

ADMINISTRATIVE PROCEEDING
FILE NO. 3-1793

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

FILED

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SECURITIES & EXCHANGE COMMISSION

In the Matter of

VOLANTE, BEHAR AND SPERLING
GUIDO VOLANTE
JACQUES BEHAR
HERMAN SPERLING

(8-14167)

INITIAL DECISION

Washington, D. C.
March 4, 1970

Sidney L. Feiler
Hearing Examiner

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:

APPEARANCES: Messrs. John J. Phelan III and Michael L. Blaine,
for the Division of Trading and Markets.

Feiner, Klaris and Curtis, by Ira N. Smith, Esq.
150 Broadway, New York, New York 10038
for Volante, Behar and Sperling, a partnership;
and Guido Volante, Jacques Behar, and
Herman Sperling, individually.

BEFORE: Sidney L. Feller, Hearing Examiner

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I. THE PROCEEDINGS

These proceedings were instituted by order of the Commission pursuant to Section 15(b) of the Securities Exchange Act of 1934, as amended ("Exchange Act") to determine whether certain allegations set forth in the order were true and, if so, what, if any, remedial action was appropriate in the public interest pursuant to Section 15(b) of the Exchange Act. It is alleged in the order for the proceedings that during the period from on or about July 24, 1968 to the date of the order, Volante, Behar and Sperling ("VB&S"), a partnership, has willfully violated Section 15(a) of the Exchange Act and Guido Volante, Jacques Behar, and Herman Sperling, its partners, have willfully aided and abetted such violation in that VB&S has used the facilities of interstate commerce to effect transactions in securities while and at a time when it failed to be registered as a broker-dealer with the Commission pursuant to Section 15(b) of the Exchange Act. ^{1/} It is further alleged that during the period from on or about June 20, 1967 to on or about July 20, 1967 Volante, while associated with another broker-dealer firm, and other persons acting in concert with him willfully aided and abetted violations of Section 5(a) and (c) of the Securities Act of 1933, as amended ("Securities Act") in connection with the offer and sale of the common stock of North American Research and Development

^{1/} Section 15(a) provides that no broker or dealer (other than one whose business is exclusively intra-state) shall make use of the mails or any means or instrumentalities of interstate commerce to effect any transaction in, or to induce the purchase or sale of any security otherwise than on a national securities exchange, unless such broker or dealer is registered in accordance with subsection (b) of Section 15 of the Exchange Act.

Corporation ("2/NARD"); that Volante and other persons acting in concert with him willfully violated anti-fraud provisions of the Securities Acts in the sale of NARD common stock; that Volante while associated 3/ with another broker-dealer firm willfully aided and abetted violations of record-keeping requirements applicable to broker-dealers (Section 17(a) of the Exchange Act and Rule 17a-3 thereunder) and net capital requirements (Section 15(c)(3) of the Exchange Act and Rule 15c3-1). Additional allegations are that Volante has been enjoined in two proceedings from further violations of the Securities Acts and that prior to becoming associated with VB&S, Volante failed reasonably to supervise to prevent violations of the Securities Acts.

It was directed that there should be first considered at the hearing the question whether, pending final determination of the ultimate issues, it was necessary or appropriate in the public interest or for the protection of investors to suspend the registration as a broker-dealer of VB&S, the registrant. Pursuant to notice a hearing was held at New York, New York on the issue of the suspension of the registration

2/ Section 5 of the Securities Act provides, in pertinent part, that it shall be unlawful to make use of the instruments of transportation or communication in interstate commerce or of the mails to offer to sell or to sell a security unless a registration statement is in effect as to it.

3/ Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The composite effect of these provisions, as applicable here, is to make unlawful the use of the mails or interstate facilities in connection with the offer or sale of any security by means of a device or scheme to defraud or untrue or misleading statements of a material fact, or any act, practice, or course of conduct which operates or would operate as a fraud or deceit upon a customer or by means of any other manipulative or fraudulent device.

of the registrant as directed in the Commission's order. After the presentation of evidence and the filing of proposed findings and briefs on behalf of the parties, the undersigned issued an initial decision directing that the aforementioned registration should be suspended pending final determination of the allegations set forth in the order for these proceedings. On review by the Commission the Commission determined that there was a likelihood that a determination of the ultimate issues would be made expeditiously and therefore considered that it was not necessary to suspend the registrant's registration pending such determination.

