

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

BEFORE THE
SECURITIES COMMISSIONER

IN THE MATTER OF)
ELEVENTH HOUR, INC., AMERICAN)
CONSOLIDATED GROWTH CORPORATION,)
NORMAN L. FISHER,)
VALERIE FISHER, GARY FLATER,)
CORY COPPAGE, AND THEIR OFFICERS,)
DIRECTORS, AGENTS, AND EMPLOYEES,)
RESPONDENTS.)

**INVESTIGATION
DECISION, ORDER, AND
NOTICE OF OPPORTUNITY
FOR HEARING**

.....
WHEREAS, Helen Igoe, a North Dakota resident, made allegations of violations of North Dakota law under Chapter 10-04 of the North Dakota Century Code against the respondents; and

WHEREAS, The office of the Securities Commissioner has conducted an investigation into this matter and provided respondents with several opportunities to present evidence and testimony, including depositions under oath on October 14, 1996 in Bismarck, North Dakota and on November 19-20, 1996 in Denver, Colorado;

NOW THEREFORE, Based upon the facts gathered in the investigation, the Commissioner makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

(1) During all times relevant to this proceeding, Helen Igoe has maintained her residence at 1500 Clydesdale Drive in Bismarck, North Dakota and has maintained a winter home in Arizona. Helen Igoe asserted that she has always been a North Dakota resident (Hearing Transcript pp. 155-156, Exhibit A, Exhibit R-10, and Deposition Exhibit Bundle 11-Subpart 3). Respondent Gary Flater knew that Helen Igoe was a resident of North Dakota, though he also knew she lived part of the year in Arizona (Gary Flater's Deposition, pp140-143).

(2) On several occasions during 1989 Gary Flater and his business partner David Mowatt by and through their company, Mowatt Flater Financial, Inc. (MFFI), offered and/or sold investment advisory services to Helen Igoe (Exhibit A, Exhibit C-1 and Gary Flater's Deposition, pp. 22:23, 23:11, 24:21, 25:17, 37, 39). MFFI was not registered in North Dakota as an investment advisor and neither Flater nor Mowatt were registered in North Dakota as investment advisor representatives.

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(3) One of the investments presented to Helen Igoe by MFFI and Gary Flater was a five-year promissory note for Eleventh Hour of California, Inc. (EHCI) with a promise of 10% annual interest plus an "equity kicker" based on the gross margin of EHCI on the maturity date of May 31, 1994 (Exhibit A and Hearing Transcripts p. 15). Gary Flater made material misrepresentations to Helen Igoe by telling her that the EHCI investment did not involve high risk as outlined in the offering memorandum (Gary Flater's Deposition, p. 92:5-17). Flater and Mowatt (MFFI) also made material misrepresentations in the offering memorandum and subscription agreement for EHCI they presented to Helen Igoe. The 10% annual interest in the offering memorandum is not mentioned in the subscription agreement (Exhibit A). When Mowatt and Flater presented the Eleventh Hour (EHCI) investment to Lincoln Trust Company, the investment was described as a 13% promissory note (Exhibit R-2, Exhibit R-3, Exhibit D, and Deposition Exhibits) with quarterly payments rather than annual payments (Exhibit A). Respondent Norman Fisher has claimed that Helen Igoe's promissory note may have been different from the investment outlined in the Offering Memorandum because infrequent payments were made to Mrs. Igoe on a quarterly rather than an annual basis (Hearing Transcript p. 52). EHCI was always a wholly owned subsidiary of Eleventh Hour, Inc. (EHI).

(4) On or around October 3, 1989, Helen Igoe agreed to purchase the investment in Eleventh Hour, and she mailed a \$50,000 check payable to Eleventh Hour (EHI or EHCI) and she returned the subscription agreement to escrow agent MFFI. Helen Igoe intended to purchase a \$50,000 promissory note of EHCI, a wholly-owned subsidiary of EHI (Deposition Exhibits). Sometime between October 3, 1989 and October 10, 1989, Gary Flater changed the original subscription agreement Helen Igoe had signed by substituting Lincoln Trust Company as the owner of the subscription agreement with the notation of "Lincoln Trust Company (LTC), F.B.O. Helen Igoe" (Gary Flater's Deposition pp. 100-112, Exhibit A, Exhibit R-10 and Bundle 11, Subpart 3 of the Deposition Exhibits). Gary Flater became a member of the board of directors of Eleventh Hour (EHI) in February of 1989 (Exhibit A). Acting as agent for EHI, Gary Flater endorsed Helen Igoe's check to Lincoln Trust F.B.O. Helen Igoe and mailed the check and the altered subscription agreement to Lincoln Trust (Gary Flater's Deposition p 42:7-12). In a letter dated October 10, 1989, Gary Flater asked Helen Igoe to fill out and sign documents to open an account with Lincoln Trust and immediately return the documents in the enclosed airborne package.

