ADMINISTRATIVE PROCEEDING
FILE NO. 3-2157

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	
IOS, LTD. (S.A.)	
INVESTORS PLANNING CORPORATION OF AMERICA	

INITIAL DECISION

Washington, D. C.
March 14, 1972

Warren E. Blair
Chief Hearing Examiner

ADMINISTRATIVE PROCEEDING
FILE NO. 3-2157

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	
IOS, LTD. (S.A.)	INITIAL DECISION
INVESTORS PLANNING CORPORATION OF AMERICA	

APPEARANCES: Kevin Thomas Duffy, Stanley Sporkin, Marvin E. Jacob, Robert M. Laprade, Joanne Leveque, and Robert L. Anthony, for the Division of Trading and Markets of the Commission.

Calvin H. Cobb, Jr., Robert M. Goolrick, Edmund B. Frost, and W. John Amerling, of Steptoe & Johnson, for IOS, Ltd. (S.A.), and Investors Planning Corporation of America.

BEFORE: Warren E. Blair, Chief Hearing Examiner

These proceedings were instituted by order of the Commission dated September 18, 1969 ("Order") pursuant to Section 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether IOS, Ltd. (S.A.), Investors Planning Corporation of America ("IPC"), and four individuals who are no longer parties in this matter [1/] wilfully violated and wilfully aided and abetted violations of the Securities Act of 1933 ("Securities Act"), the Exchange Act, and the Investment Company Act of 1940 as alleged by the Division of Trading and Markets ("Division"), and whether remedial action under the Exchange Act is in the public interest. [2/]

The Division alleges that respondents violated certain anti-fraud provisions of the Securities Act and the Exchange Act by allocating portions of the brokerage of Fund of America, Inc. ("FOA"), an investment company registered under the Investment Company Act,

---

1/ Bernard Cornfeld, Edward Cowett, Raymond Grant, and Robert F. Sutner were named as respondents. On March 1, 1971 the Commission issued its Findings and Order imposing remedial sanctions against these individuals. Securities Exchange Act Release No. 9094 (March 1, 1971). Findings herein are made only against IOS and IPC and are not binding on Cornfeld, Cowett, Grant, or Sutner. Hereinafter, unless otherwise indicated, "respondent(s)" is not a reference to the four named individuals.

2/ By order dated July 7, 1970 these proceedings were consolidated with proceedings instituted against Arthur Lipper Corporation and Arthur Lipper III, A.P. File No. 2156 (September 18, 1969). Hearings in the consolidated proceedings were held, but because offers of settlement by IOS respondents were to be submitted for Commission consideration after the close of the hearings, an Initial Decision which related only to the issues raised in the Lipper proceedings was filed on June 11, 1971. Findings herein are not binding on Arthur Lipper Corporation or Arthur Lipper III.

for their own benefit and for the benefit of persons other than FOA and its shareholders, and by using misleading prospectuses in selling FOA shares in that the prospectuses failed to disclose adverse interests of respondents in connection with FOA's portfolio transactions, and failed to disclose the compensation received by respondents from FOA's portfolio transactions, and that such compensation could have been returned to FOA. The Division further alleges that respondents violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by entering into undisclosed arrangements with a registered broker-dealer in connection with transactions in portfolio securities of three foreign investment companies, and thereby received payments out of the commissions earned by such broker-dealer on over-the-counter transactions executed for those investment companies, which payments were not disclosed to either the investment companies or their shareholders.

Additionally, the Division alleges that respondents engaged in conduct prohibited by the Investment Company Act of 1940, charging violations of (1) Section 17(e)(1) in that IFC accepted prohibited compensation for the sale of property to or for FOA; (2) Section 31(a) and Rule 31-a-1(9) thereunder in that FOA's records failed to reflect monies received by IFC on allocations of FOA's brokerage; (3) Section 20(a) and Rule 20a-1 thereunder in that respondents solicited proxies without furnishing information concerning the alleged fraudulent activities; (4) Section 15(a) in that respondents caused Fund of America Management Corp. ("FOAM") to serve as FOA's

investment adviser pursuant to a contract that failed to describe all compensation to be paid thereunder; and (5) Section 34(b) in that IPC was caused to make untrue statements of material facts in various documents filed on behalf of FOA with respect to the charged fraudulent activities.

Respondents filed an answer which included a general denial of the alleged violations. Respondents appeared and were represented by counsel throughout the hearing.

As part of the post-hearing procedures, successive filings of proposed findings, conclusions and supporting briefs were specified. Timely filings thereof were made by the Division and by the respondents.

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

Respondents

IOS, Ltd. (S.A.)

IOS, a foreign holding company incorporated in Panama in 1960, has its principal offices in Geneva, Switzerland. During the period in question IOS owned or controlled numerous subsidiaries, including IPC and the management companies of various investment companies. Among the management companies were FOAM, which advised and managed FOA; Regent Fund Advisers (1963) Ltd., and Canadian Fund Management Company Limited, which then managed Regent Fund, Ltd., a

Canadian investment fund; IIT Management Co. (S.A.), which managed IIT, a foreign investment trust; IOS Management, Ltd., which in 1966 and 1967 managed Fund of Funds, Ltd. ("FOF"), a Canadian investment company; and FOF Management Company Limited, which took over management of FOF in 1968. In addition, IOS controlled FOF and F.O.F. Proprietary Funds, Ltd. ("FOF Prop."), a Canadian investment company in which FOF was the sole stockholder.

Bernard Cornfeld was president and board chairman of IOS and Edward M. Cowett was its executive vice-president and a director. Cornfeld and Cowett also held various directorships and management positions in IOS subsidiaries.

From June, 1960 until June, 1967 IOS was registered as a broker-dealer under the Exchange Act. That registration was terminated by a withdrawal thereof pursuant to an offer of settlement accepted by the Commission in disposition of proceedings instituted against IOS and other respondents in 1966 (hereinafter referred to as "the 1966 Proceedings").[3/]

Investors Planning Corporation of America

In 1965, IOS acquired assets of a large established broker-dealer and placed those assets, including all of the stock of FOAM, into IPC, a wholly-owned subsidiary. After the acquisition IOS continued to hold 80% of IPC's stock, the other 20% being held by

---

3/ IOS, Ltd. (S.A.) d/b/a Investors Overseas Services, Securities Exchange Act Release No. 8083 (May 23, 1967).

the sellers of the acquired assets. Cornfeld, Cowett, and Robert Sutner, also an IOS officer, became three of IPC's five directors.

