LEXSEE 38 S.E.C. 843

In the Matter of CARL M. LOEB, RHOADES & CO., 42 Wall Street, New York 5, New York and DOMINICK & DOMINICK, 14 Wall Street, New York 5, New York

(File No. 8-279); (File No. 8-563)

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934, Sections 15(b) and 15A, Release No. 5870

1959 SEC LEXIS 413; 38 S.E.C. 843

February 9, 1959

ACTION:
[*1]

BROKER-DEALER PROCEEDINGS

Grounds for Revocation of Registration

Grounds for Expulsion from Registered Securities Association

Violations of Securities Act of 1933

Offer to Sell Unregistered Securities

Where registered broker-dealers, prior to the filing of registration statement with respect to contemplated offering of securities through them as underwriters, publicized such offering in a manner calculated to arouse and stimulate dealer and investor interest in the security and, by eliciting indications of interest from dealers and investors, to set in motion the process of distribution, held, publicity constituted offer to sell security in violation of Section 5(c) of Securities Act of 1933.

Public Interest

Where registered broker-dealers willfully violated Section 5(c) of Securities Act of 1933 by offering to sell security as to which no registration statement had been filed, held, under all the circumstances, including registrants' excellent reputation and fact that they acted in reliance on counsel, that no investors appear to have been injured, and registration statement as to offering has become effective, no sanction is required in public interest or for protection of **[*2]** investors.

COUNSEL: Philip A. Loomis, Jr., for the Division of Trading and Exchanges of the Commission.

John T. Cahill, of Cahill, Gordon, Reindel & Ohl for Carl M. Loeb Rhoades & Co., Dominick & Dominick and Stanley R. Grant.

TEXT: [843]** FINDINGS AND OPINION OF THE COMMISSION

These are consolidated proceedings pursuant to Sections 15(b) and 15A(1)(2) of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether to revoke the registration as a broker and **[**844]** dealer of Carl M. Loeb Rhoades & Co. ("Loeb Rhoades") and of Dominick & Dominick ("Dominick"), whether to suspend or expel registrants from membership in the National Association of Securities Dealers, Inc. ("NASD"), a registered securities association,

and whether, under Section 15A(b)(4) of the Exchange Act, Stanley R. Grant, a partner in Loeb Rhoades, is a cause of any order of revocation, suspension or expulsion which may be issued as to that firm. n1

n1 Section 15(b) of the Exchange Act, as here pertinent, provides that we shall revoke the registration of a broker or dealer if we find it is in the public interest and that such broker or dealer, or any partner, controlling or controlled person of such broker or dealer, has willfully violated any provision of the Securities Act of 1933.

Section 15A(1)(2) of the Exchange Act provides for the suspension for a maximum of twelve months or the expulsion from a registered securities association of any member thereof who has willfully violated any provision of the Securities Act of 1933 if we find such action to be necessary or appropriate in the public interest or for the protection of investors.

Under Section 15A(b)(4) of the Exchange Act, in the absence of our approval or direction, no broker or dealer may be admitted to or continued in membership in a registered securities association if the broker or dealer or any partner, officer, director, or controlling or controlled person of such broker or dealer, was a cause of any order of revocation, suspension, or expulsion which is in effect. **[*3]**

The orders for proceedings allege that commencing on September 17, 1958, registrants and Grant offered to sell shares of stock of Arvida Corporation ("Arvida") when no registration statement had been filed as to such securities, in willful violation of Section 5(c) of the Securities Act of 1933 ("Securities Act"). n2

n2 Section 5(c) of the Securities Act, as applicable here, makes unlawful the use of the mails or interstate facilities to offer to sell a security unless a registration statement has been filed as to such security.

Registrants and Grant waived a hearing, the filing of proposed findings and briefs, and oral argument before us, consented that any member of the staff might participate or advise in our decision and opinion and entered into a stipulation of a record with our Division of Trading and Exchanges. These waivers and the stipulation were tendered as part of an offer of settlement pursuant to Section 5(b) of the Administrative Procedure Act, n3 and were conditioned upon a finding by us that no sanctions need be imposed upon the registrants.

n3 Section 5(b) of the Administrative Procedure Act provides in pertinent part:

"The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit . . ." **[*4]**

On December 12, 1958, we issued an order determining that, for reasons to be set forth in a Findings and Opinion to be issued, registrants had willfully violated Section 5(c) of the Securities Act but that, under all the circumstances it was not necessary in the public interest or for the protection of investors that any sanctions be imposed, and we accordingly discontinued the proceedings. Our findings are based upon a review of the record.