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(5) On October 11, 1989, Helen Igoe signed a Limited Partnership Authorization and returned it to Gary Flater in the airborne express packet as requested. On the same day, respondent Valerie Fisher signed an altered copy of Helen Igoe's Subscription Agreement with Eleventh Hour (EHCI), before Gary Flater opened a new account at Lincoln Trust in Helen Igoe's name. Like Gary Flater, Valerie Fisher also became a member of the board of directors of Eleventh Hour (EHI) in February of 1989 (Exhibit A). Lincoln Trust did not sign a form W-9 to create an IRA account for Helen Igoe until October 19, 1989. On October 20, 1989, Lincoln Trust sent a \$50,000 check for the Eleventh Hour (ECHI) promissory note to escrow agents Mowatt and Flater at MFFI (Exhibit B and Deposition Exhibits). At some time during this period, Lincoln Trust deposited Helen Igoe's check for \$50,000. None of the respondents registered the Eleventh Hour promissory note or any other documents they offered or sold to North Dakota resident Helen Igoe with the office of the North Dakota Securities Commissioner. On November 8, 1989, Eleventh Hour (EHCI) paid \$114.40 of interest on Helen Igoe's money to Lincoln Trust for the time while the money was held in escrow (Exhibit C), but the payment was not an interest payment on the promissory note.

(6) On June 8, 1990, respondent Norman Fisher mailed a letter to Helen Igoe at her residence at 1550 Clydesdale Drive in Bismarck, North Dakota with a copy of a \$2,902.28 check made payable to Lincoln Trust allegedly for interest on the promissory note (Exhibit C). Without presenting copies of any documents or other evidence as requested by the Securities Commissioner during this investigation, the respondents also claim they made payments to Helen Igoe on June 29, 1990 in the amount of \$416, on September 30, 1990 in the amount of \$1250.00, on March 31, 1991 in the amount of \$1250.00, and on June 30, 1991 in the amount of \$1250. The respondents did provide a copy of a check for an alleged interest payment on December 31, 1990 (Exhibit C).

(7) On July 17, 1991, Helen Igoe closed her account with Lincoln Trust and legal ownership of her Eleventh Hour investment was assigned back to Helen Igoe at her North Dakota residence of Box 855, Bismarck, North Dakota. Eleventh Hour (EHCI) received notice of the assignment on July 22, 1991, and the respondents knew Helen Igoe was a resident of Bismarck, North Dakota. (Exhibit D). The respondents did not make a quarterly interest payment to Helen Igoe in September of 1991 according to the terms of the promissory note.

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(8) Along with Gary Flater, David Mowatt, and Valerie Fisher, respondent Norman Fisher became a member of the board of directors of Eleventh Hour (EHI) in February 1989 (Exhibit A). Norman Fisher made a December 16, 1991 offer to Helen Igoe to convert Helen Igoe's promissory note and unpaid delinquent interest into a new promissory note which would not pay quarterly or annual interest until April 15, 1993 with all unpaid future interest added to the value of the promissory note at maturity on December 31, 1995. Norman Fisher mailed his offer to Helen Igoe in Bismarck, North Dakota on Eleventh Hour (EHI and not EHCI) letterhead (Exhibit C-2). The new promissory note offering was not registered as a security in the office of the North Dakota Securities Commissioner (Hearing Transcripts p. 56). Eleventh Hour (EHI or EHCI) was not registered as a broker dealer and Norman Fisher was not registered as a salesman or investment advisor under North Dakota law. Norman Fisher and Gary Flater owned GDN Securities at the time of the unregistered offer and Fisher was aware of securities registration requirements. Helen Igoe did not accept Norman Fisher's unregistered offer to issue a new promissory note in December of 1991.

(9) Eleventh Hour did not pay any interest to Helen Igoe on her promissory note from December 1991 through February 1993. On February 11, 1993, Pam Hedrich of the First Trust Company of North Dakota (FTC) notified Norman Fisher that all future payments on the promissory note should be made payable to First Trust as agent for Helen Igoe (Exhibit D). On April 15, 1993, Eleventh Hour (EHI) paid First Trust \$1,468.75 as a small portion of delinquent interest (Exhibit C). Neither First Trust nor Helen Igoe has received any payment of interest or principal on the Eleventh Hour promissory note since April 15, 1993.

(10) Gary Flater was a member of the board of directors of Eleventh Hour (EHI) and GDN Securities, a broker-dealer firm owned by Norman Fisher and Gary Flater. On December 2, 1993, GDN Securities was censured and fined by the National Association of Securities Dealers (NASD) for violation of the net capitalization requirement for all securities dealers (Exhibit C-17 and Gary Flater's Deposition pp. 54-56). The illegal net capitalization resulted from a loan GDN Securities made to Eleventh Hour (EHI) which was not a "sound investment" under NASD regulations (Gary Flater's Deposition pp. 54-56). Eleventh Hour also breached all obligations owed to Helen Igoe on the May 31, 1994 maturity date of the \$50,000 promissory note (Exhibit A).

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(11) Before June 8, 1994, Norman Fisher, Gary Flater, and other persons in Eleventh Hour (EHI) and American Consolidated Growth Corporation (AMGC) discussed a merger of the two companies. AMGC was a shell corporation for other business interests. AMGC did not have any employees and AMGC did not produce any goods or services. On June 8, 1994, Norman Fisher, acting as agent for both Eleventh Hour (EHI and EHCI) and AMGC, made two unregistered offers of securities to Helen Igoe in North Dakota. Fisher offered to sell Helen Igoe AMGC stock for \$6.00 per share (which was not the market value of AMGC stock) in exchange for the cash value of the Eleventh Hour (EHCI) promissory note, including a callable put option for the original investment and accumulated delinquent interest which could be called at 1/12 of the outstanding debt each quarter for three years. Fisher also offered to sell Helen Igoe AMGC stock for \$6.00 per share (which was not the market value of AMGC stock) in exchange for the cash value of the Eleventh Hour (EHCI) promissory note (Exhibit E). In the alternative, on June 8, 1994, Norman Fisher, acting as agent for both Eleventh Hour (EHI and EHCI) and AMGC, offered to buy Helen Igoe's delinquent promissory note for twenty cents on each dollar of value.