The hearing continued on the remaining issues and at its conclusion proposed findings, together with supporting briefs, were submitted on behalf of the parties. Since the Commission had ordered the record adduced with respect to the question of suspension shall be deemed a part of the record at the reconvened hearing with respect to consideration of the remaining questions in the proceedings, counsel for the parties relied on evidence they had previously presented as well as their initial filings of proposed findings and briefs. To avoid duplication the undersigned will refer to portions of his initial decision where certain evidence, the contentions of the parties and his findings are set forth in some detail.

II. FINDINGS OF FACT AND LAW

A. Registration of the Registrant

It is alleged in the order for proceedings that from on or about July 24, 1968 VB&S willfully violated the broker-dealer

registration provisions of the Exchange Act, Sections 15(a) and (b) and Volante, Behar and Sperling each willfully aided and abetted such violation in that VB&S made use of the mails and the facilities of interstate commerce to effect transactions in securities otherwise than on a national securities exchange and at a time when it was not registered as a broker-dealer pursuant to Section 15(b) of the Exchange Act.

The evidence on this issue concerns the efforts of Volante, Behar and Sperling, as partners, to succeed to the business of Herman Sperling, d/b/a Financial Services Co., a sole proprietorship, registered as a broker-dealer with the Commission. The sequence of events, the contentions of the parties, and the findings and conclusions of the undersigned are set forth in the prior initial decision at pages 4 through 10. The undersigned concluded that there was evidence that the registrant violated the registration provisions of Section 15 of the Exchange Act and applicable rules thereunder and that its individual partners aided and abetted such violations. The respondents sought to avail themselves of an exemption from full registration requirements by filing an amendment to Sperling's registration thus avoiding the necessity of any waiting before engaging in business and the filing of required financial information. The purposes and policies of the registration requirements were thus circumvented and the interests of the investors could not be protected.

It is urged on behalf of the respondents that if there were any violations, they were due to the fact that the respondents acted

on the advice of counsel. Asserted reliance on the advice of counsel does not bar a finding of a violation or that such a violation was willful within the meaning of the Exchange Act.^{4/}

It has been stated that

"the word [willful] often denotes an act which is intentional or knowing, or voluntary, as distinguished from accidental." ^{5/}

The general standard applied by the Commission and approved by the Courts is that "willful"

"...means intentionally committing the act which constitutes the violation. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts." ^{6/}

However, such evidence may and will be considered later in this decision on the question of what sanction, if any, is necessary in the public interest.^{7/} The undersigned concludes from the complete

^{4/} Gearhart & Otis, Inc., Sec. Exch. Act Rel. No. 7329 (June 2, 1964); Strathmore Securities, Inc., Sec. Exch. Act Rel. No. 8207, p. 8 (Dec. 13, 1967).

^{5/} United States v. Murdock, 290 U. S. 389, 394-395 (1933).

^{6/} Tager v. S.E.C., 344 F. 2d 5, 8 (2nd Cir. 1965), affirming, Sidney Tager, Sec. Exch. Act Rel. No. 7368 (July 14, 1964); Accord Harry Marks, 25 S.E.C. 208, 220 (1947); George W. Chilian, 37 S.E.C. 384 (1956); E. W. Hughes & Company, 27 S.E.C. 629 (1948); Hughes v. S.E.C., 174 F. 2d 969 (C.A.D.C. 1949); Shuck & Co., 38 S.E.C. 69 (1957); Carl M. Loeb, Rhoades & Co., 38 S.E.C. 843 (1959); Ira Haupt & Company, 23 S.E.C. 589, 606 (1946); Van Alstyne, Noel & Co., 22 S.E.C. 176 (1946); Thompson Ross Securities Co., 6 S.E.C. 1111, 1122 (1940); Churchill Securities Corp., 38 S.E.C. 856 (1959). See generally Loss, Securities Regulation, (1961 Ed.), Vol. II, pp. 1309-1312 (1969 Supp.), Vol. V, pp. 3368-3374.

^{7/} Armstrong, Jones and Company, Sec. Exch. Act Rel. No. 8420, p. 15 (Oct. 3, 1968).

record that it has been established that VB&S willfully violated the broker-dealer registration provisions of Section 15 and that the individual respondents willfully aided and abetted such 8/ violation.