[845]** The Offering of Arvida Stock

Arvida was incorporated in Florida on July 30, 1958, pursuant to plans developed over the preceding four or five months to provide for the financing and development of the extensive real estate holdings of Arthur Vining Davis ("Davis") in southeastern Florida. In April 1958 each of the registrants was approached by representatives of Davis, and thereafter, in May and June 1958, as a result of discussions a plan was developed under which certain of Davis' properties would be placed in a new corporation to be financed in large part through a public offering of securities by an underwriting group proposed to be managed by registrants.

On July 8, 1958 a meeting was held in Miami to work out various aspects of **[*5]** the contemplated offering. At this meeting it was noted there was some concern in Florida real estate circles as to the ultimate disposition of the Davis properties and the possible effect thereof on real estate values, and it was decided to issue a press release. n4 Grant prepared a draft release which included some description of the "great spread" of Davis' lands and mention of a proposed underwriting of the offering through Loeb Rhoades. This draft was revised by representatives of Davis so as to state merely that the major portion of the Davis land holdings was to be transferred to Arvida which would proceed

with orderly development and arrange to obtain a large amount of new capital for that purpose. No mention was made of a public offering or of an underwriting or underwriters. The substance of this release appeared during the next few days in various Florida newspapers.

n4 Grant took with him to this meeting a draft press release which he had previously prepared and cleared with certain of his partners.

On September 16 and 17, 1958, meetings were held in New York at which the proposals of registrants for the financing were placed in final form and submitted to representatives **[*6]** of Davis for transmission to him. At this time it was decided to issue an additional press release. Grant drafted such a release on the evening of September 17 and, on September 18 submitted it to officers of Arvida, representatives of Davis, Dominick and counsel for the proposed underwriters, obtaining the approval of all of them. Later that day, Davis approved registrants' financing proposals, and public relations counsel for Loeb Rhoades was called in to arrange for distribution of the release in New York.

The release, which was issued on the letterhead of Loeb Rhoades, stated that Arvida, to which Davis was transferring his real estate, would be provided with $25 million to $30 million of additional capital through an offering of stock to the public, and that Arvida would have assets of over $100,000,000 "reflecting Mr. Davis' investment" **[**846]** and the public investment. It referred to a public offering scheduled within 60 days through a nationwide investment banking group headed by registrant's and to the transfer from Davis to Arvida of over 100,000 acres "in an area of the Gold Coast" in three named Florida counties and contained a brief description of these properties including **[*7]** reference to undeveloped lands and to "operating properties."

The release identified the principal officers of Arvida and stated that Arvida proposed to undertake a "comprehensive program of orderly development," under which some of the lands would be developed "immediately into residential communities" and others would be held for investment and future development as the area expands. It closed with a reference to the attraction of new industry and the place Arvida would assume in the "further growth of Southeastern Florida."

Officers of Arvida were anxious to have the release issued promptly. Public relations counsel advised Loeb Rhoades that, in order to make sure that the story appeared in three prominent New York newspapers, which coverage Loeb Rhoades wanted, it would be advisable, in view of newspaper deadlines, to call reporters from these papers to Loeb Rhoades' office. This was done on the afternoon of Thursday, September 18. The reporters asked certain questions which Grant undertook to answer. He disclosed that the offering price of the stock would be in the vicinity of $10 or $11 per share and gave certain information about Davis and his career but declined to **[*8]** answer questions concerning Davis' reasons for entering into the transaction, the extent of mortgage indebtedness, the capitalization of Arvida, its balance sheet, and the control of the corporation. His stated reason for refusing to answer these questions was that he did not wish to go beyond the release which had been approved by all interested parties.

Copies of the release were also delivered to other New York newspapers and to the principal wire services. The substance of the release and the information supplied by Grant appeared in the three New York newspapers on September 19, 1958, and in numerous other news media throughout the country.

