UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
STRATHMORE SECURITIES, INC.
AULDUS H. TURNER, JR.
RONALD D. TURNER
T. THEODORE TURNER
THEODORE B. HENJUM
MICHAEL R. VENTURA
LOUIS A. MOORE
ALAN J. DAVIS
HUGH M. CASPER
JOHN J. BAGINSKI
ETHEL I. WEBER
File No. 8-7323

INITIAL DECISION

Sidney L. Feiler
Hearing Examiner

Washington, D. C.
June 27, 1966

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APPEARANCES: William R. Schief and Michael J. Stewart, Esqs., for the Division of Trading and Markets.

Joseph S. Schuchert, Jr., Esq., 1420 Frick Building, Pittsburgh 19, Pa. for Strathmore Securities, Inc., Auldus H. Turner, Jr., Ronald D. Turner and T. Theodore Turner.

Gilbert J. Helwig, Harry H. Weil and Ralph H. Demmler, Esqs., of Reed, Smith, Shaw & McClay, 747 Union Trust Building, Pittsburgh 19, Pa., for Michael R. Ventura.

Lester E. Zittrain, Esq. of Crone & Cohen, 2312 Grant Building, Pittsburgh, Pa. 15219, for John J. Baginski.

Mr. Theodore B. Henjum, 1869 Chessland St., Pittsburgh, Pa. 15205, pro se.

Mr. Louis A. Moore, 135 Sheldon Avenue, Pittsburgh 20, Pa., pro se.

Murray A. Kivitz, Esq. of Kivitz & Robinson, 1155 Fifteenth Street, N. W., Washington, D. C. 20005, for Harvey E. Schauffler, Jr., a witness.

BEFORE: Sidney L. Feiler, Hearing Examiner

1. THE PROCEEDINGS

These are proceedings instituted by order of the Commission pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934, as amended, ("Exchange Act") to determine whether the respondents named in the order willfully violated and aided, abetted and caused violations of the Exchange Act and the Securities Act of 1933, as amended, ("Securities Act"), as alleged by the Division of Trading and Markets, and whether remedial action is necessary in the public interest.

The matters put in issue by the allegations in the order are:

A. Whether during the period from approximately December 1, 1959 to July 15, 1963, the respondents, singly and in concert, and together with others, willfully violated and willfully aided, abetted and caused violations of Sections 5(a) and (c) of the Securities Act in that they, directly and indirectly, made use of the means and instruments of transportation and communication in interstate commerce and of the mails to offer to sell, to sell, and to deliver after sale, the common stock of L. F. Popell Co., Inc. (Popell Co.) when no registration statement had been filed with the Commission and when no registration statement was in effect as to said securities under the Securities Act. 1/

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

The mails and the facilities of interstate commerce were used in connection with the securities transactions involved in these proceedings.

B. Whether, during the period from approximately December 1, 1959 to approximately July 15, 1963, respondents, Strathmore Securities, Inc. ("the registrant") and Auldus H. Turner, Jr. (A. Turner), a person in control of the registrant's operations, offered and sold Popell stock and in connection therewith, singly and in concert, and together with others, willfully violated and willfully aided, abetted and caused violations of the anti-fraud provisions of the Securities Acts 2/ by, among other things:

(1) commencing about January 1, 1960, withholding substantial blocks of an offer of Popell Co. stock, made pursuant to a claimed exemption under the provisions of Regulation A under the Securities Act, from immediate distribution to bona fide public purchasers so as to control the flow of securities into the market;

(2) commencing about February 1, 1960, while participating in the distribution of Popell Co. stock, directly or

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2/ Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 (17 CFR 240.10b-5 and 15c1-2) thereunder are sometimes referred to as the anti-fraud provisions of the Securities Acts. The composite effect of these provisions, as applicable here, is to make unlawful the use of the mails or interstate facilities in connection with the offer or sale of any security by means of a device or scheme to defraud or untrue or misleading statements of a material fact, or any act, practice, or course of conduct which operates or would operate as a fraud or deceit upon a customer or by means of any other manipulative or fraudulent device.

indirectly, alone or with other persons, bid for and purchased for accounts in which the registrant had a beneficial interest, shares of Popell Co. and attempted to induce other persons to purchase such securities before registrant had completed its participation in such distribution; 3/