B. Activities of Volante in the Offer and Sale of NARD Stock

1. Introduction

The remainder of the allegations in the order for these proceedings deals with Volante's activities while associated with another broker-dealer firm, Dunhill Securities Corporation. Volante acquired control of an inactive broker-dealer firm and in January 1967 notified the Commission that Dunhill had succeeded to the business of the former registrant (File No. 8-11616-1). At that time Volante and his wife were listed as the sole officers of Dunhill and Volante was listed as the only person owning more than 10% of its stock. In April, information was filed that Patrick Reynaud had become president and Volante had become vice president. In July 1967 an amendment was filed noting that Reynaud owned 75% of Dunhill stock and Volante,

8/ Evidence was presented that the registrant did business in the corporate form in that it permitted the use of its name as a corporation in a proposed underwriting agreement attached to a registration statement filed with the Commission. (Pikes Peak Turf Club, Inc., file No. 2-29216-1). There also is evidence that the registrant used some stationery on which its printer had inserted registrant's name as a corporation. The undersigned credits testimony that the use of the corporate form of registrant's name in the Pike's Peak filing was due to a misunderstanding by counsel for Pike's Peak and that while registrant and its partners exhibited some carelessness in this matter no finding of violation or the need for the imposition of any sanction has been established.

the remainder.

2. Violations of the Registration Provisions of the Securities Act

It is alleged in the order that from on or about June 20, 1967 to on or about July 20, 1967, Volante and other persons acting in concert with him willfully violated and willfully aided and abetted violations of Sections 5(a) and 5(c) of the Securities Act in the offer and sale of the common stock of NARD. During that period, Volante was in charge of the day to day operations of Dunhill and conducted all its trading activities. In addition to clerical help, the firm had one registered representative, Marvin ("Mickey") Osias, a part-time securities salesman.

On February 20, 1968 an order of preliminary injunction was issued in the United States District Court for the Southern District of New York against Volante, Dunhill and a number of others prohibiting them from further violations of Sections 5(a), 5(c) and 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder (Div. Ex. 8-B).

In an extensive opinion handed down on February 8, 1968 the Court found that there had been a scheme to acquire control of the issued stock of an inactive publicly-held corporation, NARD, and, with the participation of certain defendants, to promote distribution of the balance of the issued stock with a view to introducing it on the over-the-counter market in the United States, creating a demand for it, instigating trading in it and running up its market price, all

for the benefit of the chief defendant and a group of friends engaged in its distribution.^{9/}

The action was brought against NARD and 42 other defendants. In his opinion Judge Mansfield described in detail how Edward White, the principal originator of the scheme, acquired a publicly-held inactive corporation to use as a shell for a stock manipulation, and how shares acquired by an insider group were distributed from Canada into United States.

Some of the findings of the Court dealing with the activities of Dunhill and Volante have been set forth in the prior initial decision of the undersigned (I. D. pp. 11-13). The Court found that Dunhill was used as a conduit through which shares of NARD were funneled into the American market. Dunhill commenced trading in the stock on June 27, 1967 after filling certain orders for the purchase of NARD (8 orders totalling 3,000 shares), it proceeded to sell for Gail Dombrofsky 5,700 shares. The next day it sold an additional 4,400 shares for her account. (Div. Ex. 15).

Mrs. Dombrofsky, who had not had an account at Dunhill prior to this time, has been identified as a sister of a Morris Cooper. Cooper was found to be part of the Canadian group promoting the distribution of NARD stock in the United States. Volante testified that he knew Cooper, who had an account at Dunhill, as a friend of Alfred Blumberg. Blumberg was identified in the aforementioned

^{9/} North American Research and Development Corp., et al., 280 Fed. Supp. 106 (USDCSDNY, Feb. 8, 1968), Div. Ex. 8-A.

decision as a person to whom Cooper and another person furnished promotional information which he in turn used to tout the stock to investors in and about New York, some of whom subsequently bought shares through Dunhill.

Between June 27 and July 19, 1967 (the day before the Commission suspended trading in the stock) Dunhill bought 32,650 and sold 64,250 shares of NARD. Of these shares, 39,500 shares were sold by Dunhill as agent for Gail Dombrofsky, and 8,500 were sold for Frances Oventhal, Cooper's mother-in-law. These persons were residents of Canada. ^{10/} In addition, Dunhill purchased 8,500 shares in the market from other brokers. Of the shares sold for Dombrofsky and Oventhal and bought in the market, 35,800 were sold to other broker-dealers. Public customers of Dunhill bought or sold 58,100 shares. In situations where shares were sold to customers the seller was generally another customer, chiefly Dombrofsky or Oventhal. There were 44 public customers of Dunhill who purchased NARD shares. Of these at least 13 were solicited to make their purchases by Osias acting as a registered representative of Dunhill. Of the customers who purchased NARD shares approximately 31 were either solicited by Blumberg to purchase their shares or Blumberg placed the orders acting on powers of attorney or discretionary authority. The

^{10/} Volante gave contradictory testimony as to who had placed these orders. He finally expressed himself as uncertain as to whether Cooper or these ladies had placed the orders. Since he knew Cooper personally and not the others it is most likely that Cooper placed the orders.

importance of Dunhill in the distribution that was found to have taken place can be judged from the finding made that before the aforementioned suspension order was issued 197,397 shares of NARD were sold from Canada into the United States.