IOS intended IPC to be the IOS subsidiary which would sell securities in the United States market, and in June, 1965 IPC became registered as a broker-dealer under the Exchange Act. IPC was also a member of the National Association of Securities Dealers, Inc. ("NASD"), and had its principal offices in New York City during the period in question.

Late in 1968, in accordance with one of the undertakings in the settlement of the 1966 Proceedings, IOS sold substantially all of IPC's assets. Early in 1970 the name of IPC was changed to CIP, Inc., under which style it is presently known and registered as a broker-dealer.

Fraud Violations

FOA Portfolio Transactions

After the acquisition of IPC's assets in 1965, IOS assumed active control of IPC's affairs and instated a system of management that paralleled that of IOS. Cowett placed Sutner in charge of sales and made Raymond Grant executive vice-president with responsibility as IPC's chief operating officer over all operations excepting sales.

Cowett concluded, in reviewing the results of IPC's activities, that previous operations had resulted in a deteriorating financial condition because IPC's management had not taken advantage

of opportunities to obtain reciprocal income from investment companies whose shares IPC had been selling, and had allowed expenses to get out of hand. Cowett instructed Grant and Sutner to recapture as much of the lost reciprocal income as possible and make arrangements to obtain future reciprocal business on the same basis as that enjoyed by other broker-dealers selling mutual fund shares. Additionally, Cowett decided that IPC had a greater potential if it concentrated on selling shares of FOA rather than those of unrelated mutual funds, and directed a management policy change to that effect. Further, at Cowett's behest, the prospectus used by FOA in the sale of its shares was amended as of November 1, 1966 to disclose that brokerage arising from FOA portfolio transactions might be "allocated to dealers who offer Fund shares."

Cowett believed in 1965 that it would be two to three years before IPC could be made profitable, and IOS was prepared to accept losses during that period while changes were being effected in IPC's operations. However, IOS' plans for IPC were radically changed by the institution of the 1966 Proceedings against IOS. By December, 1966 Cowett became aware of the fact that a settlement of those proceedings would entail divestiture of IOS' interest in IPC, and of the immediate need to make IPC attractive to potential purchasers by drastic improvement in IPC's profit picture. To that end IOS sent its financial vice-president, Morton Schiowitz, to New York to become IPC's financial overseer, with instructions to cut costs and improve IPC's internal financial and accounting systems, and, through

Cowett, caused a further amendment of the brokerage section in the FOA prospectus as of April 1, 1967. By that amendment the disclaimer of intention to place "brokerage with a broker or dealer, any affiliated person of which is also an affiliated person of the Fund" set forth in the FOA prospectus of November 1, 1966 was changed to the extent that the word "orders" was substituted for "brokerage." Another part of the amendment changed the earlier recitation that brokerage might be allocated to "dealers who offer Fund shares" to include IPC as one of the dealers eligible for an allocation of the FOA brokerage.

The April 1, 1967 amendment was a preliminary step considered necessary by FOA's legal counsel before brokerage on FOA's portfolio transactions could be directed to IPC in accordance with Cowett's desire to augment IPC's revenue in that fashion. As soon as the amendment became effective, IPC began to receive remittances representing 50% of commissions FOA was being charged on its portfolio transactions by the remitting brokers.

Toward the end of April, 1967 remittances were received by IPC from the brokerage firm of Hertz, Newmark & Warner ("Hertz, Newmark") pursuant to arrangements that Grant entered into with that firm at Cowett's insistence. Under that arrangement, which called for a 50% sharing of certain commissions including those charged on FOA portfolio transactions, Hertz, Newmark remitted about $79,000 to IPC during 1967 and 1968. A greater amount of business would have been effected under the arrangement except that in May or June,

1967 Hertz, Newmark found that the arrangement in question was not as profitable as business that could be obtained through sharing its commissions elsewhere. The firm therefore advised Grant that it would have to accept less FOA business, explaining that there were fewer commissions available to direct to IPC.

With Hertz, Newmark being reluctant to accept FOA business, Grant began to utilize the services of Dishy, Easton & Co. ("Dishy, Easton"), a brokerage firm which had tried to arrange for reciprocal business with IPC in 1966, and which was willing to remit to IPC up to 50% of the commissions generated through such arrangement. During 1967 and until early 1968, while the arrangement was in effect, IPC received over $500,000 from Dishy, Easton.

Early in 1968 counsel for IPC, Irving Galpeer, who was also counsel for FOA and FOAM, had discussions with staff members of the Commission regarding allocation of a fund's brokerage at the request of the fund's principal distributor. At that time Galpeer was told that the opinion of the staff was that if an affiliate of a fund received give-ups or reciprocity, those benefits could be passed on to the fund. Galpeer then concluded that IPC should pay over to FOA the money that had been received by IPC as a share of commissions charged FOA in connection with its portfolio transactions. IPC agreed with its counsel's conclusion, and, despite the dissent of Cowett, mailed a check to FOA on August 8, 1968 in the sum of $297,422, the amount IPC determined had been received as a result of the allocation of FOA's portfolio transactions to brokers selected by IPC.

The record establishes that respondents engaged in wilful violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in connection with the described allocations of FOA brokerage and in the offer and sale of FOA shares by use of prospectuses which failed to adequately disclose the arrangements in question and the benefits inuring to respondents therefrom.

No legal impediment precluded FOA instead of IPC from being the beneficiary of the arrangements that Grant made with Hertz, Newmark and Dishy, Easton, and FOA should have been the recipient or have received credit for the portion of the commissions recaptured on its portfolio transactions.[4/] Under the circumstances, the arrangements entered into by Grant at the instance of Cowett, acting on behalf of IOS, constituted a fraud upon FOA and its shareholders for which IPC, and IOS as a participant in the scheme, must be held accountable. It is also manifest from the record that IOS and IPC withheld details regarding arrangements that had been made for the benefit of IPC from FOA and its shareholders. Full and complete disclosure of that information was required of IOS and IPC in order to meet the fiduciary responsibilities that they had assumed by their active intervention in the management of FOA.[5/] The failure of the respondents in this regard can only be viewed as deliberate, and a deception that respondents felt necessary to the success of their scheme.

4/ Cf. Moses v. Burgin, 445 F. 2d 369 (1st Cir. 1971).

5/ Id.

Moreover, no disclosure of material facts concerning the contemplated arrangements with Hertz, Newmark and Dishy, Easton was made in the FOA prospectuses dated November 1, 1966 and April 1, 1967 which were used in the offer and sale of FOA shares to the public. Clearly, the meager references to the intentions respecting utilization of FOA brokerage set forth in the "Brokerage" section of the prospectuses were inadequate to apprise a buyer of FOA shares of the proposed arrangements affecting FOA brokerage and the conflicts of interest involved in those arrangements. Since counsel for FOA, who was also counsel for FOAM and IFC, had prepared that information for the prospectuses, and Cowett had at least tacitly approved the results, and since it appears that the continued suppression of the details concerning the recapture of FOA's commission was necessary to the scheme that was being launched for IFC's benefit, responsibility for the use of the misleading prospectuses is attributable to respondents.