(12) On June 30, 1994, Michael Writer, acting as Chairman and CEO of AMGC, authorized Norman Fisher to repurchase Helen Igoe's Eleventh Hour promissory note as agent for AMGC. (Exhibit F). Acting as agent for Eleventh Hour and AMGC, Norman Fisher on July 12, 1994 re-offered the two new unregistered securities previously offered to Helen Igoe on June 8, 1994. In a letter dated July 12, 1994, Norman Fisher told Helen Igoe that the first payment on the AMGC "put" option stock would be completed on September 30, 1994. Fisher's July 12 letter included unregistered securities offerings for an "Eleventh Hour Conversion Proposal I" and "Eleventh Hour Conversion Proposal II." Both offerings stated that Helen Igoe, as owner of a promissory note, would "hereby accept the offer of American Consolidated Growth Corporation and Eleventh Hour."

(13) Eleventh Hour employees and agents made the July 12 offer because AMGC was a shell corporation without employees or personnel. Norman Fisher stated in his testimony for this investigation that he controlled the unregistered securities offerings to Helen Igoe and that he acted as agent for Eleventh Hour and AMGC. (Exhibit C-4 and Transcript page 80). On July 12, 1994, Norman Fisher also made another unregistered securities offer to purchase Helen Igoe's promissory note according to the earlier offer of June 8, 1994 (Exhibit C-4) as "Eleventh Hour Conversion Proposal III" which stated in part that Helen Igoe

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would "hereby accept the offer of American Consolidated Growth Corporation and Eleventh Hour." Norman Fisher and Eleventh Hour also stated in each of the unregistered offers that the value of Helen Igoe's promissory note on July 12, 1994 was "\$50,000 plus accrued interest of \$14,788.84" (Exhibit C-4). Eleventh Hour and AMGC were not registered as broker dealers and Norman Fisher was not registered as a salesman or investment advisor in North Dakota for any of the securities offerings.

(14) On August 12, 1994, Helen Igoe agreed to accept the put option interests which had been offered by the respondents through Norman Fisher on June 8, 1994 and July 12, 1994. Respondent Gary Flater became a member of the board of directors of AMGC (Gary Flater's Deposition p. 127) sometime in September of 1994. At this time, the boards of AMGC and Eleventh Hour were filled with directors sitting on both boards, including Gary Flater and Norman Fisher. On September 14, 1994, the sale of new securities to Helen Igoe was completed when Norman Fisher, acting as agent for Eleventh Hour and AMGC delivered the AMGC shares to Helen Igoe. At the same time, Norman Fisher told Helen Igoe the first payment for the puts would be paid on September 30, 1994. Norman Fisher and the respondents did not tell Helen Igoe there would or that there even might be any problem in providing the September 30 payment as promised. In addition, no member of the board of directors of Eleventh Hour or AMGC made any other contact with Helen Igoe to explain any problems with the put interests (C-6 and Transcript page 76).

(15) On October 4, 1994, Helen Igoe presented 1/12 of her stock to AMGC, but AMGC and Eleventh Hour failed to pay her as required by the agreement. (Exhibit C-7). Norman Fisher and the respondents AMGC and Eleventh Hour paid some other putholders' their 1/12 interests in full at that time, but made no payments to Helen Igoe as required by the agreement (Hearing Transcript Page 80-81). Despite numerous requests from Helen Igoe and her agents, and despite another 1/12 interest that was due on December 31, 1994, no payments or explanations were provided to Helen Igoe by the respondents until February 7, 1995.

(16) In a letter dated February 7, 1995 and mailed to Helen Igoe at P. O. Box 855 in Bismarck, North Dakota, respondent Cory Coppage admitted the delinquent payments and proposed a new payment plan that involved a change to Norman Fisher as chairman of the board of directors for the shell corporation AMGC and an alleged factoring of accounts receivable. Coppage promised

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Helen Igoe that payments on the delinquent "putholder" agreement would begin in mid-March of 1995 and would continue monthly (Exhibit G) until Helen Igoe received full payment. Despite previous requests from First Trust (FTC) in Bismarck that all financial issues involving the Helen Igoe investment in Eleventh Hour and AMGC should be addressed to FTC, the respondents continued to contact Helen Igoe rather than First Trust.

(17) In a letter dated March 20, 1995, Coppage told Helen Igoe that \$15,000 would be obtained each month to pay putholders like Igoe who did not receive the previous preferential payments from Eleventh Hour and AMGC. (Exhibit G). Helen Igoe received her last sporadic payment from the respondents when AMGC paid \$439.97 to First Trust as agent for Helen Igoe on April 3, 1995 (Exhibits C and G).