No registration statement has ever been filed with the Commission or become effective with respect to the stock of NARD. Counsel for the respondents concede that Dunhill sold NARD shares in violation of the registration provisions of the Securities Act. No exemption under Sections 3 or 4 of that Act are now ~~claimed~~ ^{Claimed} in view of the findings in the district court that exemption for these transactions had not been established. However, it is urged that the distribution of unregistered shares of NARD in the United States was a cleverly devised scheme, that Volante was not an active participant in the scheme, and that Dunhill and Volante were dupes. Attention also is called to a finding in the district court, that "Osias' attempts to induce customers to buy constituted solicitations destroying the §4 (4) exemption to which Volante would otherwise be entitled, since Osias' conduct, on the principle of respondeat superior, is attributable to Dunhill and Volante." (Supra, pp. 126-127; Respondents' brief, p. 18).

According to Volante the first person who told him about NARD was Blumberg who gave him information on its business. Volante had known Blumberg for a number of years and knew him as a financial analyst and an investor. Before forming his association with Reynaud he had discussed with Blumberg their engaging in business as broker-

dealers. Blumberg had an office in the same building as Dunhill during the time here relevant and he and Volante saw each other frequently. Blumberg had introduced Volante to Cooper. According to Volante, the first eight trades he executed in NARD came from Blumberg or from accounts he controlled. As previously noted, many of the trades by Dunhill in NARD for customers originated or are traceable to Blumberg. ^{11/} Volante further testified that he made efforts to determine whether there were any restrictions on the shares which were being sold through his firm and whether the persons selling them were part of any control group. He made inquiries of Cooper, the transfer agent of NARD, the president of NARD, and one other officer. He testified that these persons all assured him that there was no impediment to Dombrofsky and Oventhal selling the shares that they were attempting to sell through Dunhill. However, all these persons had played and/or were playing a part in the distribution scheme and their assurances to Volante were valueless. Volante's efforts were rejected by the Court as not fulfilling any duty of "reasonable inquiry." It is urged that while what Volante did may not have met the judicial standard it was reasonable and that the share certificates of Dombrofsky and Oventhal bore no restrictive legends.

11/ Volante testified that at Blumberg's request he credited Osias with commissions on the Dombrofsky and Oventhal accounts. Blumberg was a friend of Osias and, according to Volante, Blumberg urged him to do this because Osias needed the money and the extra compensation might induce Osias to become a full-time salesman. Volante testified he understood that Osias knew these accounts and did not learn the contrary until later.

It is also urged that Volante took no positive steps to push sales of NARD. He specifically denied findings made in the aforementioned Court decision, that he had sent a copy of a piece of selling literature of NARD entitled "Progress Report" (Div. Ex. 16) to another broker-dealer or that he had urged another broker-dealer to enter the pink sheets (National Daily Quotation Service, Inc.) to quote NARD, although he did admit that he did mention to that broker that NARD was an active stock. He also stated that he did not sell any of the stock to his own customers, that Dunhill had no trading position in the stock and that neither he nor Dunhill derived any compensation from transactions in NARD other than the usual charges. He denied ever telling Osias to solicit orders for NARD.

The distribution by broker-dealers of unregistered securities has been considered by the Commission in many decisions. In 1962, in a public release, it summarized in detail the responsibilities of broker-dealers in connection with the distribution to the public of substantial blocks of unregistered securities, particularly in situations where the securities are those of relatively obscure and unseasoned companies and where all the circumstances surrounding the proposed distribution are not known to the broker-dealer.^{12/} It pointed out that where unregistered securities are offered to a dealer for disposition, unless adequate precautions are taken, the dealer may be participating in a distribution for an issuer or persons controlling,

^{12/} Sec. Act Rel. No. 4445 (February 2, 1962).

controlled by, or under common control with an issuer, and thus lose any exemption he might otherwise have for his participation in the transactions since he thereby would become an underwriter under Section 2(11) of the Securities Act.

The Commission further pointed out, "The problem becomes particularly acute where substantial amounts of a previously little known security appear in the trading markets within a fairly short period of time and without the benefit of registration under the Securities Act of 1933. In such situations, it must be assumed that these securities emanate from the issuer or from persons controlling the issuer, unless some other source is known and the fact that the certificates may be registered in the names of various individuals could merely indicate that those responsible for the distribution are attempting to cover their tracks." (supra, p. 2).