Respondents erroneously assume that receipt of reciprocal income by IFC derived from FOA portfolio transactions is to be considered, in and of itself and without reference to disclosure, only in terms of the alleged violation of Section 17(e)(1) of the Investment Company Act.[6/] Quite independently of the proscriptions

---

6/ In this connection, respondents also request that the fraud allegations be treated as having been amended by the Division's proposed conclusions of law. Respondents construe the Division's proposed conclusions on this aspect of the proceedings as being significantly different and narrower than the Division's allegations in the Order, and contend that they are not required to challenge allegations which are not briefed by the Division. Respondents' request is hereby denied. Even assuming that respondents' view of the Division's proposed conclusions of law is correct, it does not follow that the Order should be deemed amended. The issues to be determined in this matter are those reasonably encompassed by the Order instituting these proceedings. Cf. Jaffee & Company v. S.E.C., 446 F. 2d 387, 394 (2d Cir. 1971).

found in the Investment Company Act, a breach of fiduciary obligations may involve a violation of the fraud provisions of the securities acts when that breach occurs in connection with the purchase or offer and sale of securities and forms an integral part of a scheme to defraud. 7/ Here, the respondents violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by participating in a fraudulent scheme involving transactions in FOA portfolio securities in derogation of fiduciary obligations owed by them to FOA. At the same time, as found infra, these same activities also constituted wilful violations of Section 17(e) of the Investment Company Act.

Respondents are also in error with respect to the adequacy of the disclosures made to FOA directors and inserted in the FOA prospectus and proxy material regarding the brokerage allocations in question. Grant's statements to the directors and those of Galpeer, relied upon by respondents in this connection, were inadequate for the purpose of enabling those directors to act with informed judgments. As pointed out by the Division, the FOA directors were not informed that IOS was preparing for a divestiture of its IPC interest and had embarked upon an accelerated program for improving IPC's profit picture. Neither were the directors advised of the negotiations with Hertz, Newmark and Dishy, Easton, nor provided with any

---

7/ Provident Management Corporation, Securities Exchange Act Release No. 9028 (December 1, 1970).

estimate of the dollar amount that IPC could reasonably be expected to receive from such arrangements. Moreover, in response to a director's question regarding the possibility of a recapture of the allocation of the commissions by FOA, Galpeer unequivocally advised the board that it could not be done because of the rules of the New York Stock Exchange ("NYSE"). In fact, Galpeer then knew and did not disclose to the board that FOA could in effect recapture part of the brokerage paid on regional stock exchange transactions by means of a reduction of its investment advisory fees, or that the Commission staff was suggesting disclosure in filings by FOA of information regarding brokerage arrangements with IOS or IOS related companies. Further, Galpeer did not disclose that he had not determined whether the NYSE agreed with his interpretation of its rules. 8/

While it is true, as respondents contend, that the "mechanics" of the arrangements with Hertz, Newmark and Dishy, Easton had not been worked out and the precise extent to which IPC would benefit was not known at the time the FOA board considered the question of brokerage allocations, the absence of finality in those respects cannot excuse Grant's failure to fully inform the board about those matters insofar as he could. The facts withheld were material to the board in judging whether to amend the FOA prospectus in accordance with his and Galpeer's suggestion. Additionally, if Galpeer

---

8/ Although the NYSE rules prohibited member firms from rebating commissions on NYSE transactions, those rules did not prohibit a member firm which was acting as fund manager from reducing its fees.

had not chosen to limit his response to a bare negative conclusion but had counseled the board regarding existing views on the question of brokerage allocation and the Commission's interest in brokerage arrangements involving IOS, the board's understanding of the problem would have been appreciably advanced and its thinking materially influenced. Under the circumstances, it is fair to conclude that Grant and Galpeer, faced with conflicts of interest and obligations to respondents, elected to ignore or failed to perceive the need for full disclosure to the FOA board.[9/]

Similarly, respondents' argument that disclosures in the FOA prospectus dated April 1, 1967 regarding brokerage allocation were sufficient cannot be accepted. Respondents' reliance upon the fact that FOA's counsel, Galpeer, believed the disclosure sufficient is misplaced in view of his conflicts of interest. Nor does the absence of action by the Commission staff at the time the prospectus was filed excuse the deficiencies. Reliance upon the Commission staff cannot justify a failure to comply with statutory requirements.[10/]

Respondents' comparison of the disclosures in the FOA prospectus with those found in prospectuses of other mutual funds is a futile exercise that assumes the adequacy of the other prospectuses not here at issue and admits of no possibility of differences between the circumstances involved in arrangements negotiated with respect

---

9/ Cf. Moses v. Burgin, supra.

10/ Cf. Doman Helicopters, Inc., 41 S.E.C. 431, 441 (1963).

to FOA brokerage and those of other funds. Obviously other funds unrelated to IOS would not have the same disclosure problems that were created by the interference of IOS and its interests into the management of FOA. That interference was a material fact to be taken into consideration in making an investment judgment, and a disclosure of the nature and extent of that interference was necessary in the FOA prospectus in order to provide prospective investors with a full insight into the management of FOA. Respondents' responsibility for these deficiencies in the FOA prospectus cannot be evaded by their assertions that "[t]his was FOA's prospectus, prepared under the supervision of FOA's counsel and simply furnished to IPC for delivery in connection with the sale of Fund shares." It is manifest from the record that respondents' interests with respect to preparation of the prospectus in question were being honored as completely as if they had taken over the authorship, and further that the limited disclosure offered in the prospectus was in furtherance of the scheme to defraud FOA and its shareholders.

FCF Prop., IIT and Regent Fund Portfolio Transactions

In addition to the need for quickly changing IPC's profit picture, the contemplated settlement of the 1966 Proceedings posed another problem for Cowett in that portfolio transactions of IOS and its related funds were to be prohibited in the United States unless the orders relating to such transactions were placed with an independent, non-affiliated entity outside the United States or with a

United States brokerage firm located or having branch offices outside of the United States. Seeking to resolve the latter problem as well as to develop a further source of income for IPC, Cowett spoke in early 1967 to Arthur Lipper ("Lipper"), a partner in the brokerage firm of Zuckerman, Smith & Co., with whom IOS had done business, about the possibility of that firm's opening a foreign office. Other partners of Zuckerman, Smith declined the proposition but advised Lipper that the firm would be willing to act as clearing agent for any firm that Lipper might want to organize for the purpose of accommodating IOS. Lipper then entered into an understanding with Cowett whereby in exchange for Lipper's setting up the brokerage firm and communications system that IOS required, Cowett gave assurance that Lipper would receive sufficient IOS business to compensate him for the "kind of investment that was being entailed."

