the letter so there is no issue before me and no ruling is necessary. This dispute is more of the continuous, often acrimonious, arguments that have marked this proceeding.

II. Section 10(b) and Rule 10b-6

A. Division's Position

The Division alleges that Moyer willfully aided and abetted violations by Swartwood Hesse of Section 10(b) of the Exchange Act and Rule 10b-6 because Moyer knowingly gave substantial assistance to Swartwood Hesse's primary viola-

tions. Those violations occurred when Swartwood Hesse began bidding for Software in the NASDAQ-OTC market and purchased Software shares for its trading account on October 13, 1983. The Division claims the distribution was not complete on October 13, 1983 since 79,700 IPO units which Moyer allegedly sold had not come to rest in the hands of the investing public.

The Division arrives at the net total deficiency of 79,700 IPO units as follows: 2/

30,700 units because the record contains no documentary evidence in the form of posting pages and/or confirmation sheets to support Moyer's claim that he sold this amount of units "as of" October 13 to replace cancelled orders. The Division charges that Moyer personally backdated to October 13 these first-time sales which occurred between October 14 and 19.

25,350 units Moyer sold to accounts "controlled" by Joseph P. Immitt - 15,000 sold on October 13 and 10,350 sold "as of" that date, because Swartwood Hesse, through Moyer, knew that Immitt might not be able to pay for the units, and would either cancel the purchase or flip the units to other accounts which Moyer or Immitt "con-

---

2/ I do not know how the Division arrived at 79,700. The sum of the following numbers is 95,350. If you subtract the 15,350 overlap described in the Division's Brief, pp. 22 and 23, the result would be 80,000 units.

trolled." As used in this record the term flip refers to customers who purchase stock intending to resell immediately into the market (Tr. 1918, 1934).

A total of 39,300 IPO units sold to accounts which were nominee accounts for Moyer because Moyer intended to flip and did flip these units or shares to other accounts Moyer controlled. This total consists of 5,300 units which Swartwood Hesse sold "as of" October 13 to the account of Melissa Moyer, Moyer's daughter, since Moyer treated this account as his own and on November 9 Moyer flipped the shares from these units into two accounts which Immitt controlled. Also included are 9,000 units which Moyer sold to two accounts where he allegedly acted without advance authorization from the account holders (Vivian Andrietta and Hank Klebanoff) about the purchases, and 25,000 units Moyer "parked" in the Clement Hopp, Jr. account. The Division alleges that these purchases were sham transactions designed to hold IPO units until Moyer could find a buyer or buyers, and the Hopp units did not come to rest on October 13, 1983 because Moyer had Swartwood Hesse purchase 25,000 warrants and 25,000 shares from the Hopp account on October 14 and 31, respectively. Moyer arranged for sales of most of these warrants and shares to his personal account or accounts for which he had standing orders to acquire Software. The net result of these

transactions on the Hopp account was a $22.00 clearing charge.

The other elements of a Section 10(b) violation which the Division claims are present in this situation are a distribution, participation by Swartwood Hesse and use of interstate commerce via use of the NASDAQ system.

The Division argues that Moyer's actions proximately caused the violations and that he acted willfully because he knew and intended that his actions deceive and they did deceive the investing public by creating the false appearance that a successful distribution had occurred.

B. Respondent's Position

Moyer denies the alleged aiding and abetting Section 10(b) and Rule 10b-6 violations arguing that (1) as a matter of law the charge is fatally defective because no principal was charged or proven, (2) the Division has not shown that Moyer acted willfully with unlawful intent, and (3) the distribution was complete when more than 400,000 Software IPO units were sold on October 13, 1983 since there is no evidence that Moyer had any discretion as to the purchase of IPO units in customer accounts and customers paid for more than 400,000 IPO units by October 20, 1983. According to Moyer, "coming to rest" is defined by the fact of purchase which is determined by the contractual obligation to pay; duration of actual or intended ownership is of no consequence. Moyer maintains that there is a difference between

trading shares in the aftermarket and selling IPO units, and, even if one concluded that he had discretion over some aftermarket trading, "he could have had no discretion over the IPO placements by the very nature of the IPO itself." (Reply Brief p. 6). Moyer claims that Immitt's testimony that he intended to get money to cover cancelled units belies the Division contention that Moyer knew Immitt might not be able to pay for the IPO units or would "flip" them quickly to "controlled" accounts. Moyer claims that stripped down to its essentials the Division's argument is that 24,000 IPO units had not come to rest on October 13, 1983 (15,000 to Joseph Immitt, 3,000 to Vivian Andrietta and 6,000 to Hank Klebanoff). However, Moyer argues that even if this claim were true, Swartwood Hesse had confirmed sales of more than 400,000 IPO units as of this date. Moyer contends this situation is distinguishable from the facts in R.A. Holman & Co., Inc. v. SEC, 366 F.2d 446 (2d Cir. 1966) because here there was no testimony from customers that they did not really want to make the purchases.

C. Findings

As pertinent here Section 10(b) of the Exchange Act prohibits any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange to use or employ, in connection with the purchase or sale of any security, any manipulative or deceptive device or

contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. The Commission's Rule 10b-6 makes it unlawful for an underwriter, a broker, a dealer, or other person participating in the distribution to 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 in such distribution. A distribution comprises the entire process by which in the course of a public offering the block of securities is dispersed and ultimately comes to rest in the hands of the investing public. R.A. Holman & Co. Inc. v. SEC, 366 F.2d 446, 449 (2d Cir. 1966), modified on other grounds, 377 F.2d 665 (2d Cir. 1967), cert. denied, 389 U.S. 991 (1967); Shearson, Hammill & Co., Inc., 42 SEC 811, 819-20, (1965).

The question here is whether the distribution was complete, i.e. whether 400,000 Software units were at rest in the hands of the investing public on October 13, 1983 at 12:06 p.m. when Swartwood Hesse, the underwriter and broker-dealer, purchased Software units for its proprietary trading account. The applicable standard is preponderance of the evidence, i.e. evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. Steadman v.

SEC, 450 U.S. 91, 95-96 (1981), rehearing denied, 451 U.S. 933 (1981); Black's Law Dictionary (5th ed. 1979.)

I find that the requisite minimum number of 400,000 Software units was not sold as of October 13, 1983 before Swartwood Hesse began trading Software units and shares and before it purchased shares for its trading account. I reach this conclusion because Exhibit 290, Paragraphs 39 and 40, shows a total of 36,000 units in which the trading tickets bear a date stamp of October 14 through October 20, 1983, but which Moyer and Swartwood Hesse contend represent October 13 (presumably prior to 12:06 p.m.) sales because they are either redesignations or replacements of sales made on October 13 which were cancelled or in error. I accept the testimony of the expert witness sponsored by Moyer, Mr. William J. Barrett, that "as of" sales to replace cancellations are a common occurrence in connection with IPOs. What I find implausible is that in this particular situation there is no record evidence in the form of documentation to support Moyer's position (with the exception of redesignations in the Andrietta and Dora Wong accounts and cancellation in the Dethan account totalling 2,800 units net) that original sales for this amount of units occurred on October 13, 1983 (Tr. 2176-2185). This lack of documentation occurred even though records should exist for these sales since Moyer admitted that in the normal course of business an entry is made on the posting page as each customer confirms his/her IPO purchases

and each customer receives a confirmation of his/her purchases (Tr. 2171-74). Moyer's explanation that the lack of written documentation is because if a posting page is not prepared for a few days and a cancellation occurs there is no reason to prepare a posting page (Tr. 2240-42) is non-persuasive because some of the replacements occurred four, five and six days after the alleged date of the original transactions so there was sufficient time for posting pages to be prepared. Furthermore, I find Moyer's explanation that he cannot identify the original purchasers because perhaps only some of the cancellations were by his customers implausible. Moyer by everyone's account was very deeply involved with the success of this venture in which he had a "huge" interest and for him to contend that he did not know who cancelled some 23,000 units is unconvincing where several people testified that he kept close watch on who held Software securities (Tr. 109, 1200, 1356-58).

In summary, the distribution of the Software IPO was incomplete on October 13 when Swartwood Hesse purchased units for its trading account. Elimination of Moyer's alleged "as of" purchases and redesignations reduces the IPO units distributed on October 13 to 394,450 units. This number is the original total of 430,450 units minus 36,000 units. The latter is composed of the total of Exhibit 290, Paragraphs 39 (23,500) and 40 (13,000), without the 500 unit purchase by Diane Kern from Andrietta which appears in both paragraphs.