The distribution of the NARD stock in the United States is a classic case of the illegal activities of which the Commission warned securities dealers. A group concentrated substantially all of the outstanding shares of NARD in Canadian accounts with a view to their distribution in the United States. These shares were released into that market using accounts at various brokers. Dunhill was a major source of that distribution.

NARD was a company with no operating history and no financial information available to the public. Large blocks of shares came to Dunhill from persons unknown to Volante. He did not check on NARD with objective sources such as Commission records or recognized

financial services. Instead, he went to persons who might have a substantial interest in furthering a distribution in violation of the Securities Act. His failure to take effective action furthered the fraudulent scheme and his inquiries were not reasonable under the circumstances. Not only were the exemptions the Court specifically dealt with not available to Dunhill, but, in addition, by participating in a distribution of shares from the control group in Canada (the Dombrofsky and Oventhal shares) Dunhill participated in the distribution as an underwriter and lost any claim to exemption thereby.^{13/}

It is concluded that Volante by his activities violated and aided and abetted violations of Sections 5(a) and (c) of the Securities Act in the offer and sale of the stock of NARD and that such violations were willful.^{14/}

3. Violations of the Anti-Fraud Provisions of the Securities Acts

It is further alleged in the order for proceedings that Volante and other persons acting in concert with him willfully violated the anti-fraud provisions of the Securities Acts in the offer and sale of NARD stock.

Prior to the distribution of NARD stock in the United States market, its promoters acquired for it control of a company that had a

^{13/} The Court found it unnecessary to rule whether there was a secondary distribution of all the shares offered from the Canadian accounts by those in control of the issuer at that time, but it did find that by June 27 almost all the NARD shares were in control of that group. (280 F. Supp. 115-116, 120-121).

^{14/} On willfulness, see authorities cited in footnote 6, supra.

patent application on an anti-pollution device which converted coal into coke. Then a "Progress Report" was prepared stressing the large market that would be enjoyed by the process that would be used by the company. This report was found by the Court to be incomplete, false, and misleading. No financial information on the company was included, but the impression was given that it was well capitalized and ready to continue profitable operation of its pilot plant, no mention was made of the necessity to make further tests to determine feasibility of the process and the financial inability of NARD to carry out specified plans.

As previously noted, Osias made sales of NARD stock to customers acting as a registered representative for Dunhill. Volante had hired him in February 1967 on Blumberg's recommendation. Osias' testimony reveals that he had only a very hazy knowledge of NARD. He received a copy of the "Progress Report" from Blumberg and also some oral information from him. He testified that Blumberg told him that NARD was in the air pollution field, had some kind of process to take "poisonous" elements out of coal or coke, and that if they could do it there would be a big market for the product, and the stock would go higher. The evidence establishes that he repeated this sketchy information to customers and did not attempt to give them any information on the financial condition of NARD, the problems it faced, and the stock manipulation which had taken place. His representations and omissions were clearly violative of the anti-

fraud provisions of the Securities Acts.^{15/}

Volante testified that he hired Osias after he was certain that the latter had had a good record in the securities business. He told Osias to behave in an ethical manner and did not know that Osias was making any improper statements about NARD nor did he, Volante, sell any of that stock to his customers.

However, all transactions arranged by Osias in NARD had to pass through Volante's hands. Volante had been with Osias when the latter received a copy of the "Progress Report" from Blumberg. Volante testified he leafed through it, but was not interested in it because it had no financial information. He tried to obtain this information from the company, he stated, but never received it.

Under the circumstances, Volante, as the person in charge of operations of Dunhill, had a greater obligation than to adopt the passive role he asserted he took in processing orders for Osias. He knew of the paucity of information on NARD. It was his obligation as an officer and manager for Dunhill to see to it that its customers were not defrauded. This he made no effort to do. Osias' violations were made in the course of his duties and are chargeable to Volante, whose inaction made possible the deception of customers

^{15/} The Commission has already imposed sanctions on Osias for his activities (Sec. Exch. Act Rel. No. 8612, May 27, 1969).

16/ to continue. It is concluded that Volante willfully violated the anti-fraud provisions of the Securities Acts, as alleged, and failed reasonably to supervise to prevent violations of these provisions.

C. Violations of Net Capital
and Record Keeping Rules

It is alleged in the order for these proceedings that Volante from about April 30 to June 3, 1968 willfully aided and abetted violations of the record-keeping rule (Section 17(a) of the Exchange Act and Rule 17a-3 thereunder) and the net capital rule (Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder).