In accordance with his understanding with Cowett, Lipper formed the brokerage firm of Arthur Lipper Corporation ("Lipper Corporation") with principal offices in New York City. Lipper Corporation, with Lipper as its president, became registered as a broker-dealer on March 31, 1967 and became a member of the NASD and of the NYSE and other national securities exchanges. Additionally, Lipper opened offices in London, England and Geneva, Switzerland through formation of Arthur Lipper S.A. Geneve, a wholly-owned subsidiary of Lipper Corporation, and of Arthur Lipper London Limited, a wholly-owned subsidiary of Arthur Lipper S.A. Geneve.

Commencing in April, 1967 a communications network was placed in operation and maintained by Lipper Corporation to effect securities transactions for IOS in the United States markets. Additionally, the network was used for the exchange of information otherwise relating to IOS portfolios and of other information of mutual interest to IOS and Lipper Corporation, including quotes and research information developed from sources in the United States.

Besides an understanding that he could anticipate substantial business from IOS, Lipper also realized that his arrangement with Cowett would require Lipper Corporation to "give-up" [11/] 50% of the commissions generated by IOS business to other brokers in accordance with IOS directions. As Lipper expected, instructions regarding give-ups were received from Cowett. A letter dated June 29, 1967, signed by Cowett as president of FOF Prop., directed Lipper Corporation to give IPC 50% of the commissions earned on over-the-counter transactions for FOF Prop. Similar give-up instructions relating to over-the-counter transactions for the account of IIT were received by Lipper Corporation in a letter dated July 11, 1967 over the signature of Cowett as an officer and director of IIT Management Company (S.A.). A third letter, dated March 15, 1968 signed by Cowett as vice-president of Canadian Fund Management Company Limited, confirmed an earlier request that Lipper Corporation pay IPC 50% of

---

11/ A "give-up" is in effect a splitting of the commission received by the executing broker with another broker designated by the customer to receive a certain portion of that commission.

the commissions earned on over-the-counter transactions of Regent Fund, Ltd.

Lipper raised no question regarding Cowett's give-up instructions, and caused Lipper Corporation to remit approximately $1,275,000 to IPC between July 10, 1967 and August 5, 1968, an amount equivalent to about 50% of the commissions paid to Lipper Corporation by FOF Prop., IIT, and Regent Fund on their over-the-counter portfolio transactions. However, when a further give-up demand upon Lipper Corporation for $300,000 over and above the regular 50% was made in a letter dated August 14, 1968 from Cowett as president of FOF Prop., Lipper felt the demand was excessive, and that his firm should not have to pay more than $175,000. On August 28, 1968 a check for the lower amount was sent to IPC, making the total give-ups to IPC on over-the-counter transactions for FOF Prop., IIT, and Regent Fund about $1,450,000. 12/

Adequate disclosure of the give-up arrangements was never furnished to FOF Prop., IIT, or Regent Fund, nor to the shareholders of those funds. No service was performed by IPC in consideration for the monies it received at Cowett's direction on commissions paid by FOF Prop., IIT, and Regent Fund on their respective portfolio transactions in the United States markets.

12/ Consisting of give-ups to IPC of $1,125,821 on FOF Prop. transactions, $312,175 on IIT transactions, and $12,151 on Regent Fund transactions out of respective gross commissions received during the period of April, 1967 through August, 1968 of $1,974,064, $636,423, and $28,670.

The record clearly reflects long-continued and wilful violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by IOS and IPC resulting from their participation in the give-up arrangement entered into with Lipper Corporation with respect to the portfolio transactions of FOF Prop., IIT, and Regent Fund.

Cowett, as executive vice-president of IOS, was cloaked with general authority to act for IOS within the scope of its business. The referred-to arrangements with Lipper Corporation were directly for the benefit of IPC, but obviously were also entered into at the instance of Cowett for the ultimate benefit of IOS. The success of Cowett's endeavors to make IPC attractive to a buyer for the financial advantage of IOS is well-illustrated by a comparison of the payment of $1,783,424 cash, plus approximately 20% of IPC's outstanding stock, that IOS made in April, 1965 to acquire IPC, with the payment of $9,400,000 that IOS received in April, 1969 upon disposition of IPC's assets in accordance with the terms of the settlement of the 1966 Proceedings.

But the benefits enjoyed by IPC and, indirectly by IOS, were obtained at the sacrifice of interests of the IOS related funds to whom IOS, Cowett, and IPC owed fiduciary obligations.[13/] As noted, IOS controlled the management companies of FOF Prop., IIT, and Regent Fund, and Cowett was an officer of those management companies

---

13/ Provident Management Corporation, supra.

as well as president of FOF Prop. In those capacities he had authority to control and direct the execution of portfolio transactions of those funds. Having that authority and control and the concomitant fiduciary responsibilities, Cowett, and IOS through him, were "under a duty to act solely in the best interest" of the funds and their respective shareholders.[14] When Cowett preferred IOS, and caused IPC to join with him in arrangements under which IPC received monies representing a share of commissions paid by the IOS related funds on their portfolio transactions, his actions, which under the circumstances became the actions of IOS and those of IPC, were not in the best interests of the funds, and involved conflicts of interest that should have been resolved in favor of the funds.

In making arrangements with Lipper Corporation, Cowett completely ignored the fiduciary obligations which he, as well as IOS and IPC directly and through him, owed to FOF Prop., IIT, and Regent Fund to obtain executions of the portfolio transactions at the least possible cost to those funds.[15] While the commission rate that Lipper Corporation charged the funds on over-the-counter

---

14/ Id.