(18) The respondents did not correspond with Helen Igoe or First Trust again until Coppage sent a notice on June 9, 1995 for a meeting of Put Holders on June 26, 1995 in Englewood, Colorado (Exhibit H). AMGC president Norman Fisher conducted the meeting on June 26, 1995. AMGC vice-president Valerie Fisher, AMGC treasurer Gary Flater, AMGC secretary Cory Coppage, Eleventh Hour (EHI) vice-president and controller Mary Hartley, AMGC financial consultant Lou Coppage, and AMGC/Eleventh Hour counsel Samuel Cheris attended the June 26 meeting. After claiming that delinquent payments on the put agreements would be paid within 15-45 days, Norman Fisher required that all certificates due through March 30, 1995 should be sent to AMGC (Exhibit H). No payments were made within the 15-45 day time period and the respondents did not explain the breach of payment to Helen Igoe or to other put holders.

(19) On August 28, 1995, Norman Fisher, as agent for the respondents, made another unregistered securities offer to Helen Igoe to repurchase the put option in exchange for quarterly payments of \$2,935.05 and a promised total repayment of her \$50,000 investment plus accumulated interest within five years in a "PUTHOLDER MODIFICATION AGREEMENT" (Exhibit I). The putholder modification agreement stated in part that Helen Igoe would "hereby accept the offer of American Consolidated Growth Corporation" for a new security which was not registered in North Dakota under NDCC §10-04-07, § 10-04-07.1 or § 10-04-08. AMGC was not registered as a broker dealer and Norman Fisher was not registered as a salesman or investment advisor under North Dakota law. Helen Igoe did not accept the securities offer. On December 20, 1995, Norman Fisher sent a letter to Helen Igoe indicating that putholders did not accept the

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new securities offer and that no put option interests were converted under the plan.

(20) In December of 1995, Gary Flater resigned from the board of directors of AMGC (Gary Flater's Deposition p. 20). In a letter dated December 29, 1995 and addressed to Norman Fisher at Eleventh Hour, Brad Peterson of the office of the North Dakota Securities Commissioner requested information about any offers and/or sales of securities from January 1991 to 1995, including the number of investments offered or sold, the names of the persons to whom they were offered or sold, copies of advertising materials, and copies of any purchase agreements (Exhibit J and Exhibit C-13). In a letter dated January 11, 1996, Dominic Lloyd of Eleventh Hour claimed that Norman Fisher and Eleventh Hour did not offer any investments to residents of North Dakota (Exhibit J and Exhibit C-15) and Lloyd did not mention the 1994 and 1995 offers to Helen Igoe. On January 16, 1996, Brad Peterson again requested the investment information from Norman Fisher and Eleventh Hour and Peterson asked Lloyd to search the correspondence files to see if he could find the requested information (Exhibit C-16). The respondents did not respond to Mr. Peterson's request.

(21) On February 22, 1996, Mickey Foutes, acting as agent for Eleventh Hour and AMGC, made two unregistered securities offers to Helen Igoe. The first offer was that AMGC would purchase the put option in exchange for common stock in AMGC converted at \$1.00 per share. The second offer was that AMGC would purchase the put option in exchange for a 14% AMGC bond with a maturity date of February 28, 2003 (Exhibit K). On February 22, 1996, AMGC told Helen Igoe that the fair market value of her Eleventh Hour investment was \$69,212 (Exhibit K). Both of the February 22, 1996 offers were securities as defined in NDCC §10-04-02(13) and neither offer was registered in North Dakota, but respondents claim an exemption under NDAC §73-02-03-01. On March 14, 1996, Mickey Foutes re-offered the same securities and included a subscription agreement with the re-offer (Exhibit K). Helen Igoe did not accept the offer and she did not convert her interest from the put option to the new securities.

(22) On April 12, 1996, the North Dakota Securities Commissioner issued a Cease and Desist Order against Eleventh Hour, AMGC, and their officers, directors, agents, and employees (Exhibit L). AMGC received the order on or before April 15, 1996. The order provided notice of opportunity for a hearing if a

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request for hearing was made within 14 days after receipt of the order. None of the respondents requested a hearing for the Cease and Desist Order.

(23) On April 12, 1996, the North Dakota Securities Commissioner issued an order for hearing for Eleventh Hour and AMGC and their officers, directors, agents, and employees based on the allegations of Helen Igoe that the respondents committed securities violations involving unregistered offers and sales of securities and fraudulent offers and sales of securities. The allegations were specifically stated in the order for hearing (Exhibit L), and the respondents were ordered to provide all documentary evidence and a written summary of facts and legal arguments which they intended to present at the hearing by May 10, 1996. In addition, the Securities Commissioner ordered the respondents to provide a list of witnesses and a summary of their expected testimony by May 10, 1996 (Exhibit L). On April 15, the hearing date was postponed to June 25, 1996 but the May 10 deadline to produce documents and evidence was not changed.

(24) The office of the Securities Commissioner did not receive any correspondence or telephone communications from AMGC, Eleventh Hour, or any of the respondents on or before the May 10 deadline and the respondents did not send any materials requested in the Order for Hearing. In a May 16, 1996 letter to Norman Fisher at Eleventh Hour, Matthew Bahrenburg of the office of the Securities Commissioner reminded Fisher of the May 10 deadline in the Order for Hearing and again requested that Fisher send the materials immediately (Exhibit M).