On June 19, 1968 a judgment of preliminary injunction was issued in the United States District Court for the Southern District of New York against Dunhill Securities and its officers Patrick R. Reynaud and Volante in a proceeding instituted by the Commission on May 24, 1968. (Div. Ex. 7-B).

In a memorandum opinion (Div. Ex. 7-A) the Court found that at the time of the institution of the action, Dunhill was not in compliance with either the net capital rule or the maintenance of records rule. On the basis of affidavits and an evidentiary hearing, the Court found that as of May 24, 1968 the following books of account were not up to date, as required by the record-keeping rule: Blotters,

16/ One customer of Osias testified that after the suspension he spoke with Volante who assured him that the company was still good and the trouble should blow over in a few months (Tr. 1110).

General Ledger, Customers' Individual Ledger Accounts, Trading Account, Failed to Receive Ledger, Failed to Deliver Ledger, and Stock Record Book. It noted that as of May 31 Dunhill had brought most of its records up to date, but that the stock record book was still not current and clerical errors had resulted in the Customers' Ledger not agreeing with the General Ledger to the extent of \$4746.

With respect to the net capital rule, the Court found that a deficit existed in net capital as of April 30, 1968 and May 31, 1968, and that the defendants had conceded deficiencies as of April 30 and May 24, while not conceding the amount claimed by the Commission. The defendants' claim of compliance as of May 31 was analyzed and it was concluded that there was a net capital deficit still existing in excess of \$22,000.

The parties presented additional evidence on the alleged violations at the hearing herein. Attilio Veneziano, an investigator on the staff of the New York Regional Office of the Commission, testified that he made an examination of the books and records of Dunhill on May 21, 1968. He asserted that he found that certain books and records were not posted up to date, as required, some deficiencies dating from March 29.

Veneziano asked for and received a trial balance as of April 30 and supporting schedule, but a computation of aggregate indebtedness was not available. His analysis of this material showed a net capital deficiency as of April 30 of \$88,660.34 (Div. Ex. 19). Later, Veneziano received a trial balance from Dunhill as of

May 31 with supporting schedules. His computation of net capital showed a deficiency of \$70,571.27. (Div. Ex. 21).

While the deficiencies in record-keeping reported by Veneziano were not seriously questioned, his computation of the net capital deficiencies and the procedures used were subject to extensive examination and are challenged on several grounds.

It is pointed out on behalf of the respondents that Veneziano's procedures in computing net capital of Dunhill as of April 30 and May 31 differed in that in the former calculation he did not "mark to the market" items in customers' accounts whereas there was such a calculation made in the later computation. Veneziano explained that a more detailed procedure was followed for the May 31 calculations, but that the technique previously used had not resulted in any substantial disadvantage to Dunhill in the calculations (Tr. 1040-1049).

In the net capital analysis for May 31 those accounts receivable which were owing to Dunhill from customers which were supported in the underlying securities by NARD stock were treated as unsecured debit balances. In other words, no value was ascribed to that stock. There was a misapprehension that NARD stock was still under suspension at that time. However, it was stipulated that the suspension had terminated before April 30. Nevertheless, Veneziano testified that he had also checked the quotation sheets and found that the stock was not quoted and that the valuation ascribed was in accordance with prescribed procedures. His testimony on valuation in the market

place was not challenged. (Tr. 1056-58).

The Dunhill records as of May 31 reflected an item, "Subordinated Loan, E. Flinn, 20,000." Veneziano testified that in making his analysis he checked whether a subordination agreement had been filed with the Commission and when he found that none had been filed, he treated the item as an ordinary liability rather than a subordinated loan (Tr. 1061-1065). This affected the aggregate indebtedness and the net capital deficiency. (Tr. 1068). Objection was made that Veneziano, in doing this, was using knowledge he acquired after May 31. However, even if this adjustment had not been made Dunhill would still have had a net capital deficiency. ^{17/}

Veneziano visited Dunhill on June 18, 1968 and obtained a trial balance as of June 14. The firm appeared to be in ratio by that time (Tr. 1029-1030). The undersigned credits Veneziano's testimony and concludes that his analysis of net capital of Dunhill was made in accordance with required procedures and that Dunhill had net capital deficiencies as of April 30 and May 31, 1968.