A limited survey by our staff covering the two business days, September 19 and 22, immediately following this publicity disclosed buying interest in Arvida stock attributable to this publicity on the part of brokers, dealers, and the investing public to the extent of at least $500,000. It was later ascertained that during these two business days a total of 101 securities firms were recorded by Loeb Rhoades as expressing an underwriting interest in the offering. Loeb Rhoades did not accept indications of interest from individuals or **[**847]** prospective **[*9]** selling dealers during this period, but did make notations of selling group interest on September 19 and 22 by about 25 securities dealers. In addition, following the publicity, registrants received, prior to September 30, at least 58 expressions of interest from members of the public, including at least 17 specific offers to buy.

On September 22, 1958, we commenced an action in the United States District Court for the Southern District of New York against Arvida, registrants, Grant and others, seeking an injunction against further violations of Section 5(c) of the Securities Act. On October 20, 1958, the Court denied our motion for a preliminary injunction and defendants' counter motions for dismissal, judgment on the pleadings, or summary judgment and to enjoin these broker-dealer proceedings. On December 12, 1958, the Court entered a decree permanently enjoining violation of Section 5(c) by the defendants. The defendants consented to the entry of this decree and stipulated to the findings of fact which were adopted by the Court and formed the basis for the Court's ruling. The Court concluded that, although the defendants

appeared to have acted in good faith and to have had **[*10]** no intention to violate the Securities Act, and, although they continued to deny that their activities violated the statute, their activities nevertheless constituted a violation of Section 5(c) of that Act.

Arvida filed a registration statement under the Securities Act covering its proposed offering of securities on October 27, 1958. A material amendment was filed on November 25, 1958, a further amendment was filed on December 2, 1958, and the registration statement became effective on December 10, 1958. Between December 2 and 9, 1958, the registrants pursuant to our suggestion arranged for each underwriter to furnish a copy of the November 25 and the December 2 prospectus (which were substantially the same) to all investors who were known to have expressed to such underwriter prior to October 27, 1958, any kind of interest in purchasing the securities and to whom such underwriter proposed to sell the securities. n5

n5 Distribution of preliminary prospectuses to prospective investors residing in Florida, Alabama, and Iowa, was not made because counsel for registrants advised that this would violate the laws of those States.

The November 25 and the final prospectuses included **[*11]** in this registration statement disclosed, among other things, that the properties were encumbered by mortgage debt in the amount of $30,833,324, of which approximately $20,642,000 falls due within the next five years. The equity of Davis in Arvida was stated at approximately $44,827,000, represented by $6,900,000 of debentures payable to him and capital stock and surplus of $37,927,000. A substantial part of **[**848]** the proceeds from the financing may be required to meet mortgage indebtedness maturing in the next few years and to that extent will be unavailable to develop the properties. During the first fiscal year only $2,800,000 is budgeted for such development. Approximately 61% of the 100,650 acres owned by Arvida is located in rural areas removed from present urban development, and substantial portions of this acreage are accessible only by unpaved roads and a portion is inaccessible by automobile. Approximately 50% of the 100,650 acres are below the "flood criteria" established by local authorities as the minimum elevation at which land may be developed, and substantial fill and drainage expenses would be required for the development of this property. The operating properties **[*12]** of Arvida, in the aggregate, are estimated to have operated at a net loss since their respective years of acquisition.

The Impact of Section 5(c) of the Securities Act

Section 5(c) of the Securities Act, as here pertinent, prohibits offers to sell any security, through the medium of a prospectus or otherwise, unless a registration statement has been filed. Section 2(3) defines "offer to sell" to include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security for value." Section 2(10) defines a "prospectus" to mean "any prospectus, notice, circular, advertisement, letter, or communication . . . which offers any security for sale . . . ." n6 These are broad definitions, and designedly so. It is apparent that they are not limited to communications which constitute an offer in the common law contract sense, or which on their face purport to offer a security. Rather, as stated by our General Counsel in 1941, they include "any document which is designed to procure orders for a security." n7

n6 It may be noted that the definition of a "prospectus" contained in Section 2(10) excludes "a notice, circular, advertisement, letter or communication in respect of a security . . . if it states from whom a written prospectus meeting the requirements of Section 10 may be obtained . . ." and in addition does no more than contain certain narrowly specified information. It is significant that Congress here recognized that a communication which merely states from whom a prospectus may be obtained might nevertheless constitute an offer as defined in the Securities Act and thus a prospectus unless excluded from this definition. Pursuant to the rule-making authority granted under Section 2(10)(b), we have adopted Rule 134 which defines precisely the type of information permitted in a Section 2(10)(b) communication and the circumstances under which such a communication can be used. Both Section 2(10)(b) and Rule 134 emphasize that this type of communication may only be used after the registration statement has been filed.