Additional bases for my finding that the Software distribution of 400,000 units was not complete on October 13 are that some 38,950 IPO units were sold to accounts over which Moyer exercised de facto discretionary authority to make IPO purchases, i.e. the Immitt accounts (25,350 units), his daughter Melissa Moyer's account (5,300 units), Vivian Andrietta's account (2,300 units), and Hank Klebanoff's account (6,000 units). Moyer arranged these transactions despite the fact that Swartwood Hesse had a policy that a registered representative cannot buy a new issue (Tr. 1844-45). The policy covered members of the registered representative's family.

My reasons for finding that Moyer and Immitt acted in concert are set out in the following section. Those reasons apply to the Software IPO as well as later trading in Software shares. Because of his arrangement with Immitt, Moyer had de facto control over the Immitt accounts which purchased 15,000 Software units on October 13 and 10,350 additional IPO units "as of" October 13, 1983.

Ms. Andrietta agreed to purchase 200 units of the Software IPO and the rest of the purchases were Moyer's (Tr. 374-78). Exhibit 290, in Paragraph 40 shows that a 3,000 IPO unit purchase by the Andrietta account was cancelled "as of" October 13, 1983 and on October 17, 1983 2,500 of those units were sold to Andrietta and 500 units were sold to Diane Kern "as of" October 13, 1983. Moyer

admits he did not inform Ms. Andrietta of the 3,000 IPO purchase so he acted without authority but with de facto control when he made this purchase presumably on October 13 and when he reduced it to 2,500 units on October 17 "as of" October 13 (Tr. 2222). Moreover, Moyer paid for these purchases since Andrietta paid by personal check written after Moyer gave her the money which she deposited in her checking account (Tr. 378, 391-92), and he retained the majority of the proceeds from the sales (Tr. 2125, 2238).

Melissa Moyer's account bought 5,000 units of the Software IPO "as of" October 13, 1983. The date stamp on the trading tickets was October 18, 1983. Moyer established Melissa Moyer's account at Swartwood Hesse and admittedly treated the account as if it were his own, i.e. he exercised de facto control (Exhibit 290, Paragraphs 13 and 39; Tr. 487, 2110-11). Swartwood Hesse would have canceled this trade if it had been aware of it. (Tr. 1844-45).

In late 1983 Hank Klebanoff was Moyer's close friend. Moyer had oral authority to trade in this account for which he acted as registered representative without asking permission for a specific transaction. Moyer maintains there was a difference between his authority for trades and IPO purchases in this account. His position seems to be that he sought and received specific authorization for the latter. The evidence does not support this distinction. The factors which persuade me that Moyer was exercising de facto control

over the account when he made the IPO unit purchase and in later transactions involving shares in this account are that the Klebanoff IPO purchase of 6,000 units was not paid for by the end of October, 18 days after the purchase, but there is no evidence that either Moyer or Swartwood Hesse took action to collect the money from Mr. Klebanoff. In November 1983, the account bought additional shares and sold 11,000 shares (leaving 1,000 in the account) to Swartwood Hesse's trading account which sold them to Moyer's personal account. All the transactions were at $5 1/2 and Moyer acknowledges that he had Immitt wire money to Klebanoff's account to pay for Software transactions (Tr. 96, 115-16, 455). Immitt testified that Moyer placed units and stock in the Klebanoff account for periods of time (Tr. 95-96, 110).

I find the evidence persuasive that the Software IPO units purchased for these accounts did not come to rest in the hands of the investing public on October 13, 1983 because the units were lodged in accounts over which Moyer exercised de facto control and were available for resale any time at Moyer's discretion. In the Matter of Rooney, Pace, Inc. and Randolph K. Pace, 48 SEC 891, 898-99 (1987). Elimination of the IPO units sold to these accounts over which Moyer exercised de facto control reduces the number of IPO units sold from 430,450 to 391,500 units.

The Division has demonstrated that Swartwood Hesse acting through its agent Moyer violated Section 10(b) and

Rule 10b-6. The evidence is persuasive that Moyer acted willfully and with scienter to make it appear that the requisite number of units had been sold so that the Software IPO would succeed. Factors which motivated him to do so include the fact that the Software offering three months earlier had failed, he was deeply committed to Software's success (in love with the company according to his counsel and the expert witness, Mr. Barrett), he and Immitt had agreed to share the profits from their Software investments, he had received warrants as part of his compensation for working on the underwriting, and Software's success was necessary to protect his professional reputation since he had been the moving force in having Swartwood Hesse accept the firm commitment underwriting (Tr. 1199-1200). According to Immitt, at the time of the IPO Moyer was concerned about excess units and his ability to find customers for them (Tr. 88-97). Finally, Mr. Barrett testified that market conditions for IPOs were very bleak during this time period (Tr. 1943). Moyer during the investigation admitted that (Tr. 2158)

> By the time we got to market, the new issue market in general had changed significantly. The new issue market had really virtually dried up, and it was much more difficult to sell a new issue, and that's why there were warrants added and the amount of the issue was reduced.

I reject the Division's position that the 25,000 IPO units which Moyer sold to Clement Hopp, Jr. did not come to

rest on October 13 because it was a sham transaction designed to hold the IPO units until Moyer could find a buyer. The unrefuted evidence is that Mr. Hopp, who makes his living as a trader and investor, took positions and traded quickly--which is what happened here -- and that he gave Moyer specific authority on all transactions (Tr. 480, 2103). On this record the Division has not proven this allegation.

I have considered Moyer's arguments and found them unpersuasive. I reject Moyer's position that because the Commission order instituting proceedings did not charge Swartwood Hesse with a principal violation of Section 10(b) and Rule 10b-6, the Division can not successfully prove that Swartwood Hesse committed a violation and demonstrate that Moyer aided and abetted in that violation. Moyer does not explain why his client has been disadvantaged by the situation. He argues that it just cannot be done. I find on this record that the Division has proven a principal violation which is the necessary prerequisite to the aiding and abetting violation.

I disagree with Moyer that the fact the IPO units were ultimately paid for proves conclusively that the shares had come to rest on October 13 before Swartwood Hesse began trading on the NASDAQ and purchased shares for its trading account. The fact of payment is not determinative in the area of fraud or contract law. Making a determination on such a limited technical basis runs counter to the case law

and the intent of the statute and the rule. The evidence (just discussed) is persuasive that the distribution was not completed on October 13 because the amount of units specified in the offering was not in the hands of the investing public on that date. The Division has proven a violation by Swartward Hesse which Moyer aided and abetted and that Moyer's actions were willful. It is well settled that "willfully" in the securities statutes does not have any bad purpose connotation so that Moyer's defense that he lacked a manipulative purpose is unavailaing (5 Loss, Securities Regulation, 3374 (Supp. 1969).

For all the reasons stated, I find that Swartwood Hesse violated Section 10(b) and Rule 10b-6 because it bought Software comon stock for its trading account before it completed the distribution of IPO units covered by its firm commitment underwriting agreement with Software. I find that Moyer willfully aided and abetted this violation because he knowingly made it appear that the requisite number of 400,000 units was sold, and his actions gave substantial assistance to the primary violation.

III. Section 10(b) and Rule 10b-5

A. Division's Position

The Division alleges that Moyer's secondary market trading was fraudulent and manipulative -- intentional interference with the free forces of supply and demand -- in violation of Section 10(b) of the Exchange Act and Rule 10b-

5. In support of its position the Division presented expert testimony from Leon J. Bastien, Jr., Assistant Director of Market Surveillance for the NASD. In the Division's view, during the period October 28 or November 1, 1983 through December 6, 1983, Moyer engaged in a variety of actions with the objective of substituting fiction for fact with respect to trading in Software common stock. In re Edward J. Mawod, 46 SEC 865 (1977), aff'd Edward J. Mawod & Co. v. SEC, 591 F.2d 588 (10th Cir. 1979). Moyer's alleged actions included proscribed wash sales and matched orders for the purpose of creating a false or misleading appearance (1) of active trading in Software and (2) with respect to the market for Software. The Division claims that the case law is clear that the broad sweep of Rule 10b-5 prohibits the manipulative activities specified in Section 9(a) for a stock like Software which is registered with a national exchange (Boston) and traded on the OTC market. United States v. Charnay, 537 F.2d 341, 350-51 (9th Cir. 1976); SEC v. Resch-Cassin & Co., Inc., 362 F. Supp. 964, 975 (S.D.N.Y. 1973); In re Edward J. Mawod, 46 SEC 865, 871 (1977), aff'd, Edward J. Mawod & Co. Inc. v. SEC, 591 F.2d 588 (10th Cir. 1979); In re Michael Batterman, 46 SEC 304, 305 (1976); In re Halsey, Stuart & Co., Inc., 30 SEC 106, 111 (1949).