Volante testified that difficulties developed in Dunhill's record-keeping when there was a succession of cashiers, starting in January 1968, all of whom were inadequate. Reynaud attempted to obtain a competent cashier, but was unsuccessful because, according

^{17/} Flinn made the loan in the form of a check. Payment on the check was subsequently stopped.

to Volante, he would not offer sufficient compensation. Finally, Volante in mid-April hired a competent cashier, a Dvorah Wernick, and authorized her to employ extra help to work on the books. Volante stated that as many as fifteen part-time employees were used to supplement his and Miss Wernick's efforts and the books and records were brought up to date in June 1968. He then turned over his interest in Dunhill to Reynaud without any consideration and severed all connections with that firm.

Volante further testified that in the January-June 1968 period he had had disputes with Reynaud, and had offered unsuccessfully to buy out the latter's interest in Dunhill. While Volante continued to conduct trading operations for the firm, Volante asserted that Reynaud took a more active part in management, made improper expenditures, took over sole authority to issue checks in April, and then refused to sign checks for the part-time help Volante had authorized. Volante asserted that at one point he sought to stop trading, but his recommendation was not followed. Volante's testimony as to the efforts exerted to bring the Dunhill records in order from mid-April were corroborated by Miss Wernick in certain respects.^{18/}

It is evident that Dunhill was not in compliance with the record-keeping and net capital rules during the period alleged (April 30 to June 3, 1968). Its difficulties began months previous to the inspection by a Commission investigator. Despite the problems

^{18/} At the time of the hearing Miss Wernick was employed as cashier for the registrant.

it was experiencing business was being conducted on a daily basis. In fact during the January-June 1968 period four or five representatives were added to the staff. While Volante did not have sole control of the operations of Dunhill, as a part-owner, officer, and chief trader, it was his duty to see to it that operations were conducted in accordance with applicable rules. When difficulties did develop, as he knew, he took no effective remedial action for months, but continued operations as usual, thus placing the interests of investors in serious jeopardy. The undersigned concludes that Volante aided and abetted violations of the record-keeping and net capital rules and that these violations were willful. It is further found that Volante failed reasonably to supervise with a view to preventing these violations.

III. CONCLUDING FINDINGS, PUBLIC INTEREST

The Commission, pursuant to the provisions of Section 15(b)(5) of the Exchange Act, so far as it is material herein, is required to censure, suspend for a period not exceeding twelve months or to revoke the registration of any broker or dealer if it finds that such action is in the public interest, and such broker or dealer, whether prior or subsequent to becoming such, has willfully violated any provision of the Exchange Act, the Securities Act, or any rule or regulation thereunder. It also may, pursuant to the provisions of Section 15(b)(7) of the Exchange Act, censure, bar, or suspend for a period not exceeding twelve months any person from being associated

with a broker or dealer if it finds that such sanction is in the public interest and that such person has willfully violated any provision of the Exchange Act, the Securities Act, or any rule or regulation thereunder, or has been enjoined in connection with the purchase or sale of any security, or has failed reasonably to supervise, with a view to preventing violations of the Securities Acts or rules.

^{19/}
It has been found that the registrant, aided and abetted by its individual partners, violated the registration provisions of the Exchange Act, and that such violations were willful.

The Division maintains that the conduct of the respondents was the result of a voluntary act, motivated solely by the economic and monetary considerations attendant to all business decisions and they must accept and assume all responsibilities which flow from such acts. It urges that the registration of the registrant be revoked and that Behar and Sperling be suspended for thirty days from association with any broker-dealer. It is urged on behalf of the respondents that they acted on the advice of counsel and that no further sanctions are appropriate or necessary.

Reliance on the advice of counsel, as has been previously pointed out, does not constitute a defense to an allegation of violation of the Securities Acts. However, it may be considered in determining what sanction is necessary in the public interest. It has been concluded that the respondents were actuated by a desire to

^{19/} During the pendency of these proceedings, Sperling sold his interest in the registrant to Volante. The partnership is now known as Volante, Behar. Volante owns an 87-1/2 percent interest and Behar, the remainder (Tr. 421, 438).

engage in the brokerage business without the time lapse which would ensue in securing approval of a new application and that they sought unsuccessfully to take advantage of an exception to the general rule for registration. They engaged in the securities business without compliance with the safeguards prescribed in the public interest. It is concluded that it is in the public interest to suspend the registration of the registrant for twenty (20) days. Behar had a minority interest in the partnership, but he had an obligation together with his partners to see that his firm was in compliance with registration requirements. It will be ordered that he be suspended from association with any broker-dealer for ten (10) days. There is evidence that Sperling was ill during the relevant period and unable to devote time and attention to business affairs. No sanction will be imposed on him.