15/ Consumer-Investor Planning Corporation, Securities Exchange Act Release No. 8542 (February 20, 1969); Delaware Management Company, Inc., Securities Exchange Act Release No. 8128 (July 19, 1967).

transactions was that set by the minimum rate schedule of the NYSE on exchange transactions by its member firms and was a rate that was frequently adopted on over-the-counter transactions by other brokerage firms, it is evident from the give-up arrangement that 50% of the commissions actually charged on those transactions would have been sufficient to induce Lipper to accept the funds' business. That being so, Cowett could and should have negotiated a reduction of the commissions to be charged to the funds rather than arranging for give-ups that wasted the assets of the IOS related funds. Such negotiation would have been consonant with the views on directed give-ups which the Commission expressed to Congress in 1966:

> A directed give-up of a portion of the Commission charged for handling a transaction for a fund in the over-the-counter market would be a patent waste of investment company assets. Since the over-the-counter market in both listed and unlisted securities is a negotiated market, which is not governed by fixed prices or minimum commission rate schedules, any willingness of the executing broker or dealer to allow his customer to direct a give-up of a portion of his commission or mark-up to dealers in fund shares in and of itself shows that a lower price or commission could have been negotiated. 16/

Additionally, it appears that Cowett, and IOS and IPC because of his actions, encouraged and caused Lipper Corporation to violate its obligation to treat its customers, FOF Prop., IIT, and Regent Fund, fairly by reducing the commissions charged on their over-the-counter transactions by 50% instead of remitting the give-ups in question to IPC. Lipper Corporation's disregard of that obligation

---

16/ Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong., 2d Sess. (1966), 178.

to the IOS related fund customers constituted a wilful violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder,[17/] and respondents are found to have wilfully aided and abetted that violation.

Respondents vainly attempt to justify the waste of the assets of the IOS foreign funds, contending that there is no evidence that a lower commission rate could have been obtained for the funds' over-the-counter transactions. They insist that the NYSE brokerage community respected the NYSE minimum rate schedule in charging commissions on over-the-counter transactions and that the evidence is clear that the funds could not have negotiated a lower over-the-counter rate with Lipper Corporation. While there is evidence that the brokerage firms did, as respondents state, find it in "their own economic self-interest" to apply the NYSE commission schedule to over-the-counter transactions, respondents are not justified in utilizing that practice for their own purposes to the disadvantage of funds to whom IOS owed fiduciary obligations. There was no requirement of the NYSE that its members charge NYSE rates on over-the-counter transactions and Cowett and Lipper, both highly sophisticated in the financial world, knew or should have known the limitations of the NYSE rules. It was permissible for Lipper Corporation to charge less on the funds' over-the-counter transactions

---

17/ Arleen W. Hughes, 27 S.E.C. 629 (1948), affm'd sub nom, Hughes v. S.E.C., 174 F.2d 969 (D.C. Cir. 1949).

and, contrary to respondents' position, the record evidences a willingness by Lipper Corporation to be content with 50% of the amounts actually charged the funds on such transactions. In this connection, it is also clear from the record that Cowett was not interested in negotiating for a lower rate but in having Lipper Corporation give up 50% of the funds' commission payments to IPC so that the latter would obtain additional revenues.[18/]

Respondents' argument that customer-directed give-ups on the over-the-counter market were not illegal during the period in question is valid to the extent that at the time there were no specific statutes, rules, or regulations of regulatory authority prohibiting the practice in question. However, even otherwise legal acts can become illegal where a fiduciary relationship is involved and the acts breach the fiduciary obligation. Here, respondents' argument falls; the findings are that the over-the-counter market was a negotiated market and that Cowett should have but failed to negotiate and obtain a lower commission rate from Lipper for FOF Prop., IIT, and Regent Fund.

Respondents' further contention that the give-ups in question were not the type condemned by the Commission in recent proceedings[19/]

18/ Respondents find it significant that Lipper told Cowett that the rate was too high, but did not offer to lower the rate, asking instead if he could perform more services. Respondents claim that this demonstrates that Lipper felt that the rate could not be negotiated because of the NYSE position on over-the-counter rates. This contention is rejected. It is rather found that in context such willingness evidenced Lipper's recognition of the fact that Cowett was uninterested in negotiating for a lower rate.

19/ Provident Management Corporation, supra; Consumer-Investor Planning Corp., supra.

because the funds in effect recaptured a portion of the give-ups through being provided with extra services by IOS cannot be accepted. Firstly, Cowett testified positively and unequivocally that no benefits flowed to FOF Prop., IIT, or Regent Fund from the give-ups in question. Secondly, unlike the situation portrayed by the United Fund proxy statements referred to by respondents, there is no indication that any of the claimed extra services were related in any way to the fact that Cowett had arranged to have the give-ups in question paid by Lipper Corporation to IPC. In fact, it appears that IOS commenced the so-called extra service of not charging the funds the traditional European institution commissions in 1961, and probably would have found it difficult, if not impossible, to continue to provide management to the funds without furnishing the other so-called extra services adverted to by respondents.

Also rejected are respondents' contentions that the Lipper arrangements were fully discussed with the FOF board and that the Division did not establish that no disclosure of those arrangements was made to the board of IIT or of Regent Fund. The discussions with the FOF board can hardly be characterized as "full" in view of the fact that Cowett, one of its directors, was a principal in the scheme to defraud the foreign funds. As noted by the Court in

Schoenbaum v. Firstbrook[20]:

> [A] corporation may be defrauded in a stock transaction even when all of its directors know all of the material facts, if the conflict between the interests of one or more of the directors and the interests of the corporation prevents effective transmission of material information to the corporation in violation of Rule 10b-5(2). [footnote omitted]

It is evident from the record that the conflicts of interest inherent at the time Cowett was purporting to disclose the Lipper arrangements negated the possibility of "effective transmission of material information" regarding those arrangements. The record is also clear that disclosures of those arrangements were not made to IIT or Regent Fund. Cowett testified he had not done so, and although he was not sure that no disclosure was made at board meetings he did not attend, it is reasonable to infer under all the circumstances that if there had been, Cowett would have known about it.[21]

In seeking to bolster their argument that a violation of Section 10(b) and Rule 10b-5 has not been shown, respondents take the position that the Lipper arrangements did not involve the required element of wrongful conduct "in connection with" the purchase or sale of a security. Respondents argue that the conduct in question relates

---

20/ 405 F.2d 200, 211 (2d Cir. 1968), en banc 405 F.2d 215 (2d Cir. 1968), cert. denied 395 U.S. 906 (1969).

21/ Respondents also urge that the materiality of the undisclosed facts has not been shown. It is difficult to conceive that facts bearing upon the waste of a fund's assets are not self-evident in that respect. In any event it is found that material facts relating to the Lipper arrangements were withheld from the foreign funds.

solely to actions of corporate management beyond the purview of Section 10(b). That view, however, distorts the realities established by the record, and cannot be accepted.