The Division argues that transactions between and among accounts "controlled" by Moyer and Immitt did not involve a change of beneficial ownership because Moyer and Immitt were

using these accounts for a common purpose. The Division points to four days in November 1983 when according to its expert Moyer arranged for wash sales. On November 1, 1983 Moyer arranged for the Swartwood Hesse trading account to purchase shares from his personal account and then he arranged for M.W. Jenkins to purchase from Swartwood Hesse the same quantity shares at the same price for the account Moyer established at M.W. Jenkins in his wife's name. On November 16, 1983 Moyer arranged for purchases by Swartwood Hesse from another broker-dealer from accounts "controlled" by Immitt and sales of most of these shares at the same price to two accounts at Swartwood Hesse, one of which was in the same name as the account at the selling broker-dealer and the other to an account which Moyer "controlled". On November 18, 1983 at Moyer's direction Swartwood Hesse purchased 13,000 shares of Software from M.W. Jenkins and sold 12,000 shares at 1/16 more to a third broker-dealer. The accounts from and to which the shares were bought and sold were the same Immitt accounts. On November 25, 1983 Swartwood Hesse at Moyer's direction bought 15,500 shares from M.W. Jenkins (14,000 from Moyer's wife's account) at $5 3/8 and sold shares to Moyer's wife's account at Swartwood Hesse at the same price.

The Division maintains that Section 9(a)(1) of the Exchange Act prohibits account transfers where the purpose is to create the misleading appearance of active trading and

account transfers to achieve margin status, which is Moyer's explantation for his trades to family accounts at M.W. Jenkins. In re Michael J. Meehan, 2 SEC 588, 606-07 (1937) and In re Michael Batterman, 46 SEC 304, 308 (1976).

The Division describes 14 sets of transactions on two days in October, eight days in November and three days in December 1983 which its expert characterizes as manipulative "matched orders" or "prearranged trades" - transactions involving substantially similar, if not identical, share price and share amount and close time proximity - between accounts "controlled" by Moyer and Immitt. According to the Division's expert, these transactions were done for the purpose of creating a false appearance with respect to the market demand for Software common stock thus raising the stock price, and did not make economic sense for Swartwood Hesse.

According to the Division these transactions are not legitimate crosses because they did not result from un-solicited customer orders, they passed through Swartwood Hesse's proprietary account, and they were motivated by Moyer's manipulative intent (In re Michael J. Meehan, 2 SEC 588 (1937); In re Michael Batterman, 46 SEC 304 (1976)). The Division views Moyer as having de facto discretion or control over 30 some accounts based on conduct whereby he did not consult with the account holder prior to each trade, he did not have a pending order for each trade, he unilaterally

determined the execution price, he determined the extent and frequency of trades, he shuffled stocks among customer accounts and customers invariably followed his advice.

In addition to Section 9(a)(1) the Division claims Moyer's trading activities from November 1 through December 6, 1983 were the type of manipulative practices prohibited by Sections 9(a)(2) and 10(b) of the Exchange Act because they involved a series of transactions creating active or apparent active trading and raising the price of Software for the purpose of inducing others to buy Software shares. Examples of what the Division's expert characterizes as Moyer's irregular and unacceptable trading and market-making activities include having Swartwood Hesse, on at least three occasions, purchase stock for its trading account at the inside asked price of another market maker. The expert claims this caused those other market makers to raise their asked price and then Swartwood Hesse, which had the leading bid at the time, was able to raise its bid without "locking" the market. The latter is said to occur when the inside bid and asked price are identical and is contrary to NASD policy. On one of these occasions, November 1, 1983, the Swartwood Hesse trading account held 3,630 shares in inventory before the 1,500 share purchases. On two other occasions, November 11 and 14, 1983, the Swartwood Hesse trading account sold most of the shares it purchased under these circumstances to accounts which Moyer controlled. The Division cites the

lack of transactions following a rise in Swartwood Hesse's bid price near the end of the day on November 1, 9, 11, 15 and 25 and December 5, and the unloading of shares into accounts controlled by by Moyer and Immitt when Swartwood Hesse's bid got "hit" by other market makers as evidence of the lack of legitimate customer demand for Software shares.

A third manipulative practice which the Division claims Moyer used to raise Software's price to $7 on December 6, 1983, was to keep the Swartwood Hesse bid consistently a half to three quarters of a point higher than the other four market makers in spite of low buying volume, no competitive bidding, and a company policy of not accumulating significant inventory in its trading account. The Division charges that Moyer had Swartwood Hesse raise its bid price on ten occasions close to the time the market closed for the day to "mark the close" when there was no legitimate customer demand and order flow. According to the expert sponsored by the Division, Swartwood Hesse did this to give the illusion of a higher stock price or stock value. In addition to matched orders and wash sales, advancing Swartwood Hesse's bid without legitimate demand, and marking the close, the Division claims Moyer also batched multiple orders for simultaneous execution, moved stock among accounts he "controlled" with Immitt so as to obtain marginability, avoided margin calls or payment ("free riding") and acted to eliminate excess shares (market overhang) all to the end of

creating actual or apparent trading activity so as to induce people to buy Software stock. The Division infers a manipulative purpose from Moyer's alleged actions in concert with Immitt of establishing similar accounts at other brokerage houses (Prudential Bache, M.W. Jenkins, A.G. Edwards and Shearson American Express), strategizing to eliminate market overhang, efforts to first maintain the $5 a share price level and then to move the price up to $7 and continuously moving stock among accounts "controlled" by Moyer and Immitt. According to the Division, the courts have found that transactions such as exist here where Swartwood Hesse acting through Moyer requested another broker to purchase stock and instructed that broker to seek the stock from Swartwood Hesse violated Section 10(b) and Rule 10b-5. SEC v. Commonwealth Chem. Sec., 410 F. Supp. 1002 (S.D.N.Y. 1976), aff'd in part, modified in part, and remanded on other grounds, 574 F.2d 90 (2d Cir. 1978).

The Division contends that even without a manipulative purpose, Moyer acted with scienter when he engaged in trading practices which operated as a fraud or deceit as to the nature of the market for Software from October 28 or November 1 through December 6, 1983, and thus Moyer violated Section 10(b) and Rule 10b-5.

The Division's expert believes Moyer's trading pattern caused Software's price to rise to $7.00 on December 6, 1983 (Tr. 1098-99). The actions which caused this to happen

include continually moving up Swartwood Hesse's bid price, the existence of controlled accounts to which stock could be sold to eliminate the risk of Swartwood Hesse holding too much stock in its trading account, trades at the same price, wash sales and matched sales (Tr. 946). In the expert's view, for the only active market maker in Software to gradually advance its bid and effect purchases at or near its bid price when there was little demand for Software amounts to more than supporting the stock; it shows that Moyer was trying to manipulate the stock by keeping the price up. The Division cites the lack of economic benefit to Swartwood Hesse from Moyer's trading in Software common stock as further evidence of manipulation.

The Division rejects as irrelevant Moyer's claim that his actions were prompted by his sincere belief that Software common stock was undervalued, and it cites evidence to show that he did not, as alleged, seek to maximize his personal Software holdings (Exhibits 27 and 261). The Division denies that Moyer's action were the normal market support function expected of a market maker and underwriter.

B. Respondent's Position

Moyer disputes the Division's characterization of his activities as wash sales, matched orders, batching, domination and control, and marking the close. He denies that the courts have held Sections 9(a) and 10(b) of the Exchange Act coextensive. He argues that the cases the Division cites for

support are inapt and hold that a determination of manipulative conduct under both Sections 9(a) and 10(b) depends upon a showing of improper intent.

