

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Conboy, J
(Part I)

-----X
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

AVELLINO & BIENES,
FRANK J. AVELLINO, and
MICHAEL S. BIENES,

Defendants.
-----X

92 Civ. 2

ORDER OF PRELIMINARY
INJUNCTION AND OTHER
EQUITABLE RELIEF ON
CONSENT

Plaintiff Securities and Exchange Commission ("Commission"), having filed a Complaint for Preliminary and Permanent Injunctive and Other Equitable Relief ("Complaint") against Avellino and Bienes ("A&B"), Frank Avellino ("Avellino"), and Michael Bienes ("Bienes") on November 18, 1992, and defendants A&B, Avellino, and Bienes, in their attached Consents incorporated herein, having entered a general appearance, having admitted the jurisdiction of this Court over them and the jurisdiction of this Court over the subject matter of this action, and, without admitting or denying the allegations of the Complaint, having consented, without trial, argument, or adjudication of any issue of fact or law, to the entry of this Order Of Preliminary Injunction And Other Equitable Relief On Consent ("Order"), which preliminarily enjoins them from engaging in transactions, acts, practices, and courses of business which constitute violations of Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77e(a), 77e(c)] and Section 7 of the

Investment Company Act of 1940 ("Investment Company Act") [15 U.S.C. § 80a-7];

NOW, THEREFORE, it is hereby:

I.

ORDERED, ADJUDGED AND DECREED that defendants A&B, Avellino, and Bienes, and their agents, servants, employees and attorneys-in-fact, and all persons acting in concert or participation with any of them who receive actual notice of this Order by personal service, facsimile, or otherwise, and each of them, are hereby preliminarily enjoined from, directly and indirectly, singly or in concert, violating Section 5(a) of the Securities Act [15 U.S.C. § 77e(a)], by making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell securities through the use or medium of any prospectus or otherwise; or, by carrying or causing any securities to be carried through the mails and in interstate commerce, by any means or instruments of transportation, for the purpose of sale and delivery after sale, without a registration statement being in effect as to those securities.

II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants A&B, Avellino, and Bienes, and their agents, servants, employees and attorneys-in-fact, and all persons acting in concert or participation with any of them who receive actual notice of this Order by personal service, facsimile, or otherwise, and each of them, are hereby preliminarily enjoined from, directly and

indirectly, singly or in concert, violating Section 5(c) of the Securities Act [15 U.S.C. § 77e(c)], by making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy securities through the use or medium of any prospectus or otherwise, without a registration statement being filed as to those securities.

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants A&B, Avellino, and Bienes, and their agents, servants, employees and attorneys-in-fact, and all persons acting in concert or participation with any of them who receive actual notice of this Order by personal service, facsimile, or otherwise, and each of them, are hereby preliminarily enjoined from, directly and indirectly, singly or in concert, violating, or aiding and abetting violations of Section 7 of the Investment Company Act of 1940 ("Investment Company Act") [15 U.S.C. § 80a-7], by, while acting as an investment company organized or otherwise created under the laws of the United States or aiding and abetting any such investment company:

A. offering for sale, selling, or delivering after sale, by the use of the mails or any means or instrumentalities of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; or offering for sale, selling, or delivering after sale any such security or

interest, having reason to believe that such security or interest will be made the subject of a public offering by the use of the mails or any means or instrumentalities of interstate commerce; or

- B. purchasing, redeeming, retiring, or otherwise acquiring or attempting to acquire, by use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; or
- C. engaging in any business in interstate commerce.

Provided, however, that defendants A&B, Avellino, and Bienes may engage in any activities necessary to effectuate this Order to the extent such activities are expressly authorized in writing by the Trustee appointed under Section IV. of this Order.

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

A. Lee S. Richards, of the law firm Richards Spears Libbe & Orbe, be appointed Trustee for the purpose of (1) taking control over the undistributed proceeds resulting from the liquidation of all brokerage accounts belonging to or under the control of A&B wherever situated (the "A&B brokerage accounts"); (2) distributing the undistributed proceeds of the liquidation of A&B's brokerage accounts, and any other assets marshalled by the Trustee pursuant to this Order, and taking whatever steps are necessary and appropriate to assure repayment in full to all noteholders who have purchased notes

issued by A&B; (3) reviewing the entire distribution of the proceeds of the liquidation of A&B's brokerage accounts (the "liquidation proceeds"), and any other assets marshalled by the Trustee pursuant to this Order, in order to repay all noteholders who have purchased notes issued by A&B; (4) overseeing an audit of A&B's financial statements from 1984 through the present; (5) confirming the identity of A&B's current noteholders and the amounts invested; and (6) reporting on the foregoing to the Court, the Commission and counsel to A&B. The Trustee shall have full power over all funds, assets, premises (whether owned, leased, occupied, or otherwise controlled), books, records, and other property belonging to or in the possession or control of A&B, and the power to take whatever steps may be necessary to carry out his responsibilities under this Order, including, without limitation, the power:

1. To engage and employ persons in his discretion to assist him in carrying out his duties and responsibilities hereunder, including accountants, attorneys, and experts;
2. To open, effect transactions in, and close bank and brokerage accounts;
3. To commence, maintain or defend legal proceedings; and
4. To invest such funds as may come under the Trustee's control, consistent with the other provisions of the Order, in short term obligations issued by the Treasury

of the United States, the maturity of which shall not exceed thirty days from the date of purchase.

B.1. The Trustee shall make a complete redemption to all A&B noteholders who have not already received a redemption of their note, of the principal and interest accrued on the noteholders' notes as of November 16, 1992. This distribution shall be without waiver of any right by the Commission or A&B noteholders to require, upon agreement of the parties or by order of the Court, to the payment of interest to A&B noteholders which accrued or may accrue from November 16, 1992 until the date of distribution. The defendants represent that they have already commenced such redemption and have distributed approximately \$113 million of the proceeds of the liquidation of the A&B brokerage accounts to A&B noteholders. The Trustee shall complete such redemption no later than November 24, 1992.

B.2. In order to enable the Trustee to effectuate his duties, no later than the close of business of the date of the entry of this Order, the defendants shall provide the Trustee with all of the following documents which they have within their current possession: (1) a complete noteholder list, which includes, as of the date of the entry of this Order, the name and address of each noteholder, the amount of principal and accrued interest owed to each noteholder as of November 16, 1992, and the interest rate on each noteholder's investment; (2) all account statements reflecting the liquidation of the A&B brokerage accounts and the current status of such accounts; (3) all

documentation identifying each noteholder whose A&B notes were redeemed since November 13, 1992, and the amount of such redemption, including, without limitation, copies of checks, if available, or other evidence of such payments; (4) the identification of all remaining A&B noteholders, including the amount of principal and accrued interest owed as of November 16, 1992; (5) the bank statements or other third party documentation reflecting the transfer of the liquidation proceeds from the A&B brokerage accounts. The defendants shall use their best efforts to obtain and provide to the Trustee any of this information which is not currently in their possession within 24 hours after the date and time of the entry of this Order. With regard to any note which is redeemed after November 16, 1992, no later than December 1, 1992, the defendants shall provide the Trustee with a calculation of the amount of interest on such notes from November 16, 1992 until the date of redemption.

B.3. The Trustee shall immediately take possession and control over the liquidation proceeds which have not already been distributed to noteholders. The Trustee shall then determine whether the liquidation proceeds are sufficient to make a complete redemption to all noteholders of the principal and accrued interest owed to them as of November 16, 1992 or such other date as the parties agree or the Court orders. If the Trustee determines that the proceeds from the liquidation of A&B's brokerage accounts contain sufficient money to make a complete redemption to all noteholders of the principal and

accrued interest owed to them as of November 16, 1992 or such other date as the parties agree or the Court orders, the Trustee shall direct that such a redemption be made and shall supervise the distribution of the liquidation proceeds in the form and manner that the Trustee deems appropriate.

B.4. If the Trustee determines that the liquidation proceeds are insufficient to make a complete redemption to all noteholders of the principal and accrued interest owed to them as of November 16, 1992 or such other date as the parties agree or the Court orders, the Trustee shall be authorized to sell securities from two personal accounts maintained at the broker-dealer at which A&B maintains its brokerage accounts, one being an account in the name of Frank J. Avellino Trustee, account # 1-A0051-3-0, and the other being an account in the name of Diane K. Bienes, # 1-B0018-3-0 (hereinafter referred to collectively as the "Personal Accounts"), add the proceeds to the remaining liquidation proceeds, to the extent necessary to make a complete redemption to all noteholders, and distribute those funds as set forth in Section IV.B.3., above. The Personal Accounts are discussed further in Section VIII., below.