(3) commencing about November 15, 1960, arranged for A. Turner and certain other designated persons to sell a substantial number of Popell Co. shares, allegedly held for investment, to customers through, among other things, the facilities of certain trustee bank accounts, which shares had been previously acquired by these persons directly from L. F. Popell Co., Inc.;

(4) concealed and failed to reflect on the books

3/ This conduct is also alleged to be a violation of Rule 10b-6 promulgated pursuant to Section 10(b) of the Exchange Act which defines as a "manipulative or deceptive device or contrivance" as used in Section 10(b) for any person participating in a distribution to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution or to attempt to induce any person to purchase any such security until after he has completed participation in such distribution.

and records of the registrant certain of the transactions described in paragraphs (2) and (3) above; 4/

(5) offer to sell, sold, and delivered after sale to certain persons shares of Popell Co. stock when no registration statement had been filed or was in effect as to said securities under the Securities Act;

(6) made false and misleading statements of material facts and omissions of material facts to purchasers of Popell Co. stock concerning the aforementioned activities, the plan of distribution of the Popell Co. Regulation A offering, the sale of Popell Co. stock in violation of Section 5 of the Securities Act, and the contingent liabilities arising from the sale of such Popell Co. stock.

All of the respondents except Alan J. Davis, Hugh M. Casper, and Ethel I. Weber filed answers denying any willful violations by them of the Securities Acts.

4/ This conduct is also alleged to be in violation of Rule 17a-3 promulgated pursuant to Section 17(a) of the Exchange Act. Section 17(a) of the Exchange Act requires every registered broker or dealer to keep such books and records and make such reports as the Commission by appropriate rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 17 CFR 240.17a-3 specifies the books and records which must be kept.

The requirement that records be kept embodies the requirement that such records be true and correct. Lowell Niebuhr & Co., 18 S.E.C. 471 (1945); Pilgrim Securities, Inc., 39 S.E.C. 172 (1959); Herman Bud Rothbard, 39 S.E.C. 253 (1959); Talmage Wilcher, Inc., 39 S.E.C. 936 (1960); Joseph Ernest Murray, 38 S.E.C. 460 (1958); Donald L. Tiffany, Inc., 37 S.E.C. 841 (1957).

Pursuant to notice, a hearing was held in Pittsburgh, Pa. The Division of Trading and Markets and the following respondents: the registrant, Auldus H. Turner, Jr. (A. Turner), Ronald D. Turner (R. Turner), T. Theodore Turner (T. Turner), Michael R. Ventura, and John J. Baginski were represented by counsel. Respondents, Theodore B. Henjum and Louis A. Moore appeared pro se during the course of the proceedings. Respondents Davis, Casper and Weber, although directed by the Order for Proceedings to file answers, did not do so, nor did they make an appearance in the hearing. Therefore, pursuant to Rule 7(e) of the Rules of Practice they are deemed to have admitted the allegations of fact contained in the Order for Proceedings.[5/] Full opportunity to be heard and to examine and cross-examine witnesses was afforded the parties. At the conclusion of the presentation of evidence, opportunity was afforded the parties for filing proposed findings of fact and conclusions of law, or both, together with briefs in support thereof. Proposed findings, together with supporting briefs, were submitted on behalf of all parties who appeared by counsel at the proceedings. A memorandum filed on behalf of Harvey E. Schauffler, Jr., a witness, was also received for the record. Oral argument was also presented by the parties after briefs had been filed.

5/ "If a party fails to file an answer required by this rule within the time provided, such persons shall be deemed in default and the proceeding may be determined against him by the Commission upon consideration of the order for proceeding, the allegations of which may be deemed to be true."

Upon the entire record and from his observation of the witnesses the undersigned makes the following:

II. FINDINGS OF FACT AND LAW

A. The Respondents

The registrant, a Pennsylvania corporation, has been registered as a broker-dealer pursuant to Section 15(b) of the Exchange Act since April 17, 1959. It is a member of the National Association of Securities Dealers, Inc. (NASD), a national securities association registered pursuant to Section 15A of the Exchange Act. Its offices have always been located in Pittsburgh, Pennsylvania.

Charles Klein was president of registrant from its inception until February 19, 1964, when he died. A. Turner succeeded Klein to the presidency of the registrant and is also a director and owner of 100% of the common stock of the registrant. Prior thereto he was the vice president, a director, and owner of 50% of the common stock of the registrant.