Moyer introduced expert testimony from William J. Barrett, Senior Vice-President, Janney, Montgomery & Scott, a registered broker-dealer. Mr. Barrett supervised Moyer in 1981-82 when Moyer was a Vice-President at Janney, Montgomery & Scott. Mr. Barrett believes Moyer's aftermarket activities in Software did not constitute manipulative behavior. He claims it is preposterous to consider the economic viability of Software share transactions when the Software IPO was a unit offering (Tr. 1947). He sees nothing unreasonable with Moyer opening accounts for family members with M.W. Jenkins, with the cross trades engaged in by Moyer, i.e. getting a buyer and seller together, or with Swartwood Hesse raising what was already the leading bid for Software. In his opinion, Swartwood Hesse's activity of consistently raising its lead bid before the market closed was not manipulative but,

> ". . . just a example of a firm that was looking to sponsor a newly issued stock. They had a trading strategy that they wanted to keep the stock above the issue price. . . they didn't want the issue to go down. And, in effect, they were committing their customers resources and their own resources to make sure that didn't happen in a very floppy market environment." (Tr. 1956)

According to Mr. Barrett, Moyer's actions in various customer accounts taken pursuant to oral authority did not equal discretionary authority.

Moyer contends that Immitt was a friend and customer like lots of other people. He denies Immitt's claim that they agreed to divide or otherwise share the proceeds from the Software trades. Moyer maintains the evidence does not show the alleged Section 10(b) and Rule 10b-5 violations. He argues that the essential ingredients for a manipulation scheme are not present here because his intentions were good, the Division's expert was misinformed, this expert's investigation was unreasonably limited as to time and type of security, and market conditions did not allow "dumping" or misleading others in the market place. Moyer contends that he acted lawfully at all times to acquire more Software shares. He denies having or exercising "discretionary" authority in the accounts named by the Division, knowing about Immitt's full trading activities in Software or conspiring with Immitt to manipulate Software stock. Moyer explains that the reason he requested Swartwood Hesse on nine occasions to raise its bid even when it had the leading bid was so that he could buy more stock for his customers or himself.

C. Findings

Section 10(b) of the Exchange Act prohibits any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe, used in connection with the purchase or sale of any security. The term manipulation refers generally to

practices, such as wash sales and matched orders, that are intended to mislead investors by artificially affecting market activity; in essence it encompasses intentional interference with the free forces of supply and demand (Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 476 (1977)). A wash sale is a transaction which involves no change in beneficial ownership in a security (Section 9(a)(1)(A) of the Exchange Act). The test for beneficial ownership is whether a person has the power to control or direct the voting, disposition and transfer of the shares, as well as the income from securities. A matched order is a transaction entered with knowledge that a transaction in that security of substantially the same size and price has been or will be entered by or for the same or different parties at substantially the same time on the opposite side of the market (Section 9(a)(1)(B) and (C) of the Exchange Act).

The essential elements of manipulation are misrepresentation or nondisclosure, i.e. an interference with the free flow of information on which the forces of supply and demand rely. Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 476-78 (1977); Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623, 628 (D. Md. 1982).

Rule 10b-5 makes unlawful the following in connection with the purchase or sale of any security:

(1) To employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material

fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

According to an authority in the securities area, "The problem of manipulation was attacked by by Congress in a number of ways -- by specific prohibitions, by giving the Commission rulemaking authority in certain areas, and by a general prohibition against any trading for a manipulative purpose." (L. Loss, Fundamentals of Securities Regulation, 850 (2nd ed. 1988)). Section 10(b) is one of the basic antifraud provisions referred to as a catchall section. This section has been used to attack certain types of manipulative behavior. Section 9 outlaws specific manipulative practices. The law is clear that the specific prohibitions in Section 9 are incorporated into Section 10(b) with respect to OTC securities where there is a showing that the conduct was for the purpose of manipulation (R.W. Jennings & H. Marsh, Jr., Securities Regulation, 623 (6th ed. 1987); SEC v. Resch-Cassin & Co., Inc., 362 F. Supp. 964 (S.D.N.Y. 1973); Thornton v. SEC, 171 F.2d 702 (2nd Cir. 1948); In re Edward J. Mawod, 46 SEC 865, 871 (1977), aff'd Edward J. Mawood & Co., v. SEC, 591 F.2d 588 (10th Cir. 1979). As relevant here Section 9(a)(1) makes it unlawful for the purpose of creating a false or misleading appearance of active trading or with respect to the market for any security

registered on a national securities exchange to effect any transaction in such security which involves no change in beneficial ownership or to enter orders for the purchase or sale of a security with the knowledge that a sale or purchase order of substantially the same size, same time, and same price has been entered or will be entered. Section 9(a)(2) makes it unlawful to effect transactions in a security registered on a national exchange creating actual or apparent active trading, or raising the price of a security for the purpose of inducing the purchase or sale of the security by others.

I find that the Division has shown by a preponderance of the evidence that Moyer's trading activities in Software common stock during the period October 28 or November 1, 1983 through December 6, 1983 violated Section 10(b) and Rule 10b-5. I make this finding because taken together the weight of the evidence is that Moyer engaged in manipulative behavior by buying and selling Software common stock among accounts over which he had de facto control, and based on his position in the firm and representations that he had orders in these accounts he had Swartwood Hesse raise its bid price at a time of very low market activity so as to cause the price of Software to increase. The evidence is persuasive that Swartwood Hesse's increased bids, supported by purchases at or near or above the bid price, elevated the prices at which Software was sold (Tr. 1297; Exhibits 225, 227, 229;

Advanced Research Associates, Inc., 41 SEC 579, 605 (1963)). The insertion of increasingly higher bids is the most universally employed device to create a false appearance of activity in the OTC market, and tends to support the price at its inflated level (Gob Shops of America, Inc., 39 SEC 92, 101 (1959)).

Mr. Barrett's expert opinion in support of Moyer is of little value because it does not consider that Moyer's actions were taken pursuant to a secret agreement with Immitt to act to make Software stock successful in the aftermarket by keeping the price of Software shares above the $5.00 level and moving it up to $7.00 or $7.50, if possible. Assuming as I do that Moyer had a specific manipulative purpose for his activities is an entirely different factual situation than what Mr. Barrett opined on. (See In re Michael J. Meehan, 2 SEC 588, 606-08 (1937))

It is relevant when determining the legitimacy of Moyer's actions to consider that some of them were of no economic benefit to the Swartwood Hesse trading account. I reject Mr. Barrett's view that it is preposterous to view only the economic viability of Software share transactions in the November 1 through December 6 period because the IPO was a unit offering. Mr. Barrett agreed with the Division's expert that the common stock drives the price of the unit and the warrant. Trading in units dried up very quickly (Tr. 2032) and there is no evidence that the firm employed a

strategy of convertible arbitrage which would require an examination of both securities.

I find that the preponderance of the evidence shows that Immitt's testimony is true that he and Moyer acting together took manipulative actions for the purpose of misleading the investing public so as to increase the price of Software common stock and that Moyer's actions amounted to intentional interference with the market forces of supply and demand. Moyer's failure to disclose that the market had been artificially influenced was an omission to state a material fact and hence a fraud on the purchasers. In re Edward J. Mawod, 46 SEC 865, 871 (1977), aff'd Edward J. Mawod & Co., Inc. v. SEC, 591 F.2d 588 (10th Cir. 1979).

My conclusion that Immitt's testimony is true is based on the cumulative circumstantial evidence. (The Federal Corp., 25 SEC 227, 230 (1947)). Some of these facts occurred outside the roughly one-month period when Moyer violated Section 10(b) and Rule 10b-5 but they are relevant and material to show as false Moyer's claims that his relationship with Immitt during the period was only as a friend and customer. Moyer knew that Immitt should have had written authorization for conducting transactions in the approximately 28 accounts in which Immitt actively traded and for which Moyer was registered representative. Moyer did not require Immitt to produce any written support for his alleged authority (Tr. 2111-13). At Moyer's request, Immitt wired

money on several occasions to accounts, other than accounts in which Immitt traded, to pay for Software trades which Moyer had made in those accounts (Tr. 455-56). In August 1984 Moyer told Ms. Andrietta who was "together" with Moyer while he was separated from his wife to write a check to "Joe" (Immitt) because Moyer had "to give Joe money" (Tr. 379). Moyer's friend set up accounts at M.W. Jenkins at Moyer's request for Moyer's wife and daughter and for Immitt and he allowed Immitt to establish other accounts at the firm. The friend considered the Immitt accounts to be Moyer's accounts (Tr. 1195-97, 1221). He took instructions from Moyer on the Moyer accounts and from Immitt on the Immitt accounts. He did not acknowledge on the account forms that these accounts were being operated by another person (Tr. 1202-03, 1223, 1229, 1247). At times Moyer paid personally for trades in these accounts (Tr. 1205). I reject Moyer's claim that he only set up accounts for his wife and daughter at M.W. Jenkins and that he did so to take advantage of the fact that Software was immediately marginable there when it was not marginable at Swartwood Hesse. If this were the only or paramount reason for establishing these accounts, why did he hide them from Swartwood Hesse? The President of Swartwood Hesse testified that if he had known he would not have caused Moyer to close these accounts but would have wanted to know why they were established and watched the transactions that occurred in them. By hiding the accounts

Moyer prevented Swartwood Hesse from receiving documentation about the full range of his trading activities.