Volante, as the majority owner in the partnership and the person who signed the documents filed with the Commission had a direct responsibility to see that the registration requirements were observed. It has been found that he participated in the aforementioned violation. It has also been concluded that Volante willfully violated and willfully aided and abetted violations of the registration provisions of the Securities Acts in connection with the offer and sale of NARD stock; violated the anti-fraud provisions of the Securities Acts and willfully aided and abetted such violations in connection with the offer and sale of that stock; aided and abetted violations of the net

capital and record-keeping rules while associated with Dunhill; and has been twice enjoined in connection with the offer and sale of a security.

It is urged in his behalf that he never was associated with the principals of NARD, was not an active participant in the fraud, did not profit thereby, did not solicit or recommend purchases of NARD shares, attempted to make reasonable inquiry as to whether NARD shares were freely tradeable, and was not aware that Osias was soliciting purchases of NARD and making false and incomplete statements in the course of these activities. Some of these contentions have already been considered. In substance, it is argued that Volante had a passive role in the distribution of NARD.

Volante, of course, was aware of the transactions going through Dunhill since he executed each order. As the person in charge of the operations of Dunhill his duty under the circumstances was more than a passive one. A broker-dealer impliedly represents that he is skilled in his field and alert to prevent violations of the Securities Acts and to protect the public interest. ^{19a/} Under the best construction of the facts for Volante, he acquiesced in the use by Blumberg, Cooper, and their associates of Dunhill as the agency for a massive distribution of NARD stock when there were suspicious circumstances which should have caused him to make a searching inquiry. This he failed to do and his action led to the defrauding of public investors.

While conceding the importance of the book-keeping and net

^{19a/} See, Alfred Miller, Sec. Exch. Act Rel. 8012, December 28, 1966, p. 5 and cases cited in Footnote 11 therein.

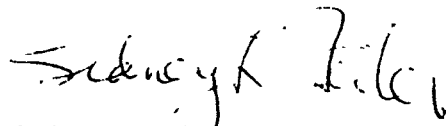
capital rules in the regulatory pattern, it is pointed out on Volante's behalf that he was concerned with Dunhill's difficulties with these rules and caused action to be taken to achieve compliance, thus evidencing his anxiety to comply with his statutory obligations. It is urged that at most only a short period of suspension is warranted here.

The Division asserts that Volante's violations were so serious and pervasive as to warrant an order barring him from association with any broker-dealer. The undersigned agrees with the contentions of the Division that the violations of Volante were most serious and involve key provisions designed for the protection of investors and the public interest. However, Volante, by his efforts to cure the aforementioned violations at Dunhill, though somewhat belated, has shown a recognition of his affirmative obligations in the broker-dealer field. It is concluded that a substantial sanction should be imposed in the public interest but that this respondent should not be permanently barred from the securities field. ^{20/} Accordingly,

^{20/} It is argued that in other cases involving violations in the purchase and sale of NARD stock the Commission has accepted offers of settlement where the sanctions imposed were much less drastic than those requested here (Roberts, Scott & Co., Inc., Sec. Exch. Act Rel. No. 8467, July 10, 1969); Bateman, Eichler, Hill Richards, Inc. (Sec. Exch. Act Rel. No. 8462, November 29, 1968). This proceeding involves allegations of violations in addition to activities in the purchase and sale of NARD stock. Furthermore, the Commission has pointed out that, "the remedial action which is appropriate in the public interest depends upon the facts and circumstances of each particular case and cannot be precisely determined by comparison with action taken in other areas." (Martin A. Fleishman, Sec. Exch. Act Rel. No. 8002, p. 5 (Dec. 7, 1966); A. T. Brod & Company, Sec. Exch. Act Rel No. 8060, p. 6 (Apr. 26, 1967); Commonwealth Securities Corporation, Sec. Exch. Act Rel No. 8360, p. 8 (July 23, 1968)).

IT IS ORDERED that the registration of the registrant, Volante, Behar be suspended for a period of twenty days; that Jacques Behar is suspended from association with any broker-dealer for ten days; and that Guido Volante is suspended from association with any broker-dealer for six months. No sanctions are imposed upon Herman Sperling.

Pursuant to Rule 17(b) of the Commission's Rules of Practice a party may file a petition for Commission review of this initial decision within fifteen days after service thereof on him. This initial decision, pursuant to Rule 17(f) shall become the final decision of the Commission as to each party unless he files a petition for review pursuant to Rule 17(b) or the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition to review or the Commission takes action to review as to a party, ^{21/} this initial decision shall not become final as to that party.


Sidney L. Feller
Hearing Examiner

Washington, D. C.
March 4, 1970

21/ All contentions and proposed findings have been carefully considered. This initial decision incorporates those which have been found necessary for incorporation therein.