n7 Securities Act Release No. 2623 (July 25, 1941). **[*13]**

The broad sweep of these definitions is necessary to accomplish the statutory purposes in the light of the process of securities distribution as it exists in the United States. Securities are distributed in this country by a complex and sensitive machinery geared to accomplish nationwide distribution of large quantities of securities **[**849]** with great speed. Multi-million dollar issues are often over-subscribed on the day the securities are made available for sale. n8

This result is accomplished by a network of prior informal indications of interest or offers to buy between underwriters and dealers and between dealers and investors based upon mutual expectations that, at the moment when sales may legally be made, many prior indications will immediately materialize as purchases. It is wholly unrealistic to assume in this context that "offers" must take any particular legal form. Legal formalities come at the end to record prior understandings, but it is the procedures by which these prior understandings, embodying investment decisions, are obtained or generated which the Securities Act was intended to reform.

n8 See Exchange Act Release No. 2446 (March 18, 1940).

One of the cardinal **[*14]** purposes of the Securities Act is to slow down this process of rapid distribution of corporate securities, at least in its earlier and crucial stages, in order that dealers and investors might have access to, and an opportunity to consider, the disclosures of the material business and financial facts of the issuer provided in registration statements and prospectuses. Under the practices existing prior to the enactment of the statute in 1933, dealers made blind commitments to purchase securities without adequate information, and in turn, resold the securities to an equally uninformed investing public. The entire distribution process was often stimulated by sales literature designed solely to arouse interest in the securities and not to disclose material facts about the issuer and its securities. n9 It was to correct this situation that the Securities Act originally prohibited offers to sell and solicitations of offers to buy as well as sales prior to the effective date of a registration statement and imposed a 20-day waiting period between the filing and the effective date. n10

n9 "Despite the fact that [the underwriting] business demands the assumption of responsibilities of a character fully equivalent to those of trusteeship, compelling full and fair disclosure not only of the character of the security but of the charges made in connection with its distribution, the literature on the faith of which the public was urged to invest its savings was too often deliberately misleading and illusive. Even dealers through the exertion of high-pressure tactics by underwriters were forced to take allotments of securities of an essentially unsound character and without opportunity to scrutinize their nature. These then would be worked off upon the unsuspecting public." House Report No. 85, 73rd Cong., 1st Sess. p. 3 (1933).

n10 Section 8(a) of the Securities Act. Under the statute as amended in 1940 we may accelerate the effective date if the conditions specified in Section 8(a) are, in our judgment, satisfied. **[*15]**

This entire problem was carefully reconsidered by the Congress in 1954. Both the securities industry and the Commission had been concerned by the fact that dissemination to investors during the waiting period of the information contained in a registration statement was impeded by the fear that any such dissemination might be held to constitute an illegal offer. As a result, wide dissemination of material facts prior to the time of sale, which was an important **[**850]** objective of the statute, was to some extent frustrated. We had attempted to deal with this problem by rules which defined distribution of preliminary or so-called "red herring" prospectuses as not constituting an "offer", and required such distribution at least to dealers as a prerequisite to acceleration of the registration statement. However, the concern that Section 5 might be violated persisted despite the permissibility of red herring prospectuses, and the desired dissemination of information was not obtained. n11 This continuing concern is significant for present purposes and illustrates the scope and reach attributed to the prohibitions of Section 5(c).

n11 Senate Report No. 1036, 83rd Cong., 2nd Sess. p. 5 (1954); House Report No. 1542, 83rd Cong., 2nd Sess. pp. 7-14 (1954). **[*16]**

The Congress in 1954 adopted a carefully worked out procedure to meet the problem. It is essentially as follows: (1) the strict prohibition of offers prior to the filing of a registration statement was continued; (2) during the period between the filing of a registration statement and its effective date offers but not sales may be made but written offers could be made only by documents prescribed or processed by the Commission; and (3) sales continued to be prohibited prior to the effective date. n12 In permitting, but limiting the manner in which pre-effective written offers might be made, the Congress was concerned lest inadequate or misleading information be used in connection with the distribution of securities. We were directed to pursue a vigorous enforcement policy to prevent this from happening. n13 In obedience to this mandate we have made clear our position that the statute prohibits issuers, underwriters and dealers from initiating a public sales campaign prior to the filing of a registration statement by means of publicity efforts which,

even though not couched in terms of an express offer, condition the public mind or arouse public interest in the particular securities. **[*17]** n14 Even if there might have been some uncertainty as to Congressional intent with regard to pre-effective publicity prior to 1954, n15 none should have existed thereafter. The Congress has specified a period during **[**851]** which, and a procedure by which, information concerning a proposed offering may be disseminated to dealers and investors. This procedure is exclusive and cannot be nullified by recourse to public relations techniques to set in motion or further the machinery of distribution before the statutory disclosures have been made and upon the basis of whatever information the distributor deems it expedient to supply.