B.5. If the liquidation proceeds, as supplemented by the proceeds resulting from the liquidation of the Personal Accounts, are still insufficient to make a complete redemption, the Trustee shall demand of defendants Avellino and Bienes that within six business days they provide to the Trustee funds equal to the amount of the shortfall, and defendants Avellino and Bienes shall

comply with that demand. In the event that defendants Avellino and Bienes do not timely comply in full with that demand, the Trustee shall distribute the liquidation proceeds, as supplemented by the proceeds of the Personal Accounts to noteholders on a pro rata basis. The Trustee shall take whatever measures may be reasonably necessary, including without limitation commencing litigation, to recover additional funds from defendants Avellino and Bienes personally and from defendant A&B, so that all noteholders may be repaid in full. When the Trustee shall have completed whatever steps he deems reasonably necessary to recover additional funds from defendants Avellino, and Bienes, and A&B, the Trustee shall apply to the Court for authorization to distribute such proceeds to noteholders. Each noteholder's pro rata share of any distribution made pursuant to this Section shall be based on the amount owed by A&B to each noteholder as of the date of distribution.

B.6. The Trustee shall have the power to rescind and seek the return of any redemption already made to any noteholder since November 13, 1992. The Trustee shall also have the power to recover from A&B, Avellino, and Bienes the amount of any over-redemption made to any noteholder since November 13, 1992, to the extent such over-redemption is necessary to cover a shortfall in the amount required to repay noteholders in full, and A&B, Avellino and Bienes shall make such payment to the Trustee upon demand.

B.7. If at any time, upon review of Price Waterhouse's report described in Section IV.C., below, or otherwise, the Trustee identifies additional noteholders who did not receive repayment of their investment pursuant to Section IV.B.1. - 6., above, the Trustee shall take whatever measures are reasonably necessary, including without limitation, the commencement and prosecution of litigation, to recover funds from Avellino and Bienes personally and from A&B in order to repay those noteholders in full (including interest on their investment until the date of such repayment), and shall apply to the Court for authorization to distribute such proceeds to such noteholders.

B.8. If any funds or assets remain after the completion of the distribution set forth in Section IV.B.1. - 7., above, unless otherwise ordered by the Court, the Trustee shall retain control over \$250,000 of such amount and remit the remaining funds to defendants Avellino and Bienes. The Trustee may at any time apply to the Court for permission to use such funds to repay any noteholders identified pursuant to Section IV.B.7., above, or to reimburse the Trustee for his reasonable costs, fees, and expenses pursuant to Section IV.D., below. After the completion of the audit and the performance of all other duties required of the Trustee by this Order, the Trustee shall distribute any amount remaining from the \$250,000 to defendants Avellino and Bienes.

C. The Trustee shall engage and employ Fred Werblow and the accounting firm of Price Waterhouse to (1) conduct an audit

of A&B's financial statements from 1984 to the present; (2) express an opinion confirming the identity of all noteholders in A&B notes and the amount of principal and accrued interest owed to each such noteholder as of November 16, 1992, and as of the date of distribution of principal and accrued interest to each such noteholder; and (3) perform such other duties and functions as the Trustee may request. As expeditiously as possible, but in any event no later than December 30, 1992, Price Waterhouse shall submit a report on its findings to the Commission, the Trustee, counsel to A&B and the Court. Price Waterhouse will immediately report any irregularities to the Trustee, counsel for A&B, and the Commission.

D. Defendants A&B, Avellino, and Bienes shall pay the costs, fees and expenses of the Trustee incurred in connection with the performance of the Trustee's duties as described herein, including the reasonable costs, fees and expenses of Price Waterhouse and all other persons who may be engaged or employed by the Trustee to assist him in carrying out his duties and obligations. All applications for costs, fees and expenses of the Trustee shall be made by application to the Court setting forth in reasonable detail the nature of such reasonable costs, fees and expenses.

E. The Trustee, Fred Werblow, Price Waterhouse, and all other persons who may be engaged or employed by the Trustee to assist him in carrying out his duties and obligations shall not be liable by reason of any act or omission to act in the course

of performing their duties, except upon a finding by this Court of gross negligence or willful failure by the Trustee to comply with the terms of this Order or any other order of this Court. Defendants A&B, Avellino, and Bienes shall indemnify and hold harmless the Trustee, Fred Werblow, Price Waterhouse, and all other persons who may be engaged or employed by the Trustee to assist him in carrying out his duties and obligations, from and against any liabilities, including costs and expenses of defending claims, for which they may become liable or incur by reason or any act or omission to act in the course of performing their duties, except upon a finding by this Court of gross negligence or willful failure by them to comply with the terms of this Order or any other order of this Court. This provision shall apply to claims based on conduct during the term of any agreement that may be entered into with the Trustee, Fred Werblow, Price Waterhouse, and all other persons who may be engaged or employed by the Trustee to assist him in carrying out his duties and obligations, even if such claims are filed after the termination of any such agreement. Furthermore, the Trustee, Werblow and any other persons employed by the Trustee pursuant to this Order understand that this matter shall remain confidential until such time as the seal is removed, except as necessary to perform their duties pursuant to his Order.