R. Turner and T. Turner, brothers of A. Turner, were registered representatives employed by the registrant from approximately June 15, 1959 to July 15, 1963, and are still so employed. Henjum was a salesman for Strathmore from approximately June 15, 1959 to July 15, 1963.

Ventura was a salesman in the Pittsburgh office of Merrill Lynch, Pierce, Fenner and Smith from approximately November 1, 1960 to July 15, 1963, and is still so employed.

The remaining respondents were associated with the Pittsburgh office of Blair F. Claybaugh & Co. (Claybaugh). Weber, who did not appear in this proceeding, was office manager during the period from approximately November 1, 1960 to June 1962. Davis and Casper, who also did not make any appearances in these proceedings, were salesmen: Davis, during the period November 1, 1960 to April 27, 1961, and Casper, from November 1, 1960 to March 1, 1961. Baginski and Moore were also employed as salesmen by Claybaugh. They were so employed during the period of approximately November 1, 1960 to March 1, 1962.

B. Background Facts Pertaining to L. F. Popell Co., Inc.

L. F. Popell Co., Inc., a Florida corporation, was incorporated on August 5, 1948 for the stated purpose of conducting a business of selling, distributing and installing various types of building, insulating and acoustical products. In July 1963 it filed a voluntary petition for reorganization under Chapter XI of the Bankruptcy Act. From August 5, 1958 to at least July 1963, Leo F. Popell, Jr. (Leo Popell) was the president of Popell Co. Marjorie Baldwin, Leo Popell's sister, was an officer of Popell Co. during this period. She and Leo Popell were subpoenaed by the Division in these proceedings and invoked the privilege against self-incrimination when called to the witness stand.

Leo Popell and A. Turner met in 1959 and became personal friends as well as business associates. During the period of December 1, 1959 to July 15, 1963 Popell and A. Turner visited each

others' place of business and engaged in social activities together on many occasions. They also communicated with each other frequently. A. Turner's father was employed by the Popell company from approximately January 1961 and was in daily contact with Popell.

On December 21, 1959, 100,000 common shares of Popell Co. were offered to the public at $3 per share, pursuant to a Regulation A offering.[6/] The registrant was the underwriter and Bertner Bros., a registered broker-dealer with a place of business in New York City, was a member of the selling group. No registration has ever become effective with the Commission for any offering of Popell stock. Negotiations and arrangements for the sale of the shares of the Regulation A offering were conducted between Popell, representing the Popell Co., and Charles Klein and A. Turner, representing the registrant.

On March 10, 1960, Popell filed with the Commission a 2-A Report (report of sales) stating that the Regulation A offering had been completed on January 29, 1960. In fact, Regulation A sales were continued in February.

C. Sales by Strathmore and Bertner Bros. of 18,500 Shares of the Popell Regulation A Offering to Various Persons and Subsequent Sales of 16,500 of These Shares to Strathmore

Strathmore reflected on its books the sale, between

6/ Regulation A, adopted under Section 3(b) of the Securities Act, as here applicable, provides for an exemption from registration when the aggregate amount at which securities are offered to the public does not exceed $300,000.

February 1 and 10, 1960, of 8,500 shares of Popell Regulation A stock to six individuals, each of whom resided in the Miami area. These individuals were Jane Baker, Mary Joyce Kelly, Dolly McCarthy, Richard Judy, Roger Cartier, and Edmund Kulczynski. None of these individuals previously had an account at Strathmore and none of them communicated directly with anyone connected with Strathmore to order these shares or to open accounts in their names or for any other reason. Their accounts were handled by A. Turner as "house accounts" and he prepared order tickets for all Strathmore transactions mentioned in the following sections. No activity took place in each of these accounts except a purchase of Popell Regulation A stock and a sale of this stock back to Strathmore within approximately six months.

On February 1, 1960, Bertner Bros. reflected on its books the sale of 10,000 shares of Regulation A stock in the names of six individuals, each of whom resided in the Miami, Florida area - Mary Joyce Kelly, Shirley Griffith, William Hartack, Hilda Scales, Dorothy Schmelz, and Edmund Kulczynski. None of these individuals communicated with Bertner Bros. to order shares, open an account, or for any other reason.