Moyer did not deny Immitt's claims that (1) in 1979 he and Immitt and a third person jointly invested in a stock purchase of Ocean Airlines where the stock was held in the name of the third person and the proceeds distributed according to the terms of a written agreement, (2) he and Immitt invested jointly in Thunander stock according to the terms of a written agreement, (3) he and Immitt exchanged a number of personal checks (Exhibits 254, 256), (4) they discussed Software's status from one to five times a day in the relevant period (Tr. 335-36), and (5) he knew Immitt was under pressure to pay back borrowed money and that Immitt was relying on the success of Software common stock to enable him to meet his pressing financial obligations.

Moyer's explanation that his actions were part of a consistent strategy of acquiring more and more Software stock for the long term for himself and his customers is not persuasive because he failed to show that the accounts purchasing the stock followed such a policy. Moyer sold 14,000 shares of Software stock to the Swartwood Hesse trading account from his personal account on November 1, he purchased 1,500 shares on November 14, and he purchased 11,000 shares on November 22 (Exhibit 261). In the same time span (November 1 - December 6), the Carole and Melissa Moyer accounts which Moyer treated as his own did the following:

purchased 14,000 shares on November 1, sold 5,300 shares on November 9, purchased 4,200 shares on November 23, sold 14,000 shares on November 25, and bought 10,000 shares on November 25 (Exhibit 261). In the same time frame, the Klebanoff account, a Moyer customer and an account over which he exercised de facto control, purchased 6,000 shares on November 16, sold 11,000 shares on November 22, purchased 500 shares on November 28, and purchased 12,000 shares on December 1 (Exhibit 261). The Immitt family accounts bought 10,000 shares on November 7, bought 10,700 shares on November 9, bought 7,000 shares on November 10, sold 5,600 shares on November 10, sold 7700 shares on November 16, sold 13,000 shares on November 18, bought 12,000 shares on November 18, sold 12,000 shares on December 1, and sold 5,000 shares on December 2 (Exhibit 261). Immitt liquidated his Software stock holdings in late 1983 and early 1984 (Tr. 243). The trading activity of Moyer in his personal accounts and accounts over which he exercised de facto control is not compatible with a strategy of consistently accumulating shares for long-term investment.

Other pieces of evidence which when considered together persuade me that Moyer lied when he denied scheming with Moyer to raise the price of Software stock include the facts that contrary to Swartwood Hesse policy he secretly established accounts at M.W. Jenkins, he bought shares of the Software IPO for his daughter, and he allowed Immitt and

another customer to authorize transactions in accounts in the names of other people without written authority (Tr. 2146). According to Swartwood Hesse's President, "the rules" required that Swartwood Hesse receive copies of confirmations where employees opened accounts with other firms (Tr. 1568-69). Moyer did not arrange for Swartwood Hesse to receive confirmations on transactions thus he hid his trading activities in these accounts. The record does not explain the discrepancy between Mr. Hesse's statement during the investigation that Swartwood Hesse did not allow a registered representative or his/her family members to buy securities in an IPO where Swartwood Hesse was the underwriter and Mr. Swartwood's statement at trial that he would have thanked Moyer for having his daughter buy Software IPO units. I accept Mr. Hesse's position as valid because the testimony was given prior to the commencement of litigation and he was examined in some detail on this point (Tr. 1844-47). In contrast Mr. Swartwood's statement was a comment and there was no follow-up examination (Tr. 1560-61). Moyer's position that he did not buy IPO units when he admits he bought units for his daughter in an account he opened and which he treated as his own is another instance where Moyer acted to hide his trading activities in Software from public view. Finally, Moyer lied to Ms. Andrietta when he told her he would stop trading Software in her account as she requested (Tr. 385). Because Moyer told her Bear Stearns, Swartwood

Hesse's clearing broker, would not accept third party checks, Mr. Andrietta paid with her personal check based on cash which Moyer gave her to cover his activities in her account (Tr. 392). Here again Moyer acted to conceal his transactions in Software.

Specific Software transactions in the late October to early December 1983 period which I find violated Section 10(b) and Rule 10b-5 as wash sales, matched orders, or prearranged trades done to create a false or misleading appearance of the market demand for Software and to raise the price of Software so as to induce others to purchase Software shares include the following:

On November 1, 1983 Moyer arranged both the sale of 14,000 shares from his personal account at Swartwood Hesse and purchase of 14,000 shares by M.W. Jenkins for the account he established in his wife's name, Carole Moyer, at the same price ($4). This was a wash sale as there was no change in stock ownership and I find it was a prearranged trade or matched order which is what Moyer told the Swartwood Hesse trader (Tr. 1370-71). There was no profit to the Swartwood Hesse trading account; instead it was charged $44.00 by its clearing broker. The trader at Swartwood Hesse did this transaction for Moyer as a favor because Moyer had such a "huge" position in Software and he was a firm vice-president and one of the better producers (Tr. 1373). Swartwood Hesse dominated the market in Software on November

1, because it had 93 percent of the total volume of trades in Software reported to NASDAQ, and Moyer was responsible for this demand because almost all of the trades (18,150 shares out of 19,100 shares sold to customers) were to and from Moyer's customers including Immitt accounts (Exhibits 261 & 263).

On November 4 Moyer had the Swartwood Hesse trading account buy a total of 10,000 shares at $4 1/2 from two accounts where Immitt authorized the transactions. The next business day M.W. Jenkins bought 10,000 shares at $4 1/2 from Swartwood Hesse for the accounts of Steven Immitt and Theresa Immitt, two accounts where Immitt authorized the transactions. The Swartwood Hesse trading account did not earn any profit from these trades but it did incur a ticket charge from its clearing broker. I find this was a prearranged trade or matched order which is how Moyer described it to the Swartwood Hesse trader (Tr. 1376-77). Swartwood Hesse dominated the market in Software on November 4 because it had 100 percent of the total volume of trades in Software reported to NASDAQ, and Moyer was responsible for this demand because all these shares were traded to and from Immitt accounts over which Moyer exercised de facto control (Exhibits 261 & 263).

On November 9 Moyer had the Swartwood Hesse trading account buy a total of 10,700 shares from his daughter's account and from an account in which Immitt authorized the

transactions (Robert Heise) at $4 7/16. Later the same day Swartwood Hesse's trading account sold 10,700 shares at $4 1/2 to A.G. Edwards for two accounts in which Immitt authorized the transactions (Immitt and J. Mott accounts). These transactions were matched or prearranged orders. Swartwood Hesse dominated the market in Software on November 9 because it had 92 percent of the total volume of trades in Software reported to NASDAQ, and Moyer was responsible for this demand because all those trades were to and from Immitt accounts over which Moyer exercised de facto control (Exhibits 261 & 263).

On November 10 Moyer sold 10,600 shares at $4 7/16 to the Swartwood Hesse trading account from the Immitt account and another account in which Immitt authorized the transactions (M. Hoffman). Some 16 minutes later the Swartwood Hesse trading account sold 10,000 shares at $4 1/2 to accounts (J. Mott and F. Douglas) in which Immitt authorized the transactions. These transactions were matched or prearragned orders by Moyer who exercised de facto control over the accounts in which Immitt authorized trades. Swartwood Hesse dominated the market in Software on November 10 because it had 89 percent of the total volume of Software trades reported to NASDAQ, and Moyer was responsible for this demand because all the transactions in the trading account were to and from Immitt accounts over which Moyer exercised de facto control (Exhibits 261 & 263).

On November 16 Moyer had the Swartwood Hesse trading account purchase a total of 9,000 shares at $ 5 1/4 from another broker (Branch Cabal -- the three selling accounts were ones in which Immitt authorized transactions). Later that same afternoon Moyer arranged for the Swartwood Hesse trading account to sell 7,000 shares at the same price to an account in the same name as one of the selling accounts at Branch Cabal (Lombardi) and to an account in which Moyer authorized transactions pursuant to oral authority. I find that these transactions involved a wash sale because there was no change of ownership on the Lombardi transfer and matched or prearranged orders (Tr. 1387-93). Swartwood Hesse dominated the Software market on November 16 because it had 96 percent of the total volume of trades in Software reported to NASDAQ, and Moyer was responsible for this demand because 25 of the 28 trades were to or from Moyer and Immitt accounts (Exhibits 261 & 263).