(25) In a May 16, 1996 letter to respondent Gary Flater at Global Financial Group, Bahrenburg again requested documents and information for the offer and sales of Eleventh Hour and AMGC investments. Bahrenburg specifically asked Flater to disclose whether Flater "had been a defendant or respondent in any litigation or proceeding alleging the violation of a securities . . . law or regulation." In a letter dated May 28, 1996 from Global Financial Group, Gary Flater specifically denied any involvement in the sale of securities to any North Dakota resident from 1991 to May 28, 1996. In response to the question about any proceedings alleging the violation of securities law or regulation, Flater mentioned an arbitration initiated by Corine Kaste but Flater did not disclose the NASD censure and fine which occurred on December 2, 1993.

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(26) On June 14, 1996, attorney Kermit Bye telephoned Matthew Bahrenburg at the office of the Securities Commissioner. Bye stated that he might represent Eleventh Hour and AMGC for the Securities Commissioner's investigation and Bye requested that the hearing scheduled for June 25, 1996 be delayed to July 17, 1996 so that Bye would have time to review the case and provide the requested documents to the Securities Commissioner. The hearing was postponed to allow attorney Bye sufficient time to provide all of the requested documents and evidence.

(27) Attorney Bye and the respondents did not send any requested materials to the office of the Securities Commissioner as required in the order for hearing. In a July 8, 1996 letter to attorney Bye, Harold Kocher of the office of the Securities Commissioner once again requested the same materials and information that Peterson, Bahrenburg, and the Securities Commissioner had requested earlier.

(28) On July 12, 1996, attorney Bye again telephoned Bahrenburg and requested another delay of the hearing until late August or early September of 1996. Bye explained that he had the relevant requested records of Eleventh Hour and AMGC and that he would provide copies to the office of the Securities Commissioner in the near future. On or about August 12, 1996, Bahrenburg contacted Bye by telephone and left a voice-mail message to notify him of a proposed hearing date of October 1, 1996 and requesting that he contact this office as soon as possible if that date would not work for him or his clients. After receiving no response from Bye, on August 16, 1996 the Securities Commissioner rescheduled the hearing for October 1, 1996 and issued an Amended Order for Hearing. The Amended Order for Hearing again ordered production of the materials and information to be delivered to the office of the Securities Commissioner on or before September 4, 1996. Copies of the order were received within a few days by respondents Norman Fisher, Valerie Fisher, Cory Coppage, Gary Flater, and attorney Bye.

(29) On September 3, Bahrenburg called Bye at his office and left a voice-mail message. On September 4, 1996, Bye returned Bahrenburg's voice-mail message and made an offer on behalf of Eleventh Hour and AMGC to settle this matter by converting the interest currently held by Mrs. Igoe with an unregistered security. Bye also stated that Norman Fisher would not attend the hearing scheduled for October 1, 1996 hearing date and said he had not mailed the documents and information as promised months earlier because he was still reviewing them. Bye again promised to send the information immediately, this

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time on or before September 7, 1996. On September 6, 1996, the Securities Commissioner issued a Notice of Rescheduled Hearing and an Amended Order for Hearing to postpone the hearing to October 14, 1996 and the Order required production of all documents on or before September 20, 1996,

(31) On September 9, 1996, the Office of the Securities Commissioner received copies of a few documents from Bye and an offer from the respondents to exchange Helen Igoe's put option in AMGC for an unregistered seven-year 14% bond. Attorney Bye raised the following legal defenses for the first time:

1. Helen Igoe might have a private right of action but the Securities Commissioner does not have an interest in this matter.
2. The Statute of Limitations precludes any recovery.
3. The respondent's actions were based on the advice of counsel.
4. All securities transactions which occurred in North Dakota were exempt under NDCC chapter 10-04 and NDAC § 3-02-03-01.
5. Release, accord and satisfaction, and latches.

(31) On September 16, 1996, Bahrenburg, from the Office of the Securities Commissioner sent the proposed hearing exhibits of the Securities Commissioner to Bye with specific factual allegations and without benefit of the production of documents requested from the respondents. On September 23, 1996, three days after the deadline in the request for information, Bye produced a few more of the requested materials. On October 7, 1996, Bye sent a few more of the requested materials, including copies of false and misleading financial statements.

(32) Late in the day on October 11, 1996, the office of the Securities Commissioner received a facsimile (the original was received on October 14, 1996) from Bye indicating that, notwithstanding the hearing scheduled for October 14, 1996, he would like to depose several witnesses in Denver, Colorado, and make that testimony available for the hearing. Bahrenburg immediately contacted Bye to say the hearing had been postponed at the request of the respondents several times already and that the hearing would continue as scheduled to avoid further delays.

(33) On October 14, 1996, the Securities Commissioner heard the testimony of Norman Fisher and Helen Igoe under oath. At the beginning of the hearing, Bye produced a large three-ring binder of documents which had not been previously presented to the office of the Securities Commissioner. In an attempt to gather

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all the information relating to this matter and to avoid further delay, the office of the Securities Commissioner accepted the documents into evidence without any reasonable opportunity to review the documents or cross-examine Norman Fisher about the documents. The respondents did not provide any copies of the documents to other participants at the hearing for Norman Fisher. At the conclusion of Fisher's testimony, attorney Bye gathered the frequently requested documents and promised to provide two copies to the office of the Securities Commissioner the next day. Copies were not provided for several days while attorney Bye and his clients reviewed and screened the materials.