The Division contends that the above sales and subsequent resales to Strathmore were violative of the Securities Act.

1. 500 Shares Sold by Strathmore to Account in Name of Jane Baker, and Subsequent Sale Back to Strathmore

Jane Baker was a personal friend of Leo Popell. In January 1960, he told her of the Regulation A offering and when she expressed an interest in acquiring some shares, but stated she had no

funds for the purchase, Popell said he would arrange the financing. Baker assumed she would be acquiring the stock.

On February 1, 1960, an account in Jane Baker's name was opened at Strathmore and 500 shares of Popell Regulation A stock was purchased in that account at the offering price of $3 per share. A. Turner executed the transaction on behalf of Strathmore.

Baker had no securities experience. She knew nothing of Strathmore. It is undisputed that Popell caused the order for the account of Baker to be placed with Strathmore. Baker received a confirmation in the mail.

Payment for the shares was made by a treasurer's check dated February 10, 1960, drawn on the Little River Bank and Trust Company and payable to Strathmore. The check was purchased by Marjorie Baldwin, sister of Leo Popell and an officer of the Popell Co. Baker had no knowledge of the purchase or use of this check nor did she ever pay the purchase price of the stock.

On February 26, 1960, the 500 shares were sold out of the account of Baker to Strathmore at the same price at which it was purchased. Baker did not place the order to sell and had no advance knowledge of it. She did not receive a certificate for the original purchase in her name, but signed a stock power at Popell's request. Baker received a confirmation of the transactions by mail, but was not certain from whom.

On March 10, 1960, Strathmore issued its check to Baker for $1,499.40 as the proceeds of the sale of 500 shares. Baker had

no recollection of receiving it. Her name was endorsed on it and it was deposited in Popell's personal checking account at the Little River Bank and Trust Company.

2. 3,000 Shares Sold by Strathmore and Bertner Bros. to Accounts in Name of Mary Joyce Kelly; and Subsequent Sales Back to Strathmore

Mary Joyce Kelly, a housewife, is the sister-in-law of Thomas M. Beckley who, in 1960, was an employee of the Popell Co. Kelly met Leo Popell at a social gathering in Beckley's home in late 1959. Shortly after this, Beckley asked Kelly, at the request of Popell, if she would be willing to be what he called a "trustee" of Popell shares for Leo Popell. Kelly understood that the shares to be purchased would be owned by Popell.

Kelly never opened an account with any brokerage firm or authorized the establishment of any such account. Despite this, accounts were opened in her name on February 1, 1960 at both Strathmore and Bertner Bros. In each account 1,000 shares of Regulation A stockwere purchased at $3 a share. Kelly received in the mail a Strathmore confirmation for 1,000 shares purchased on February 1, another confirmation for 1,000 shares purchased on February 10, and a Popell stock certificate for 2,000 shares. She also received a 1,000 share certificate from Bertner Bros. She telephoned the Popell Co. and on instructions from Marjorie Baldwin, endorsed the certificates and mailed them and the confirmations to the Popell Co.

Payment for the three blocks of stock was made by treasurer's

checks purchased by Marjorie Baldwin at the Little River Bank and Trust Company. Kelly had no part in these transactions.

Kelly did not order any sales from her account, but the 3,000 shares in her name were sold out of her account at Strathmore, as follows: 1,000 on July 1, 1960 at $3.75 a share, 1,000 on August 5, 1960 at $3.25 a share, and 1,000 on August 12, 1960 at $3.25 a share. On June 1, 1960, at Baldwin's direction, she had executed an option to purchase some of her shares and mailed it to Strathmore.

Kelly received three Strathmore checks in payment for the blocks of stock sold from her account. The first check she received was from the Popell Co. and not Strathmore.[7/] She asked Beckley what she should do with it and at his instructions or Baldwin's she cashed the check and held the proceeds for Beckley. Beckley delivered a second check to her personally. She cashed this check and gave him the proceeds. He said the sums would go to Popell. Kelly received a third check from the Popell Co. and on instructions bought a cashier's check with the proceeds payable to Baldwin and delivered it to her.

7/ The respondents concerned in this phase of the proceedings, the registrant and A. Turner, contend that in all cases confirmations of transactions and checks were sent only to the person who was listed on registrant's records as the owner of an account. An employee of registrant so testified. However, there is substantial evidence, which the undersigned has credited, that the asserted practice was not followed in all cases and the findings reflect that determination.