n12 See House Report No. 1542, 83rd Cong., 2nd Sess. p. 24 (1954).

n13 "Your committee in recommending that this bill be enacted expects the Commission to be most vigorous in the enforcement and implementation of the basic provisions of these acts as amended by the adoption of appropriate rules, procedures, and other means designed to provide full disclosure and the dissemination of accurate and adequate information to the investing public. It also expects that the Commission will be ever vigilant and alert to prevent the development of any deceptive or 'shady' practices which may have the effect of defeating the basic purposes of the acts or misleading or inaccurately informing the investing public in connection with the issuance or distribution of securities". Senate Report No. 1036, 83rd Cong., 2nd Sess. p. 2 (1954).

n14 Securities Act Release No. 3844 (October 8, 1957); Address of Chairman Edward N. Gadsby before the Central States Group of the Investment Bankers Association, "Current Problems under Section 5 of the Securities Act and Release No. 3844" (Chicago, Illinois, March 20, 1958).

n15 See, however, Securities Act Release No. 70 (November 6, 1933), Securities Act Release No. 464 (August 19, 1935) and Securities Act Release No. 802 (May 23, 1936). **[*18]**

We accordingly conclude that publicity, prior to the filing of a registration statement by means of public media of communication, with respect to an issuer or its securities, emanating from broker-dealer firms who as underwriters or prospective underwriters have negotiated or are negotiating for a public offering of the securities of such issuer, must be presumed to set in motion or to be a part of the distribution process and therefore to involve an offer to sell or a solicitation of an offer to buy such securities prohibited by Section 5(c). Since it is unlawful under the statute for dealers to offer to sell or to offer to buy a security as to which registration is required, prior to the filing of a registration statement, dealers who are to participate in a distribution likewise risk the possibility that employment by them of public media of communication to give publicity to a forthcoming offering prior to the filing of a registration statement constitutes a premature sales activity prohibited by Section 5(c).

Turning to the facts of this case, we find that the September 19, 1958, press release and resultant publicity concerning Arvida and its securities emanated from managing **[*19]** underwriters contemplating a distribution of such securities in the near future as to which a registration statement had not yet been filed. We also find that the mails and instrumentalities of interstate commerce were used in the dissemination of this publicity. We further find that such release and publicity was of a character calculated, by arousing and stimulating investor and dealer interest in Arvida securities and by eliciting indications of interest from customers to dealers and from dealer to underwriters, to set in motion the processes of distribution. In fact it had such an effect. n16 It contained descriptive material concerning the properties, business, plans and management of Arvida, it included arresting references to "assets in excess of $100,000,000", and "over 100,000 acres, more than 155 square miles, in an area of the Gold Coast". Reporters were furnished with price data, and registrants were named as the managing underwriters thus permitting, if **[**852]** not inviting, dealers to register their interest with them. n17 We find that such activities constituted part of a selling effort by the managing underwriters.

n16 At least one of the news reports following this meeting included a statement that it was unusual for underwriters to volunteer so much detail prior to registration, and also a statement that this advance detail would presumably help to intensify widespread interest in Davis' activities.

n17 We reject the suggestion that the purpose of the release was merely to dispel rumors in Florida concerning the ultimate disposition of the Davis holdings. Had this been the purpose no such elaboration of detail would have been necessary, nor would there have been need to go to such effort to make sure that the

material appeared in the principal financial newspapers in New York or to give it nationwide circulation. In any event, the July 8 press release seems entirely adequate to quiet any apprehension in Florida concerning the fate of the Davis properties and in fact had that effect. It was then announced that the properties were to be conveyed to Arvida which proposed to proceed with their orderly development and was arranging for necessary financing. It is significant that the July 8 release elicited public response primarily from persons interested in Florida real estate, while the September 18 release produced a reaction primarily from investors and securities dealers. This is hardly a coincidence. **[*20]**