On November 18, 1983 Moyer arranged for Swartwood Hesse's trading account to buy 13,000 shares at $5 7/16 from M.W. Jenkins. The shares were sold from two Immitt accounts (Joseph and Theresa). Later that day the Swartwood Hesse trading account sold 12,000 shares at $5 1/2 to Shearson American Express for two Immitt accounts (Joseph and Theresa). This was a wash sale and matched or prearranged orders (Tr. 1394). Swartwood Hesse dominated the trading in Software on November 18 because it had 93 percent of the

total volume of trades in Software reported to NASDQ, and Moyer was responsible for this demand because 13,000 shares of the 14,000 shares reported involved transactions in Immitt accounts over which Moyer exercised de facto control (Exhibits 261 & 263).

On November 22, at 11:25 a.m. Moyer sold 11,000 shares from the Klebanoff account over which Moyer exercised de facto control at $5 1/2 to the Swartwood Hesse trading account and purchased 11,000 shares for his personal account at the same price.. This was a matched order.

On November 25, 1983 Swartwood Hesse's trading account purchased 15,500 shares from M.W. Jenkins at $5 3/8. Some 14,000 of these shares came from Moyer's wife's account which Moyer treated as his own. Later the same day, Moyer placed a buy order with the Swartwood Hesse trading account for 10,000 shares to his wife's account at $5 3/8 and 4,500 shares at $5 7/16 to three accounts in which Moyer made purchases pursuant to oral authority. These trades include a wash sale and matched or prearranged orders. Swartwood Hesse dominated trading in Software on November 25 because it had 100 percent of the total volume reported to NASDAQ, and Moyer was responsible for this demand because 16 of the 21 transactions involved Moyer and Immitt accounts (Exhibits 261 & 263).

On December 1, 1983 at 2:30 p.m. Swartwood Hesse's trading account bought 6,000 shares from Investor Associates/

Prudential Bache and an account in which Immitt authorized the transactions (J. Mott) at $6 which it sold at 2:32 and 2:33 p.m. to two accounts where Moyer acted pursuant to oral authority (W. McLeod and G. Gaudette) and to one account in which Immitt authorized the transactions (F. Piotrowsky) at the same price. At 3:44 p.m.Swartwood Hesse's trading account bought 12,000 shares at $6 1/4 from an Immitt account at Shearson American Express and sold 12,000 shares at the same price at 3:47 p.m. to the Klebanoff account over which Moyer exercised de facto control. These transactions were matched orders or prearranged trades. Swartwood Hesse dominated the market in Software on December 1 because it had 100 percent of the NASDAQ reported volume, and Moyer was responsible for this demand because most of the trades were to and from Moyer and Immitt accounts (Exhibits 261 & 263).

On December 2 the Swartwood Hesse trading account bought 5,000 shares at $6 1/4 from the Immitt and Theresa Immitt accounts at A. G. Edwards and 12 minutes earlier the trading account sold 5,000 shares at $6 5/16 to an account in which Immitt authorized the transactions (F. Douglas account). This was a matched order or prearranged trade. From the time sequence it appears that the sale by the trading account anticipated the purchase from A.G. Edwards. Swartwood Hesse dominated the market in Software on December 2 because it had 97 percent of the total volume of Software trades reported to NASDAQ.

On December 6 at 3:33 p.m. the Swartwood Hesse trading account bought 6,000 shares at $6 15/16 from an account in which Immitt authorized the transactions (F. Pietrowsky) and sold it at the same time in 500 share segments to 12 accounts at $7. In eleven of the 12 accounts Moyer made purchases within specified price ranges pursuant to oral authority. These transactions were matched orders or prearranged trades. Swartwood Hesse dominated the market in Software on December 6 because it had 73 percent of the NASDAQ reported volume, and Moyer was responsible for much of this demand because ten of the 16 customer trades were to or from Moyer or Immitt accounts (Exhibits 261 & 263).

Despite Moyer's attempts to discredit the Division's expert witness, the expert's view that Moyer traded between and among accounts over which he exercised de facto control to create volume to susbtantiate price increases is persuasive (Tr. 1048-54). An examination of Swartwood Hesse's volume as a percentage of NASDAQ volume and Moyer's position as the registered representative on most Software transactions confirms the expert's view that during the relevant period this record shows little, if any, demand for Software common stock outside of transactions between and among accounts in which Moyer exercised de facto control including the Immitt accounts which justified the consistent increases in Swartwood Hesse's bid price during the period in question.

These transactions were illegal because they constituted

a manipulative scheme intended to mislead people into believing that a demand existed for Software stock, they interfered with the free forces of supply and demand, they involved either no change in beneficial ownership (wash sales) or they were matching buys and sells done by Moyer and Immitt for the purpose of creating a false or misleading appearance of active trading in Software for the purpose of inducing Software transactions by others. The elements of Section 9(a)(2), incorporated into Section 10(b), are satisfied because:

1. Moyer engaged in a series of transactions (Software trades) assisted by Immitt.

2. Moyer's actions caused Software's bid price to rise from an inside close of $4 on October 27, 1983 to an inside close of $7 on December 6, 1983. He did this by effecting transactions in controlled accounts, by causing Swartwood Hesse which dominated the market to consistently increase its high bid and to purchase shares at this price or higher.

3. Moyer's purpose was to induce others to purchase Software stock so as to increase the price of Software common stock which would benefit himself and Immitt financially and confirm his professional opinion that the company was a good investment whose IPO was undervalued.

For all the reasons given, I find that Moyer violated Section 10(b) and Rule 10b-5 during the period on or about November 1, 1983 through December 6, 1983 because he willfully engaged in activities, which he failed to disclose to the investing public, and these activities operated as a

manipulative course of business concerning the market demand and price of Software common stock during the period November 1, 1983 through December 6, 1983.

III. Sections 15(b)(4)(E) and (b)(6)

A. Division's Position

The Division contends that Marshall Swartwood and Swartwood Hesse did not reasonably carry out their responsibility of supervising Moyer with a view to preventing Moyer's violations of the securities statutes and regulations in violation of Section 15(b)(4)(E) of the Exchange Act. To prove that Marshall Swartwood was responsible for supervising Moyer, the Division relies on (1) Swartwood Hesse's Form BD as originally filed and later amended naming T. Marshall Swartwood as the person authorized to receive and disseminate compliance information, (2) testimony from two Swartwood Hesse employees naming T. Marshall Swartwood as the person in charge of compliance (Moyer and Rosenfeld, the trader), and (3) the lack of documentation to support Mr. Swartwood's claim that he delegated supervision of Moyer's trading activities to Robert Hesse. The Division contends that this Commission has held that shared responsibility does not absolve a compliance officer of his responsibility (In re Michael Tennenbaum, 47 SEC 703, 711 (1982)).

To prove that Marshall Swartwood failed reasonably to supervise Moyer, the Division alleges that (1) Mr. Swartwood was aware that the trader expressed concern about Moyer's

"unusual orders" or "unusual directions", (2) Moyer's "as of" sales to replace cancelled orders totalled 23,500 units but Mr. Swartwood understood 10,000 to 12,000 IPO units were cancelled, and (3) a review of the monthly statements of six of Moyer's customers would have shown that they did not pay a total of $172,425 for their IPO units until long after the October 20, 1983 settlement date. See Berdahl v. SEC, 572 F.2d 643 (8th Cir. 1978). According to the Division, Marshall Swartwood would have learned of Moyer's violations if he had reviewed order tickets, the Quotron machine, and the trading blotters.

The Division claims the affirmative defenses spelled out in Section 15(b)(4)(E) of the Exchange Act are unavailable here because Swartwood Hesse did not have in place in 1983 procedures that could reasonably be expected to prevent and detect violations.