The Lipper arrangements cannot be said to be divorced from the securities transactions which were essential to Cowett's scheme if it were to bear fruit. Far from the respondents' thesis, the increased commission costs borne by the foreign funds increased their cost of portfolio securities purchased and decreased amounts realized from portfolio sales, and those effects which here constitute a fraud upon those funds cannot be separated from the securities transactions that played an essential part in the scheme. The fraud that emanated from the Lipper arrangements is therefore found to be more than internal corporate mismanagement and well within the purview of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. 22/

With respect to the question of the respondents' aiding and abetting violations of Lipper Corporation, respondents first contend that the arrangements did not involve Lipper Corporation in misconduct and second, that the issue of respondents aiding and abetting Lipper Corporation is not a matter properly alleged in the Order. As to the first point, respondents rely for the most part upon their positions earlier discussed. Those positions have been found to be

---

22/ Sup't of Insurance v. Bankers Life & Cas. Co., ___U.S.__(1971), 92 S.Ct. 165 (1971).

without merit, and are again found so in this connection. The additional argument that in any event respondents were not aware of the fraudulent scheme which involved a breach of a fiduciary obligation owing by Lipper Corporation to FOF Prop., IIT, and Regent Fund is belied by the record. Cowett, who acted on behalf of respondents in bringing the arrangements to fruition, knew or should have known that he was encouraging Lipper Corporation to violate its obligation to deal fairly with its customers. As agent for respondents, his knowledge and actions in this connection are imputed to respondents, making them, as well as Cowett, aiders and abetters of Lipper Corporation's violations.

Respondents' contention that the Order does not encompass this issue is also found to be devoid of merit.

Section III of the Order charges that:

> A. During the period from on or about July 10, 1967 to on or about August 5, 1968, respondents IOS, Cornfeld, Cowett and IPC, singly and in concert, willfully violated and willfully aided and abetted violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in that, in connection with the offer, purchase and sale of certain securities, namely the portfolio securities of FOF Prop., IIT and Regent, they, directly and indirectly, among other things, would and did:
>
> 1. induce, enter into and engage in certain undisclosed arrangements with a registered broker-dealer which provided for the payment of direct and indirect pecuniary benefits to IPC, the principals and affiliates of IPC and others out of charges and commissions earned by such broker-dealer on transactions executed over-the-counter for the accounts of FOF Prop., IIT and Regent;
>
> . . . .

Standing alone, the charge might well be reasonably construed to limit the issues, as respondents claim, to the question of whether respondents were accused of aiding and abetting one another. However, over respondents' objections that the allegations against respondents were dissimilar to those involving Lipper and his company, the Commission determined to consolidate these proceedings [23/] with those that had been instituted against Lipper and Lipper Corporation. [24/] In meeting respondents' objections at that time, the Commission observed:

> The orders instituting the two proceedings alleged that between July 1967 and August 1968 Lipper Corp., Lipper, IOS, IPC, Cornfeld and Cowett, singly and in concert, willfully violated and willfully aided and abetted violations of the antifraud provisions of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in connection with transactions in the portfolio securities of three foreign investment funds, F.O.F. Proprietary Funds, Ltd., IIT, and Regent Fund, Ltd., whose management companies were owned or controlled by IOS. It is charged that, among other things, those respondents entered into and engaged in certain undisclosed arrangements which provided for the payment of pecuniary benefits to IPC, its principals and affiliates and others, out of charges and commissions earned on over-the-counter transactions executed for the accounts of F.O.F., IIT and Regent; that they provided IPC, its principals and affiliates and others, with payments in the form of give-ups out of commissions earned on such transactions; that the activities described constituted part of a course of conduct to obtain from F.O.F., IIT and Regent and to divert to IPC and its principals and affiliates pecuniary and other benefits resulting from the execution of transactions in portfolio securities of F.O.F., IIT and Regent, and that the aforesaid respondents failed to disclose to those companies and their shareholders the facts enumerated above.

23/ Order dated July 7, 1970, A. P. File Nos. 3-2156 and 3-2157.

24/ Arthur Lipper Corporation, supra.

> In support of the motion, the Division asserts that for the most part identical testimony will be adduced to support the charges that certain of the respondents in the proceedings against IOS, et al. ("IOS Proceedings") entered into an undisclosed arrangement with the respondents in the proceedings against Lipper Corp. and Lipper ("Lipper Proceedings") whereby a substantial portion of commissions paid by IOS controlled mutual funds to Lipper Corp. on over-the-counter transactions were channeled to IPC.
>
> . . . .

Thus, it was clear to the Commission, and, from the order of consolidation it should have been clear to respondents, that the Division was charging that all of the named respondents in the consolidated proceedings except Grant and Sutner were being accused of aiding and abetting one another in the violations of Section 10(b) and Rule 10b-5 thereunder in connection with the Lipper arrangements.

Investment Company Act Violations

Section 15(a)(1)

Under Section 15(a)(1) of the Investment Company Act, it is unlawful for a person to serve as an investment adviser of a registered investment company except pursuant to a written contract that "precisely describes all compensation to be paid thereunder." Here, as reflected in the files of the Commission, the contract between FOA and FOAM, its investment adviser, covering the period in question made no reference to the compensation that IPC would receive under the arrangements with Hertz, Newmark and Dishy, Easton. Since the record establishes that IOS and IPC exercised complete control over FOAM and the direction of FOA brokerage and that FOAM was

respondents' vehicle for carrying out their scheme, part of the compensation for the investment adviser may be deemed to have flowed from the arrangements with Hertz, Newmark and Dishy, Easton. Such compensation should have been disclosed in the adviser's contract, and failure to do so constituted a wilful violation of Section 15(a)(1) of the Investment Company Act for which respondents are responsible.

Section 17(e)(1)

In pertinent part, Section 17(e)(1) of the Investment Company Act prohibits "any affiliated person of a registered investment company, or any affiliated person of such person," acting as agent from accepting any compensation from any source "for the purchase or sale of any property to or for such registered company" except in the course of "business as an underwriter or broker." It is apparent from the record that FOA's management company, FOAM, was substantially identical with IPC, and that IPC and IOS directed and controlled FOA's portfolio transactions. Under the circumstances, respondents became agents of FOA and subject to the provisions of Section 17(e)(1). Since neither IOS nor IPC performed brokerage services or, for that matter, any other service for FOA, the acceptance of moneys by IPC pursuant to the arrangements with Hertz, Newmark and Dishy, Easton constituted wilful violations by IPC of Section 17(e)(1) of the Investment Company Act, which violations IOS wilfully aided and abetted.

Respondents are entirely mistaken in their view that the "only circumstance under which IPC could have been involved conceivably

in the sale of 'property' to or for FOA was in the sale of FOA shares."[25] As cogently argued by the Division and found above, it was IPC's acceptance of money generated in connection with FOA's portfolio transactions that gave rise to the violation of Section 17(e)(1).