The principal justification advanced for the September 19 release and publicity was the claim that the activities of Mr. Davis, and specifically his interests in Florida real estate, are "news" and that accordingly Section 5(c) should not be construed to restrict the freedom of the managing underwriters to release such publicity. n18 We reject this contention. Section 5(c) is equally applicable whether or not the issuer or the surrounding circumstances have, or by astute public relations activities may be made to appear to have, news value. n19

n18 Other explanations, not strongly urged, were that the release was a species of institutional advertising designed to enhance the "prestige" of registrants and that it was intended to forestall competition from other investment bankers for the Arvida financing. It would seem, however, that registrants could equally well, or better, obtain any benefits of prestige arising from their connection with the financing by waiting until the registration statement was on file or effective, at which time their connection would be publicized. It does not appear that any competition for the financing was in the field on September 18 and, in any event, prior to dissemination of the release, Davis had indicated his acceptance of registrants' proposal. The existence of competition would not, in any event, limit the applicability of Section 5(c).

n19 It should be clear that our interpretation of Section 5(c) in no way restricts the freedom of news media to seek out and publish financial news. Reporters presumably have no securities to sell and, absent collusion with sellers, Section 5(c) has no application to them. Underwriters such as registrants are in a different position; they are in the business of distributing securities, not news. Failure to appreciate this distinction between reporters and securities distributors has given rise to a further misconception. Instances have arisen in which a proposed financing is of sufficient public interest that journalists on their own initiative have sought out and published information concerning it. Since such journalistic enterprise does not violate Section 5, our failure to question resulting publicity should not have been taken as any indication that Section 5 is inapplicable to publicity by underwriters about newsworthy offerings. Similar considerations apply to publicity by issuers. **[*21]**

Brokers and dealers properly and commendably provide their customers with a substantial amount of information concerning business and financial developments of interest to investors, including information with respect to particular securities and issuers. Section 5, nevertheless, prohibits selling efforts in connection with a proposed public distribution of securities prior to the filing of a registration statement and, as we have indicated, this prohibition includes any publicity which is in fact part of a selling effort. Indeed, the danger to investors from publicity amounting to a selling **[**853]** effort may be greater in cases where an issue has "news value" since it may be easier to whip up a "speculative frenzy" concerning the offering by incomplete or misleading publicity and thus facilitate the distribution of an unsound security at inflated prices. This is precisely the evil which the Securities Act seeks to prevent.

We realize, of course, that corporations regularly release various types of information and that a corporation in which there is wide public interest may be called upon to release more information more frequently about its activities than would be expected of lesser **[*22]** known or privately held enterprises. In the normal conduct of its business a corporation may continue to advertise its products and services without interruption, it may send out its customary quarterly, annual and other periodic reports to security holders, and it may publish its proxy statements, send out its dividend notices and make routine announcements to the press. This flow of normal corporate news, unrelated to a selling effort for an issue of securities, is natural, desirable and entirely consistent with the objective of disclosure to the public which underlies the federal securities laws. However, an issuer who is a party to or collaborates with underwriters or prospective underwriters in initiating or securing publicity must be regarded as participating directly or indirectly in an offer to sell or a solicitation of an offer to buy prohibited by Section 5(c).

Difficult and close questions of fact may arise as to whether a particular item of publicity by an issuer is part of a selling effort or whether it is an item of legitimate disclosure to investors unrelated to such an effort. n20 Some of these problems are illustrated in Securities Act Release No. 3844 above cited. **[*23]** This case, however, does not present

such difficulties. Arvida was a new venture having, at the date of the September publicity, only one stockholder - Davis. There was no occasion to inform existing stockholders or investors in the trading markets concerning developments in its affairs in order that they might protect their interests or trade intelligently. We see no basis for concluding that the purpose of the release was different from its effect - the stimulation of investor and dealer interest as the first step in a selling effort.

n20 Whether in any particular case publicity is an offer depends upon all the facts, and the surrounding circumstances including the nature, source, distribution, timing, and apparent purpose and effect of the published material. Cf. Securities and Exchange Commission vs. Georgia Pacific Corporation, (Civil Action No. 115-75, S.D.N.Y., 1956). Here a well-known corporation, as to which a distribution of securities was not quite completed, published what purported to be a piece of institutional or product advertising but which was so phrased as apparently to relate also to its securities and to convey a misleading impression concerning them. We filed an action for injunction against further violation of Sections 5 and 17 and obtained a temporary restraining order. The action was later dismissed upon defendant's stipulation to omit the objectionable material from future advertising.