F. The Trustee may apply to the Court to seek an extension of the redemption deadline or any other modification of this Order for good cause shown. The fact that Price Waterhouse has

not completed its duties pursuant to this Order will not, absent other facts and circumstances, constitute good cause to extend the redemption deadline.

V.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Trustee shall direct that a notice acceptable to the Commission staff, which explains the circumstances of the redemption in the form and manner the Trustee deems appropriate, be sent each noteholder.

VI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants A&B, Avellino, and Bienes, their agents, servants, employees and attorneys-in-fact, and all persons acting in concert or participation with any of them, who receive actual notice of this Order by personal service, facsimile or otherwise, and each of them, shall cooperate with and assist the Trustee, and obtain the cooperation of its employees or other persons under its control, including, if deemed necessary by the Trustee, appearing for deposition testimony and producing documents, upon one day notice. Defendants A&B, Avellino, and Bienes shall provide to the Trustee all information relating to the past and present operations and activities of A&B. Defendants A&B, Avellino, and Bienes shall take no action, directly or indirectly, to hinder, obstruct, or otherwise interfere in any manner with the distribution of the liquidation proceeds or, if necessary, the

proceeds resulting from the liquidation of the Personal Accounts, as outlined in Section IV.B.4., above.

VII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, no later than the close of business of the date of entry of this Order, defendants A&B, Avellino, and Bienes shall provide to the Trustee all information required by Section IV.B.2., above. The defendants shall use their best efforts to obtain and provide to the Trustee any of this information which is not currently in their possession within 24 hours after the date and time of the entry of this Order. Defendants shall represent under oath that such information is complete and accurate to the best of their knowledge. If at any time it is determined by the Trustee, the Commission, or the Court that any information on the noteholder list is inaccurate or incomplete in any material respect, the Commission may petition the Court for any and all appropriate remedies.

VIII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Avellino, and Bienes are preliminarily enjoined from withdrawing, transferring, pledging, encumbering, assigning, dissipating, concealing, or otherwise disposing of any assets or funds held in the Personal Accounts until such time as it is determined by the Trustee that all noteholders have received the full amount of principal and accrued interest through November 16, 1992, or such other date as the parties agree or the Court orders. The Trustee

appointed pursuant to Section IV.A., above, shall have the authority to halt all trading in these Personal Accounts within his or her sole discretion, if deemed necessary to preserve, or otherwise protect, the assets in these accounts. The Trustee shall also have the authority to sell securities in the Personal Accounts as necessary pursuant to Section IV.B.4., above.

IX.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, except as otherwise ordered by this Court, defendants A&B, Avellino, and Bienes, their agents, servants, employees and attorneys, and all persons acting in concert or participation with any of them who receive actual notice of this Order by personal service, facsimile, or otherwise, and each of them, are hereby preliminarily enjoined from, directly or indirectly:

- A. transferring, pledging, changing, wasting, dissipating, converting, concealing, or otherwise disposing of, in any manner, any funds, assets, claims, or other property or assets owned or controlled by, or in the possession or custody of A&B, including, without limitation, any securities, notes, or investment contracts owned by A&B; or
- B. destroying, mutilating, concealing, transferring, altering, or otherwise disposing of, in any manner, any books, records, computer programs, computer files, computer printouts, correspondence, memoranda,

brochures, or any other documents of any kind,
pertaining to any manner to the business of A&B.

X.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all papers filed with the Court shall be filed in sealed envelopes on which shall be endorsed the index number of this action and the caption "In re Sealed Proceeding," a brief, general indication of the nature of the contents of such sealed envelopes, the words "Confidential Information" and a statement substantially in the following form: "This envelope containing documents which are filed in this case, pursuant to an order entered November 17, 1992, is not to be opened, nor are the contents thereof to be displayed or revealed, except by or under the direction of the Court." The Clerk shall remove the seal from such papers on November 25, 1992, unless otherwise directed by the Court.

XI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the annexed Consents of defendants A&B, Avellino, and Bienes to this Order are hereby incorporated herein with the same force as if fully set forth herein.