(34) On November 4, 1996, the office of the Securities Commissioner issued a request for admissions and Subpoena Duces Tecum via certified mail to attorney Bye. The respondents have not delivered any documents or information in response to the subpoena. At depositions in Denver, Colorado on November 19 and 20, the respondents referred to a large volume of documents during testimony and attorney Bye once again promised to send copies of the documents to the office of the Securities Commissioner. Attorney Bye and the respondents have not provided any of the documents as promised at the depositions on October 14, November 19, and November 20. On November 22, 1996 the office of the Securities Commissioner again made separate requests to attorneys, Kermit Bye and Dominic Lloyd to produce the promised documents and business records of the respondents. The Securities Commissioner has not received requested documents from the respondents during the course of continual requests, subpoenas, and broken promises over the past year. The investigation of this matter has been repeatedly delayed, postponed, and obstructed by the respondents and the office of the Securities Commissioner has spent more than \$15,000 for costs during this investigation.

CONCLUSIONS OF LAW

Based on the preceding facts, the Securities Commissioner makes the following Conclusions of law:

1. During all relevant time periods, the respondents knew Helen Igoe was a resident of North Dakota.
2. Respondents Gary Flater and David Mowatt, acting as agents for Mowatt Flater Financial, Inc., have been involved in the offer and/or sale of

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- investment advisory services that were not registered in North Dakota and in violation of NDCC §10-04-10(3).
3. Gary Flater has offered and/or sold investment advisory services while he was not registered in North Dakota as an investment advisor representative in violation of NDCC § 10-04-10(4).
 4. Gary Flater acted as agent for Mowatt Flater Financial Inc. and Eleventh Hour, (EHCI and EHI) when he materially misstated the investment risks to Helen Igoe by claiming the \$50,000 investment was safe despite contrary statements in the offering memorandum. Flater violated NDCC § 10-04-15 by committing an "act, practice, or course of business which operates or would operate as a fraud" as defined in NDAC § 73-02-09-01 (2). The Commissioner is barred from enforcing the provision for those statements because of the statute of limitations in NDCC § 10-04-15(6). Flater's false statements also violated the NASD rule of fair practice § 2168, but the office of the Securities Commissioner can only consider that violation in a case involving the revocation or denial of applications for registration.
 5. Valerie Fisher, Gary Flater, and Eleventh Hour (EHI) offered and/or sold a \$50,000 promissory note of Eleventh Hour, Inc. to Helen Igoe, when they knew she was a resident of North Dakota. The promissory note was a security as defined in NDCC 10-04-02(13). The promissory note was not registered in North Dakota, but NDAC § 73-02-03-01 provides an exemption and the Securities Commissioner will not claim a violation for the original sale.
 6. Norman Fisher and Eleventh Hour (EHI) offered to sell a security to Helen Igoe when he knew she was a resident of North Dakota on December 16, 1991 (Exhibit C-2). The offer to change the promissory note was an offer to exchange one security for another security as defined in NDCC § 10-04-02(13). The price of the EHI security was the value of Helen Igoe's promissory note of EHCI in the exchange. The offer of the new security was not registered in North Dakota under NDCC §10-04-07, § 10-04-07.1 or § 10-04-08. Eleventh Hour (EHI and EHCI) was not registered as a broker dealer and Norman Fisher was not registered as a salesman or investment adviser. However, NDAC § 73-02-03-01 provides an exemption and no violation occurred as a result of the offer and sale.
 7. Norman Fisher, acting as agent for EHI and AMGC, offered two securities on June 8, 1994 and July 12, 1994 to Helen Igoe. The securities, as defined in NDCC §10-04-02(13), were not registered in North Dakota under NDCC §10-04-07, § 10-04-07.1 or § 10-04-08, and were not exempt from registration under NDCC §10-04-05 or § 10-04-06. Therefore, Norman Fisher, AMGC and Eleventh Hour (EHI and EHCI) violated NDCC § 10-04-04. EHI and

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AMGC were not registered as broker dealers and Norman Fisher was not registered as a salesman or investment adviser. The respondents claim an exemption under NDAC § 73-02-03-01, but that section does not apply to the securities offers because of the disciplinary history of Gary Flater, who was a member of the board of directors of EHI at the time of the offers. The respondents Eleventh Hour (EHI), AMGC, and Norman Fisher violated NDCC § 10-04-04 for each offer. In addition, the respondents EHI and AMGC violated NDCC § 10-04-10(1) with each offer for failure to register as a broker dealer. Respondent Norman Fisher violated NDCC § 10-04-10(2) for his failure to register as a salesman or investment adviser for each offer.