[854]** **[*24]** Comparison of the September publicity with the final prospectus of Arvida illustrates the wisdom of the Congressional prohibition against pre-filing publicity. Wholly omitted from the release and withheld from reporters were the essential financial facts of capitalization, indebtedness and operating results which are so material to any informed investment decision. The great acreage owned by Arvida was stressed without disclosing that the bulk of it was in areas remote in time and distance from the development which was also stressed. Obscured also was the probable use of much of the proceeds of the financing, not to develop the properties but rather to discharge mortgage debt. As is so often the case, the impression conveyed by the whole is more significant than the individual acts of omission. From the publicity investors could, and no doubt many did, derive the impression that the risk and financing requirements of this real estate venture had been substantially satisfied by Davis and that the public was being invited to participate in reaping the fruits through early development. In fact, as clearly appears from the final prospectus, much of the risk remains to be taken **[*25]** and much of the financing essential to the issuer's business remains to be carried out.

What is presented in this case is no mere technical controversy as to the time and manner of public disclosure concerning significant business facts. On the contrary, the issue vitally concerns the basic principle of the Securities Act that the health of the capital markets requires that new issues be marketed upon the basis of full disclosure of material facts under statutory standards of accuracy and adequacy and in accordance with the procedural requirements of Section 5. If actual investment decisions may be brought about by press releases, then compliance with the registration requirements may be reduced to little more than a legal formality having small practical significance in the marketing of new issues.

We conclude, therefore, that registrants and Grant willfully violated Section 5(c) of the Securities Act. n21

n21 This does not mean that we find registrants and Grant to have intentionally violated the law. They assert that they acted under the mistaken impression that Section 5(c) is inapplicable to press releases concerning Section 5(c) is inapplisable to press releases concerning offerings having news value. But, as is well settled, a finding of willfulness within the meaning of Sections 15(b) and 15A(1)(2) of the Exchange Act does not require a finding of intention to violate the law. It is sufficient that registrants be shown to have known what they were doing. *Thompson Ross Securities Co., 6 S.E.C. 1111, 1122-23 (1940); Hughes vs. S.E.C. 174 F. 2d 969, 977 (C.A. D.C. 1949);* The Whitehall Corporation, Exchange Act Release No. 5667 (April 2, 1958); Shuck vs. S.E.C. (C.A. D.C. No. 14,208, December 1958). Registrants, of course, knew that no registration statement had been filed and the release was intentionally composed and publicized. **[*26]**

The Public Interest

Since we have found willful violations of the Securities Act, we must consider whether it is in the public interest or necessary or **[**855]** appropriate for the protection of investors to revoke the registration of either registrant or to suspend or expel either of them from membership in the NASD. In such inquiry our concern is not only with the gravity of the violations but primarily whether under all the circumstances the public interest or investor protection calls for elimination of registrants from the securities business or their permanent or temporary exclusion from the NASD.

For the reasons discussed above we believe the violations were serious, since practices such as these may subvert to a substantial degree the essential objective of the Securities Act that investors and dealers should have the opportunity to make investment decisions upon the basis of adequate information fully disclosed under statutory standards and sanctions.

However, we have taken into account a number of mitigating factors. Registrants bear an excellent general reputation in the securities business and have never before been the subject of disciplinary proceedings by us. The **[*27]** Court has found that they acted in good faith and in reliance upon the opinion of counsel. These proceedings and the judgment of the Court in the injunctive action we commenced have served to place registrants and the securities industry upon unmistakable notice of their obligations in the field of publicity and forcibly to direct the attention of registrants to the consequences of improper practices in this area. There is no evidence of injury to investors since the publicity attendant upon our actions and the steps taken to disseminate the facts disclosed in the registration statement, particularly to those investors who had previously evidenced an interest, should have been adequate to dispel the effect of the unlawful release. We therefore conclude that the public interest and the protection of investors do not require that the registrations of registrants as brokers and dealers be revoked or that they be suspended or expelled from membership in the NASD.

By the Commission (Chairman Gadsby and Commissioners Orrick, Patterson, Hastings, and Sargent).