The Division cites six provisions of the code of business conduct from the Swartwood Hesse Compliance Manual and two unwritten company policies which it contends Moyer violated and which Swartwood Hesse failed to detect. They are as follows:

Code of Business Conduct Paragraph No.	Subject
3	A registered representative will not take or receive directly or indirectly, a share in the profits of any customer's account, or share in any losses sustained in any such account.
4	A registered representative is not allowed to maintain a cash or margin account without the prior consent of his/her employer.
4	A registered representative is not allowed to receive compensation or commissions or profits earned on any transaction or account in which he/she has a direct or indirect financial interest, except with employer approval.
8	A registered representative is not allowed to take, accept or receive, directly or indirectly, any compensation of any nature in connection with any securities transaction or transactions except with prior written consent of the New York Stock Exchange.
Additional Restrictions No. 1	A registered representative is not allowed to accept orders from a third party for a customer's account without the prior written authorization of the customer.
Additional Restrictions No. 3	A registered representative is not allowed to open a security account with another firm for the representative or the representative's spouse.

Code of Business Conduct Paragraph No.	Subject
Unwritten Company Policies	A registered representative is not allowed to purchase any IPO securities for his/her account or the accounts of immediate family members (Tr. 1844). Discretionary accounts are not allowed.

B. Respondents' Position

T. Marshall Swartwood maintains that he shared supervisory authority at Swartwood Hesse with several people including Robert Hesse to whom he delegated authority to supervise Moyer's trading activities, and there is no evidence that customers or anyone else, including Mr. Hesse, complained to him or brought to his attention during the relevant period any complaints or comments about Moyer's conduct or his unusual orders and unusual directions. Mr. Swartwood argues that a firm may have more than one supervisory employee, and that a supervisory employee need not be the person listed as the compliance contact on the firm's Form BD on file with this Commission. He relies on the Division's expert's opinion that the documentary material available to Swartwood Hesse at the time did not reveal that Moyer opened accounts at another broker-dealer. Mr. Swartwood argues that Congress did not intend that this type of factual situation would constitute a failure to supervise where, in

his view, Swartwood Hesse established and implemented procedures reasonably expected to prevent and detect violations by adopting the Bear Stearns Compliance Manual, keeping a copy of the manual on the premises, and requiring that registered representatives observe its provisions. Marshall Swartwood and Swartwood Hesse declare there is no basis for finding against them, citing decisions, including Juan Carlos Schidlowski, 48 SEC 507 (1986) and Universal Heritage Investments Corp., 47 SEC 839 (1982).

C. Findings

As pertinent here Section 15(b)(4)(E) provides that:

> The Commission . . . shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds. . . that such censure, placing of limitations, supervision, or revocation is in the public interest and that such broker or dealer . . . or any person associated with such broker or dealer . . . has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules and regulations, another person who commits such a violation, if such other person is subject to his supervision . . . no person shall be deemed to have failed reasonably to supervise . . . if
>
> > (i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and
> >
> > (ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

I find that T. Marshall Swartwood was responsible for supervising Moyer. I make this finding based on the following factors: T. Marshall Swartwood's capacity as President of the firm, he was the only person Swartwood Hesse designated to receive and disseminate compliance information communications from this Commission, the sworn testimony of Moyer during the investigation phase that Mr. Swartwood was in charge of compliance at Swartwood Hesse in 1983 and he probably reported to Mr. Swartwood and Mr. Hesse but he had more contact with Mr. Swartwood (Tr. 398-401, 404-06), and the testimony of the firm's trader that during the relevant time Mr. Swartwood was the firm's compliance officer (Tr. 1265).

The Schidowski situation is distinguishable on its facts from this one because there the transgressions occurred for the most part in a branch office and the Commission found that the firm's president, Schidowski, had no reason to be aware of them. Here Moyer was a senior vice-president and minority shareholder working closely at the same small office with the firm's president, T. Marshall Swartwood. In Schidowski the record showed that another firm principal had responsibility for the compliance area at issue. Here the evidence is not persuasive that Mr. Swartwood delegated responsibility for supervising Moyer's trading activities, and, again unlike Schidlowski it is impossible to conclude that Mr. Swartwood did not have or should not have had the

slightest indication of any irregularity. Universal Heritage Investments Corp., 47 SEC 839 (1982), the other case relied on by Swartwood Hesse and T. Marshall Swartwood, is also distinguishable on its facts. There the President devoted most of his time to outside activities and his delegation of the firm's day-to-day management to the Executive Vice-President was found to be reasonable. The President authorized the Executive Vice-President to hire outside counsel when informed of possible problems, and did not learn that counsel had performed a cursory review until after the NASD filed its complaint. Here Mr. Swartwood, the firm's specialist on underwritings, worked closely with Moyer at the same office on the Software underwriting. The activities in question began less than a month after the IPO was effective. The expert testimony is that the aftermarket activities are crucial to the success of the underwriting (Tr. 1892) and the two activities are not neatly separable. On these facts Mr. Swartwood has not shown that he is similarly situated to the President of Universal.

I find that T. Marshall Swartwood and Swartwood Hesse failed reasonably to supervise Moyer because the preponderance of the evidence is that Mr. Swartwood let Moyer function in an unsupervised fashion. Some of the facts which support this conclusion are that despite contradictory testimony at the hearing the investigative record shows that T. Marshall Swartwood reviewed all tickets (purchases) in

firm underwritings before they were executed (Tr. 1847), and that he took turns with Mr. Hesse in reviewing the blotter and/or tickets every day for a number of days (Tr. 1841). No reason was given why, given these responsibilities and his position as firm president, he failed to (1) note the purchase by Melissa Moyer of 5,000 Software IPO units which was against company policy as purchases by a family member of a registered representative (compare Mr. Hesse's testimony at Tr. 1844-45 and Mr. Swartwood's testimony at Tr. 1560-61), (2) know that the number of cancellations was 23,500 units not 10,000 to 12,000 units (Compare Exhibit 290 Paragraph 39 and Tr. 1662), and (3) that documentation was lacking to support some 36,000 units allegedly purchased on October 13 which were replaced after the 13th by "as of" purchases. Counsel dispute whether the testimony shows that Mr. Hesse informed Mr. Swartwood during or after the relevant period that Swartwood Hesse's trader was concerned about Moyer's trades.

Because of the numerous disputes between and among counsel, the record is not clear whether Mr. Hesse told Mr. Swartwood in the period November 1 through December 6, 1983 that the Swartwood Hesse trader was concerned about Moyer's trading activities (Tr. 1852-60). The record is clear that at some time he did convey this information. It is not necessary to resolve this dispute to find that Mr. Swartwood did not exercise a reasonable level of supervision. I reach

this conclusion because the firm's single trader, who viewed himself as a firm money maker and Mr. Swartwood as the compliance officer, admits that (1) at Moyer's request he performed prearranged trades which did not benefit the company's trading account set up to operate as a profit center, (2) he executed questionable trades as a favor to Moyer because of Moyer's position as a firm vice-president and leading producer and Moyer's huge holdings in Software, (3) Moyer directed him to buy shares at prices higher than Swartwood Hesse's bid on NASDAQ (Tr. 1297), and (4) Moyer instructed him to execute no gross trades and Moyer would make-up the lost profit on another trade (Tr. 1303, 1315-16). As the President and compliance officer of a firm with only six to eight registered representatives, Mr. Swartwood should have been aware of what was happening in the office where he worked with Moyer about his aftermarket activities in a stock where Swartwood Hesse was the single firm commitment underwriter.

This record does not show that Swartwood Hesse had in place procedures which would reasonably be expected to prevent and detect the violations found to have occurred. Moreover, lacking such established procedures Mr. Swartwood did not take it upon himself to do the necessary record review which would have uncovered improper activities.

Mr. Swartwood claims that Swartwood Hesse watched over Moyer's activities to be sure customers paid for IPO units in

a timely fashion. However, the evidence is that Mr. Swartwood did not supervise Moyer in this limited area because several customers did not pay within the customary five to seven business days allowed (Tr. 1934) and the amounts owed to Swartwood Hesse were substantial. Mr. Swartwood claims these nonpayments did not exist because Bear Stearns gave Swartwood Hesse an extra five business days to clear (collect) on IPOs (Tr. 1706) so that customers were not required to pay for Software by October 20 when Swartwood Hesse settled or paid Software. This explanation is unacceptable because the evidence shows that some of Moyer's accounts which purchased Software IPO units had not paid for them by the end of October or later, well beyond the ten-day period (Tr. 426-27, 430-32, 435, 449-50, 453).

Another situation where T. Marshall Swartwood did not reasonably exercise his supervisory responsibilities is shown by the fact that the firm's Software holdings in its inventory account were suppose to remain at a reasonable level which the company's trader interpreted to mean holdings of 5,000 to 10,000 shares or a value of $25,000 (Tr. 1319). The trader reported the account's position daily to Mr. Swartwood. Mr. Swartwood took no action in spite of the following holdings in the trading account which resulted from Moyer's activities trading Software.