8. Norman Fisher, acting as agent for EHI and AMGC, offered an unregistered and non-exempt security to Helen Igoe on August 28, 1995 in violation of NDCC § 10-04-04. EHI and AMGC were not registered as broker dealers at the time of the offer and Norman Fisher was not registered as a salesman or investment adviser. The respondents claim an exemption under NDAC § 73-02-03-01, but that section does not apply to the offer because of the disciplinary history of Gary Flater, who was a member of the board of directors of EHI and AMGC at the time of the offer. The respondents Eleventh Hour (EHI), AMGC and Norman Fisher violated NDCC § 10-04-04 for failure to register the securities. Respondents EHI and AMGC violated NDCC § 10-04-10 (1) for failing to register as broker dealers and respondent Norman Fisher violated NDCC § 10-04-10 (2) for his failure to register as a salesman or investment adviser.
9. Respondents EHI and AMGC failed to supervise Norman Fisher and Gary Flater in their offers which were violations of North Dakota law as outlined in 5-8 of the conclusions of law.
10. Norman Fisher, Eleventh Hour (EHI and EHCI), AMGC, and Gary Flater violated NDCC § 10-04-16.1 (1)(b) by failing to provide information requested by the office of the Securities Commissioner for offers of investments made to North Dakota resident Helen Igoe or other unknown North Dakota residents, which was requested or subpoenaed on numerous occasions and in the numerous requests of the office of the Securities Commissioner in 1995 and 1996.
11. Mickey Foutes, acting as agent for EHI and AMGC, offered two securities on February 22, 1996 and March 14, 1996 to North Dakota resident Helen Igoe. The securities as defined in NDCC §10-04-02(13) were not registered in North Dakota under NDCC §10-04-07, § 10-04-07.1 or § 10-04-08. The respondents claim an exemption under NDAC § 73-02-03-01. Gary Flater was no longer associated with EHI or AMGC at the time of these offers.

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Therefore, the respondents did not violate registration requirements for the offers.

12. Respondents EHI, AMGC, Norman Fisher and Gary Flater engaged in actions which constitute a fraudulent practice under NDCC § 10-04-15 (4), through their new offers, their promises of repayment, and their continued unexplained delays, which constitute a "course of business which operates or would operate as a fraud or deception on the purchasers" as outlined in 4, 5, 8, 11-13, 16-20, and 22 in the findings of fact.
13. Gary Flater violated NDCC 10-04-16.1(1)(a) for failing to disclose his disciplinary history involving securities law when requested to do so on May 16, 1996.
14. EHI, AMGC and Norman Fisher engaged in a fraudulent practice as defined in NDCC § 10-04-15(1) by producing false and misleading financial statements to the Office of the Securities Commissioner in the October 7, 1996 production of documents.
15. AMGC, Norman Fisher, and Eleventh Hour (EHI) violated NDCC 10-04-16.1 (1)(a) for their repeated failure to provide materials requested by the office of the Securities Commissioner in a Subpoena Duces Tecum dated November 4, 1996.
16. AMGC, Norman Fisher, and Eleventh Hour (EHI) violated NDCC 10-04-16.1 (1)(a) for their failure to provide the materials requested during the depositions on November 19 and 20, 1996.
17. AMGC, Norman Fisher, and Eleventh Hour (EHI) violated NDCC 10-04-16.1 (1)(a) for their failure to provide the information requested from attorney Kermit Bye and from Eleventh Hour on November 22, 1996.
18. AMGC, Norman Fisher, and Eleventh Hour (EHI) violated NDCC 10-04-16.1 (1)(a) for their failure to provide the information requested from attorney Dominic Lloyd and from Eleventh Hour on November 22, 1996.

ORDER

Based on the Findings of Fact and Conclusions of Law, the Securities Commissioner hereby orders the following:

1. Respondent Gary Flater violated NDCC 10-04-10(3) by his failure to register as an investment advisor and an investment advisor representative for offers and sales involving North Dakota resident Helen Igoe and the Securities Commissioner assesses a \$5,000 civil penalty for each of the two violations,

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- for a total civil penalty of \$10,000 civil penalty for Flater's violations as an investment advisor.
2. The respondents Norman Fisher, Eleventh Hour (EHI and EHCI), and AMGC made two offers of unregistered securities in violation of NDCC § 10-04-04 involving the 1994 offers (#7 above). Eleventh Hour and AMGC failed to register as broker dealers as required by NDCC § 10-04-10 (1) and Norman Fisher failed to register as a salesman or investment adviser in conjunction with those offers as required by NDCC § 10-04-10 (2). The Securities Commissioner orders Eleventh Hour and AMGC to pay a civil penalty in the amount of \$20,000 for their joint and several liability for the six violations and Norman Fisher to pay a civil penalty of \$20,000 for his four violations.
 3. The respondents Norman Fisher and AMGC made an offer of unregistered securities to Helen Igoe in violation of NDCC § 10-04-04 for the 1995 offer (#8 above). AMGC failed to register as a broker dealer as required by NDCC § 10-04-10 (1) and Norman Fisher failed to register as a salesman or investment adviser in conjunction with the offer as required by NDCC § 10-04-10 (2). The Securities Commissioner orders AMGC to pay a civil penalty of \$10,000 for its violations and Norman Fisher to pay a civil penalty of \$10,000 for his violations.
 4. Respondents, EHI, AMGC, Norman Fisher and Gary Flater violated NDCC § 10-04-15 as expressed in #12 above in the Conclusions of Law section of this order by engaging in a "course of business which operates or would operate as a fraud or deception on the purchasers". The commissioner hereby orders payment of civil penalties in the amount of \$5,000 to be paid jointly and severally.
 5. Respondents, EHI, AMGC and Norman Fisher violated NDCC § 10-04-15(1) by producing to the Office of the Securities Commissioner copies of a false and misleading financial statement on the October 7, 1996 production of documents as expressed in #14 above of the Conclusions of Law. The commissioner hereby orders payment of \$5,000 in civil penalties for respondents to be jointly and severally liable.
 6. Respondents, EHI and AMGC failed to properly supervise Norman Fisher and Gary Flater in the offers and fraudulent practices as contained in 2-5 above. The commissioner hereby orders payment of a civil penalty in the amount of \$5,000 for each violation, with a total payment to be made in the amount of \$40,000 to be paid jointly and severally.
 7. The respondents Norman Fisher, Eleventh Hour (EHI), and AMGC violated NDCC § 10-04-16.1(1)(b) by their failure to provide the office of the securities commissioner with information requested in the December 29, 1995 letter