Contrary to respondents' further assertion that IIC did not receive that income "acting as agent" for FOA in connection with the purchase or sale of "any property" for FOA, it is found that the portfolio securities of FOA constituted FOA "property" within the meaning of Section 17(e)(1).[26] It is also found that FOAM participated with IOS and IPC in the scheme to defraud FOA, and that the acts of FOAM and of each respondent in furtherance of that scheme became the acts of the other.[27] Since FOAM was indisputably the agent of FOA in the purchase and sale of FOA portfolio securities, the payments received from Hertz, Newmark and Dishy, Easton by IPC, another of the participants in the scheme, may be regarded as a payment to FOAM that constituted compensation unlawfully accepted in connection with the purchase and sale of FOA property.

25/ Brief for Respondents at 140.

26/ Provident Management Corporation, supra.

27/ See Pinkerton v. U.S., 328 U.S. 640, 647 (1946); Cossack v. U.S., 82 F.2d 214, 216 (9th Cir. 1936), cert. denied 298 U.S. 654 (1936).

The suggestion of respondents that the payments to IPC represented reciprocal income in consideration of IPC's sale of FOA shares as a dealer and were unrelated to any agency relationship does not square with the record. It is clear that Cowett conceived the idea of having FOA's brokerage benefit IPC without reference to the latter's sale of FOA shares. In fact, as Cowett testified, a shift in IPC's operations to emphasize sale of FOA shares was influenced by him because he felt that "the firm profitability-wise recognized much more residual benefits for the years to come through the building of a management fee."[28/] Further, Grant testified that in the latter part of 1966 or early 1967, Hertz, Newmark informed him that if the firm could be named as a principal broker for FOA, the firm "could find a way of reciprocating to IPC through the sharing of unrelated over-the-counter transactions."[29/] Thus, it appears that the testimony respondents rely upon to establish that the payments in question were received by IPC in consideration of services rendered to IPC is simply an attempted camouflage for respondents' fraudulent scheme and that IPC would have sold FOA shares regardless of whether moneys had been received from Hertz, Newmark and Dishy, Easton. The arguments advanced by respondents regarding the propriety of allocations of brokerage in consideration for sales of a fund's shares and

---

28/ Tr. 499-500.

29/ Tr. 1427.

the application of Section 17(e)(1) thereto, are therefore inapposite.

Section 20(a) and Rule 20a-1

Under Section 20(a) of the Investment Company Act and Rule 20a-1 thereunder, it is unlawful for any person to solicit proxies from shareholders of a registered investment company through use of a false or misleading proxy statement. The proxy solicitation material of FOA circulated prior to the March, 1967 FOA shareholders meeting omitted disclosure regarding arrangements under which IPC was to receive direct cash payments in connection with the allocation of FOA brokerage. This information was material in that its omission undoubtedly had an influence on the way a shareholder voted.[30/] The omission, therefore, made the proxy material false and misleading. Since IOS and IPC concealed the nature of the arrangements with Hertz, Newmark and Dishy, Easton, they are chargeable with causing use of false and misleading proxy material. Accordingly, respondents are found to have wilfully violated and wilfully aided and abetted violations of Section 20(a) of the Investment Company Act and Rule 20a-1 thereunder.

Section 31(a) and Rule 31a-1

Subparagraph (b)(9) of Rule 31a-1 under Section 31(a) of the Investment Company Act requires a registered investment company to

---

30/ Walpert v. Bart, 280 F. Supp. 1006, 1011 (D. Md. 1967), aff'd per curiam, 390 F.2d 877 (4th Cir. 1968).

maintain and keep current a record containing specific information as to "the basis or bases upon which the allocation of orders for the purchase and sale of portfolio securities to named brokers or dealers and the division of brokerage commissions or other compensation on such purchase and sale orders among named persons were made." Inasmuch as IOS and IPC concealed the arrangements concerning FOA's portfolio transactions from FOA, the books of FOA necessarily could not reflect information required by the rule concerning the monies received by IPC on allocations of FOA brokerage. Accordingly, it is found that IOS and IPC caused FOA to violate Section 31(a) of the Investment Company Act and Rule 31a-1 thereunder, and wilfully aided and abetted those violations.

Section 34(b)

Under Section 34(b) of the Investment Company Act it is unlawful for a person to make false or misleading statements in any registration statement or certain other documents filed or transmitted pursuant to the Act. It is manifest from the record that FOA prospectuses and proxy solicitation material filed during the period in question by IPC on behalf of FOA were false and misleading in failing to disclose arrangements involving the allocation of FOA's brokerage and the conflicts of interest inherent in those arrangements which redounded to the detriment of FOA. Since IOS and IPC were participants in the scheme to defraud FOA, and the filing of the misleading material was a necessary part of that scheme, it is found that IOS and IPC wilfully violated Section 34(b) of the Investment Company Act.

Other Matters

Jurisdiction

The jurisdiction of the Commission over the breach of IOS' fiduciary duty to its related foreign funds is brought into question by respondents' contention that the laws of the United States do not govern the relationship between IOS and those funds, and that the Commission has no jurisdiction to enforce the applicable foreign law. It is concluded that the Commission has properly invoked its jurisdiction and that under the circumstances the anti-fraud provisions of the Exchange Act are applicable to the conduct in question.

In trying to sustain their position, respondents ignore their participation with Lipper Corporation, a registered broker-dealer, in the fraudulent scheme in question. Although respondents' wilful aiding and abetting of Lipper Corporation in the latter's wilful violation of Section 10(b) and Rule 10b-5 suffices to bring IOS' conduct within the Commission's jurisdiction pursuant to the Exchange Act, that jurisdiction also flows from IOS' role in a fraudulent scheme that utilized the United States over-the-counter markets and the services of Lipper Corporation for the direct and indirect benefit of IOS and IPC.

Respondents argue that the misconduct relates to the relationship between IOS and its related foreign funds and had "no effect at all on the U. S. markets or American investors in those markets." From those premises, respondents conclude that there has been no

showing of circumstances that would make United States law applicable to their conduct. It is true that in cases relied upon by respondents [31/] the courts have looked upon the question of subject-matter jurisdiction over the alleged offenses in terms of whether the transactions in question have "some significant impact on the domestic securities market or on domestic investors, ..." [32/] But before reaching the point that respondents have so quickly arrived at in connection with extra-territorial application of Section 10(b) in this matter, consideration must be given to whether the transactions in issue occurred in the United States. As noted in Investment Properties International [33/]:

> For purposes of deciding whether any or all of these transactions create subject matter jurisdiction, the same questions must be asked of each. First, has the allegedly unlawful transaction "occurred" in the United States? Second, if the transaction has occurred outside the United States, does the 1934 Act nevertheless reach it?