Date	Balance in Inventory Acct	Closing Bid	Value
11/04/83	14,130	4 1/4	$60,052.50
11/23/83	11,730	5 1/8	$60,116.25
11/30/83	15,705	6	$94,230.00
12/01/83	11,205	6	$67,230.00

I reject as unpersuasive Mr. Swartwood's position that he is not culpable because he delegated to Mr. Hesse authority over Moyer's trading activities. The evidence for Mr. Swartwood's position are the statements of Mr. Swartwood and Mr. Hesse. The company had no memoranda, directives or written documentation to support such a claim. What I find persuasive is the fact that the firm's single trader was unaware of any delegation (Tr. 1428), and he and Moyer thought Mr. Swartwood was the compliance officer (Tr 492-93, 1265). The fact that others shared responsibility for supervising Moyer would not automatically relieve Mr. Swartwood of his supervisory obligations (See Michael E. Tennenbaum, 47 SEC 703, (1982) and Robert J. Check, Securities Exchange Act Release No. 26367, 42 SEC DOCKET 760 at 764 (1988)). It is significant that Mr. Swartwood as firm President worked with Moyer in the same office of a small firm. These conditions would make it difficult to hide one's activities yet Moyer was able to violate Section 10(b) of the Exchange Act, Rule 10b-5, Paragraphs 3,4, and 8 and Additional Restrictions Nos. 1 and 3 of Swartwood Hesse's Compliance Manual and the unwritten company policy against

purchases of IPO securities by a registered representative or immediate family member.

It appears on this record that in 1983 Swartwood Hesse's compliance activities consisted of little more than updating the Compliance Manual of Bear Stearns which it adopted when it commenced operations in 1981 so as to satisfy a NASD requirement (Tr. 1626). Moyer whose testimony was supportive of Mr. Swartwood and Swartwood Hesse admitted that he had been a registered representative at Swartwood Hesse since September 1982 but he did not look at the Compliance Manual for any purpose until the end of 1983, and the firm first requested that he look at the manual after 1983. (Tr. 488-91). Furthermore, Swartwood Hesse did not offer a single document to support its claim that in 1983 it had its registered representatives sign a form acknowledging that they were familiar with and would abide by the terms of the compliance manual, although it seems reasonable to expect that such forms, if they existed, would be retained in the representatives' personnel folders. It is important to note again that Swartwood Hesse was a small firm with six to eight registered representatives so the administrative burden of this record keeping was not great.

Based on the evidence I find that T. Marshall Swartwood and Swartwood Hesse violated Sections 15(b)(4)(E) and 15(b)(6) because they failed reasonably to supervise Moyer, with a view to preventing the violations of the statutes and

rules which Moyer committed. I find further that the affirmative defenses set out in (i) and (ii) of Section 15(b)(4)(E) do not apply because (1) Mr. Swartwood and Swartwood Hesse did not have in place established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect these violations, and (2) even if you assumed that the alleged delegation to Mr. Hesse did occur the evidence shows that Mr. Swartwood either knew or should have known that the procedures and system were not being complied with, i.e. Moyer was not complying with the statute and rules.

IV. Sanctions

The Division recommends that it is in the public interest to:

1. permanently bar Moyer from the securities industry pursuant to Section 15(b)(6) of the Exchange Act,
2. suspend T. Marshall Swartwood from association with any broker-dealer in a supervisory capacity for 90 days pursuant to Section 15(b)(4)(E) and 15(b)(6), and
3. censure Swartwood Hesse pursuant to Section 15(b)(4)(E).

The bases for these recommendations are the importance of free and honest markets, the gravity of acts of market manipulation, Moyer's willful conduct, and Marshall

Swartwood's loose treatment of serious supervisory responsibilities.

The remedial action appropriate in the public interest depends on the facts and circumstances of each particular case. See Butz v. Glover Livestock Commission Co., Inc., 411 U.S. 182, 187 (1973); Hiller v. SEC, 429 F.2d 856, 858-59 (2d Cir. 1970). The case law has established many elements to be considered in determining what sanctions are appropriate: the seriousness of the violations, the time over which they occurred, respondents' prior disciplinary history, respondents' efforts at restitution and rehabilitation and their dedication to compliance, the probability of future misconduct by respondents, and the deterrent effect on others in the security business.

Applying these factors first to Mr. Moyer and then to Mr. Swartwood shows that the unlawful activities occurred in a relatively brief period -- less than two months time, and involved securities of one company. The type of violations could hardly be more serious as manipulation strikes at the heart of the pricing process on which all investors rely (In re Pagel, Inc., Release No. 34-22280 [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) §83,909 (1985), aff'd, Pagel, Inc. v. SEC, 803 F.2d 942 (8th Cir. 1986)). The illegal feature of such conduct is its impairment of free and open securities markets and it is immaterial that the security involved may have had a value equal to the advanced prices

paid by the purchasers, that the purchasers may have had independent information respecting the security, or that the purchaser may have suffered no out-of-pocket losses (In the Matter of M.S. Wien & Co., 23 SEC 735, 745 (1946)). Respondents note that the record does not show testimony by customers of damages suffered. Such a defense confuses private actions for money damages with proceedings to redress the public interest. No proof of damages is needed in the latter type of case. The express provisions of the Act and the legislative history show that Congress was bent on stamping out deceptions of this character (Edward J. Mawod, 46 SEC 865, 871 (1977), aff'd Edward J. Mawod & Co. v. SEC, 591 F.2d 588 (10th Cir. 1979)).

Mr. Swartwood has been engaged in the securities business for some 28 years. In 1974 while a principal with Flaherty & Swartwood Inc., a registered broker-dealer, he and Mr. Flaherty signed a letter of waiver and consent acknowledging violations of NASD's Rules of Fair Practice and agreed to pay a $750 penalty (Exhibit 297). On October 27, 1987, the NASD issued a complaint alleging that Swartwood Hesse acting through Mr. Swartwood and others violated NASD's Rules of Fair Practice (Tr. 1694-96). Mr. Moyer has been engaged in the securities business since at least 1977 and has not been the subject of any prior disciplinary action (Tr. 2104-06). Neither Mr. Moyer nor Mr. Swartwood expressed any remorse or effort at rehabilitation.

I conclude that Richard T. Moyer should be barred from being associated with a broker or dealer, provided that after one year he may apply to become so associated in a non-supervisory and non-proprietary capacity, upon a showing of adequate supervision; T. Marshall Swartwood should be suspended from association with any broker or dealer in a supervisory capacity for 90 days; and the firm of Swartwood Hesse should be censured. I make these determinations because the violations occurred due to the actions of Moyer and the inaction of Mr. Swartwood. Both men have spent their lives in the industry and it appears from this record that both require a startling reminder that the positions they hold as registered representative and principal require that their primary obligation should be to the protection of public investors. As the Commission stated in In re Pagel, Inc., Release No. 34-22280 [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) §83,909 at p. 87,754 (1985), aff'd, Pagel, Inc. v. SEC, 803 F.2d 942 (8th Cir. 1986) lesser sanctions are not warranted because the violations were not the result of hectic initial trading nor were they merely the result of errors of judgment. On the contrary, respondents engaged in a deliberate manipulation of the market. The gravity of the misconduct is compounded since it was perpetrated by experienced professionals who, invested with public confidence, abused that trust for their own personal benefit.

The status of Swartwood Hesse is unknown since Mr. Hesse withdrew as a firm principal in 1988 (Tr. 1774). However, the public should be aware of the serious transgressions committed by the firm though its officers. Censure, a matter of public information, will put the public on notice.

I have considered and rejected those proposed findings, arguments, and conclusions that are inconsistent with this decision.

V. ORDER

Based on the findings and conclusions set out in this decision, I ORDER that:

1. Richard T. Moyer is barred from being associated with a broker or dealer, provided, that after one year he may apply to become so associated in a non-supervisory and non-proprietary capacity, upon a showing of adequate supervision;

2. T. Marshall Swartwood is suspended from association with any broker or dealer in a supervisory capacity for 90 days; and

3. Swartwood Hesse, Inc. is censured.

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)) of the Commission's Rules of Practice (17 CFR 201.17(f)), this initial decision shall become the Commission's final decision 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 this initial decision. If a party timely files a petition for review, orthe Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

Brenda P. Murray
Administrative Law Judge

Washington, D.C.
March 6, 1989