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- (#11 above). The Securities Commissioner hereby orders respondents Norman Fisher, Eleventh Hour (EHI), and AMGC to pay a \$1,000 civil penalty for their joint and several liability for the violation.
8. Respondent Gary Flater violated NDCC § 10-04-16.1 (1)(b) by his failure to provide the office of the securities commissioner with information requested in the May 16, 1996 letter. The Securities Commissioner orders Gary Flater to pay a \$1,000 civil penalty for the violation.
 9. The respondents AMGC, Norman Fisher, and Eleventh Hour (EHI) violated NDCC § 10-04-16.1 (1)(b) by their failure to provide the office of the securities commissioner with information requested in the Subpoena Duces Tecum dated November 4, 1996 (#12 above). The Securities Commissioner orders respondents AMGC, Norman Fisher, and Eleventh Hour (EHI) to pay a \$5,000 civil penalty for their joint and several liability for the violations.
 10. The respondents AMGC, Norman Fisher, and Eleventh Hour (EHI) violated NDCC § 10-04-16.1 (1)(b) by failing to provide the office of the securities commissioner with information requested during the depositions on November 19 and 20, 1996 (#13 above). The Securities Commissioner orders respondents AMGC, Norman Fisher, and Eleventh Hour (EHI) to pay a \$5,000 civil penalty for their joint and several liability for the violations.
 11. The respondents AMGC, Norman Fisher, and Eleventh Hour (EHI) violated NDCC § 10-04-16.1 (1)(b) by failing to provide the office of the securities commissioner with information requested in a letter to their attorney, Kermit Bye, dated November 22, 1996 (#14 above). The Securities Commissioner orders respondents AMGC, Norman Fisher, and Eleventh Hour (EHI) to pay a \$3,000 civil penalty for their joint and several liability for the violations.
 12. The respondents AMGC, Norman Fisher, and Eleventh Hour (EHI) violated NDCC § 10-04-16.1 (1)(b) by their failure to provide the office of the securities commissioner with information requested in a letter to their attorney, Dominic Lloyd, dated November 22, 1996 (#15 above). The Securities Commissioner orders respondents AMGC, Norman Fisher, and Eleventh Hour (EHI) to pay a \$3,000 civil penalty for their joint and several liability for the violations.
 13. The respondents Norman Fisher, Gary Flater, Eleventh Hour (EHI), and AMGC have delayed the investigation and have caused unnecessary expenses and the Securities Commissioner orders the respondents to pay \$15,000 for their joint and several liability for investigative costs.
 14. The respondents Valerie Fisher and Cory Coppage participated in activities that are relevant for the investigation of this matter but they have not violated

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any provisions of chapter 10-04 of the North Dakota Century Code and they are not ordered to pay any civil penalties or investigative costs.

In total, the following amounts are owed by respondents for their violations of North Dakota law:

- a. Gary Flater is individually responsible for and must pay to the Securities Commissioner \$11,000 for his violations contained in numbers 1 and 8 above.
- b. Norman Fisher is individually responsible for and must pay to the Securities Commissioner \$30,000 for his violations contained in numbers 2 and 3 above.
- c. AMGC shall is individually responsible and must pay to the Securities Commissioner \$10,000 for its violations as contained in number 3 above.
- d. AMGC and EHI shall be jointly and severally responsible and liable and must pay to the Securities Commissioner \$60,000 for its violations as contained in numbers 2 and 6 above.
- e. Norman Fisher, EHI and AMGC shall be jointly and severally responsible and liable and must pay to the Securities Commissioner \$22,000 for the violations contained in numbers 5, 7, 9, 10, 11, and 12 above.
- f. Norman Fisher, Gary Flater, EHI and AMGC shall be jointly and severally responsible and liable and must pay to the Securities Commissioner \$5,000 for violations contained in number 4 and \$15,000 for the investigative costs associated with this investigation as contained in number 13 above for a total of \$20,000.

In the alternative to the payments outlined in a-f above, Respondents can avoid all civil penalties and investigative costs by paying to Helen Igoe the sum of \$74,504.64 which is the amount owed to her based on the payments made and the statutory interest rate contained in NDCC § 47-14-05.

NOTICE OF OPPORTUNITY FOR HEARING

You are notified that pursuant to NDCC § 10-04-16 and NDCC § 10-04-12 you may request a hearing before the Securities Commissioner if such a request is made in writing within ten (10) days after the receipt of this order. Such writing should contain all specific objections to the Findings of Fact and Conclusions of Law as contained in this order. Respondents should also state, in specific detail,

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any legal theories upon which any objections may be based. The respondents have the right to be represented by legal counsel at the hearing.

IN TESTIMONY WHEREOF, witness my hand and seal this 7th day of February, 1997.

(SEAL)

CAL HOOVESTOL
SECURITIES COMMISSIONER
STATE CAPITOL – FIFTH FLOOR
600 E. BOULEVARD AVE.
BISMARCK, ND 58505-0510

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