Here, there is no need to go beyond the first question because the transactions complained of by the Division "occurred" in the United States. Respondents cannot gainsay the fact that the unlawful transactions giving rise to the fraud were those for which the foreign

---

31/ In particular, Schoenbaum v. Firstbrook, supra; Investment Properties International, Ltd. v. I.O.S. Ltd., CCH Sec. L. Rep. ¶93,011 (S.D.N.Y. 1971); Finch v. Marathon Securities Corp., 316 F. Supp. 1345 (S.D.N.Y. 1970).

32/ Investment Properties International, Ltd. v. I.O.S. Ltd., supra at 90,735.

33/ Id., at 90,734.

funds were overcharged by Lipper Corporation in furtherance of the scheme to defraud, nor can they deny that those transactions "occurred" in the over-the-counter markets of this country. That being so, subject-matter jurisdiction attaches without recourse to extra-territorial application of the Exchange Act.

By the same token, the exemption provided by Section 30(b) of the Exchange Act[34/] is not available to IOS with respect to the transactions affecting the foreign funds. Kook v. Crang,[35/] relied upon by respondents, makes clear that a Section 30(b) exemption depends upon a showing that all the essentials of the transactions in question occurred outside of the United States. Here, the portfolio transactions effected by Lipper Corporation for the foreign funds constitute acts within the United States that preclude the application of Section 30(b) sought by respondents.

Due Process

The Motion for Disqualification of the Hearing Examiner, which had been considered and denied at the beginning of the reopened hearing in this matter,[36/] has been renewed by respondents. They argue

---

34/ Section 30(b) of the Exchange Act provides:

> (b) The provisions of this title or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this title.

35/ 182 F. Supp. 388 (S.D.N.Y. 1960).

36/ Tr. 1175.

as they did earlier, this time more extensively, that disqualification based upon prejudgment of the issues is required to afford respondents their rights under the due process clause of the Fifth Amendment to the Constitution of the United States. That position, anchored as before to the assumption that the Lipper Initial Decision[37/] evidences prejudgment of the issues decided herein, is again rejected.

Quite obviously, there can be no quarrel with the established principles found in the cases cited by respondents to the effect that due process requires a fair hearing and that a fair hearing is denied where the decisional authority lacks impartiality or the appearance of impartiality.[38/] But in all of the cases relied upon by respondents, those principles were enunciated in contexts factually distinguishable from the present situation. None involved a challenge of a judge or other decisional authority on the grounds that an earlier decision handed down in discharge of judicial or quasi-judicial duties constituted prejudgment of similar issues in a succeeding case or proceeding. More apposite to a determination here are the views expressed in Federal Trade Commission v. Cement Institute,[39/] wherein the Supreme Court, after consideration of its

---

37/ Arthur Lipper Corporation, supra.

38/ See e.g., In re Murchison, 349 U.S. 133 (1955); Pillsbury Company v. F.T.C., 354 F.2d 1952 (5th Cir. 1966); Texaco, Inc. v. F.T.C., 336 F.2d 754 (D.C. Cir. 1964).

39/ 333 U.S. 683 (1948).

earlier decision in Tumey v. Ohio,[40] concluded:

> Neither the Tumey decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court. [Footnote omitted]. 41/

No showing having been made that the Lipper decision standing alone is cause for disqualification, and the Hearing Examiner having heretofore stated[42] that he could, and now asserting that he did, review the record upon which this decision is based in an unbiased light and make the findings and conclusions herein without bias or prejudice and solely upon the record herein, it is concluded that respondents' renewed Motion for Disqualification should be, and it hereby is, denied.

Public Interest

Respondents contend that sanctions are not required in the public interest because of mitigating circumstances surrounding their conduct. They point to their reliance upon advice of counsel

---

40/ 273 U.S. 510 (1927).

41/ Federal Trade Commission v. Cement Institute, supra, 702-3.

42/ Tr. 1174-75.

for guidance in resolving the legality of customer-directed give-ups, the then existing industry practices relating to give-ups, the absence of any likelihood that respondents will commit comparable future violations, and the detriment they have suffered from the prosecution of these proceedings and will suffer from publication of the Commission's opinion in this matter. The Division, on the other hand, characterizes respondents' activities as "pervasive, long continued, deliberately planned, and willful," and insists that IPC's registration should be revoked and IOS barred from association with any broker or dealer.

Upon consideration of the mitigative factors offered by respondents and of the opposing views of the Division, it is concluded that upon the record herein IOS should be barred from association with a broker or dealer and that the registration of IPC should be suspended for a period of nine months.

The record is clear that IOS allowed Cowett free rein in devising and implementing the plans that wasted the assets of the IOS foreign funds, and which, except for intervention by the Commission staff, would have caused financial injury to FOA. It is also evident that IOS placed its entire reliance upon Cowett, and not upon advice of counsel which happened to coincide with Cowett's views of what the law should be, and that neither IOS nor Cowett were concerned in the slightest about the highly critical views of the Commission and its staff on the subject of customer-directed give-ups. Furthermore, claimed reliance upon the "give-up" practice of the securities

industry is unavailing in view of the fact that the conduct here also entailed the breach of fiduciary duties.

Against the backdrop of IOS' unwonted preoccupation with self-interest, coupled with its callous indifference regarding rights of FOA and the related foreign funds, the serious and long-continued wilful violations found herein require that IOS be barred from association with a broker or dealer despite the change in its management and the adverse publicity it has had and will experience by reason of these proceedings. However, the position of IPC may be viewed in a different light since it is no longer affiliated or otherwise connected with IOS. Inasmuch as the domination and control that IOS exercised over IPC during the period in question was primarily responsible for the latter's participation in Cowett's schemes, it does not appear necessary in the public interest to revoke IPC's registration now that such influence has been removed. This is not to suggest that IPC's misconduct can in any sense be excused or condoned, but that IPC's return of $300,000 to FOA, the termination of its relationship with IOS, and the dominant role that IOS played in Cowett's schemes have been recognized and taken into account.[43/]

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

Accordingly, IT IS ORDERED that IOS, Ltd. (S.A.) be, and hereby is, barred from association with a broker or dealer, and that the registration of Investors Planning Corporation (now named CIP, Inc.) as a broker-dealer be, and it hereby is, suspended for a period of nine months from the effective date of this order.

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

Pursuant to Rule 17(f) of the Rules of Practice, this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

Warren E. Blair
Chief Hearing Examiner

Washington, D. C.
March 14, 1972