Kelly never ordered the sale of the Popell stock and never received confirmations of the sales.

3. 2,000 Shares Sold by Strathmore to Account in Name of Dolly McCarthy; Subsequent Sale Back to Strathmore

In 1960 Dolly McCarthy resided in Miami, Florida, and was employed by the Popell Co. She learned of the public offering of the Popell Co. stock and heard Popell tell employees they could buy the stock. She advised him she had no funds.

Without the knowledge of McCarthy, an account was opened in her name at Strathmore on February 1, 1960, and 2,000 shares of the Regulation A stock were purchased in that account. McCarthy did not receive a confirmation of the transaction and did not pay for the stock. Payment was made by treasurer's checks purchased from the Little River Bank and Trust Company by Marjorie Baldwin and payable to Strathmore.

McCarthy received in the mail from Strathmore a Popell stock certificate for 2,000 shares issued in her name. She spoke to her supervisor at Popell about it. Subsequently, Leo Popell told her to bring the certificate to the office. McCarthy did so and also endorsed it. She testified that she thought she had an option from Popell to buy the stock, but there was no definitive arrangement and McCarthy made no effort to acquire it.

The 2,000 shares were sold out of McCarthy's account at Strathmore on July 1, 1960 without her knowledge. Funds were wired to

a Miami Bank by Strathmore and McCarthy, at Popell's direction, endorsed a check representing the proceeds.

4. 2,000 Shares Sold by Strathmore to an Account in the Name of Richard Judy; and Subsequent Sale Back to Strathmore

Richard Judy, a social acquaintance of Leo Popell, discussed the Regulation A offering with him. Judy told Popell he would like to buy some stock, but did not have funds available.

On February 1, 1960, without Judy's knowledge, an account was opened in his name at Strathmore and 2,000 shares were purchased in that account on that day. He did not receive a confirmation, but later did receive a 2,000 share certificate of Popell stock from Strathmore in the mail. Payment was made by a treasurer's check drawn on the Little River Bank and Trust Company, payable to Strathmore, purchased by Marjorie Baldwin and delivered by her to Strathmore.

Some months later Popell asked Judy to pay for the stock. Judy was not able to do so and endorsed and delivered the certificate to Popell. Judy also signed a letter dated July 1, 1960 in which he gave a 90-day option to Strathmore to purchase the Popell shares. He had no recollection of the contents of this document or the background circumstances.

On August 18 and 25, 1960, 2,000 shares of Popell stock were sold out of the Judy account to Strathmore. Strathmore issued two checks to Judy in payment. Judy was not certain how he got possession

of the checks. He deposited the first check in his own bank account and gave Marjorie Baldwin a check which she deposited in her own account. Judy merely endorsed the second check and gave it to Popell.

5. 1,000 Shares Sold by Strathmore to Account in the Name of Roger Cartier; and Subsequent Sale Back to Strathmore

On February 1, 1960 an account was opened at Strathmore in the name of Roger Cartier, an employee at Popell Company, and 1,000 shares of Popell Regulation A stock were purchased in that account on that day. Cartier knew nothing of the opening of that account or the purchase. He had no recollection of receiving a confirmation.

Payment for the 1,000 shares was made by a treasurer's check obtained from the Little River Bank and Trust Company on February 5, 1960, payable to Strathmore. Although Cartier is reflected on the check as the purchaser, he had nothing to do with it. On that same day two other treasurer's checks had been purchased at that same bank by Baldwin and used to purchase shares in the accounts of Judy and McCarthy.

A Popell stock certificate for 1,000 shares was issued in Cartier's name. Cartier did not receive it directly, but was asked to endorse it by either Leo Popell or Baldwin.

On June 24, 1960, the 1,000 shares were sold out of Cartier's account. Popell obtained possession of the Strathmore check issued in payment, and, on instructions from either Baldwin or Popell, the Strathmore check was deposited in Cartier's account and an offsetting check issued to Baldwin from that account.

6. 2,000 Shares Sold by Strathmore and Bertner Bros. to Accounts in the Name of Edmund Kulczynski; and Subsequent Sale Back to Strathmore

Edmund Kulczynski, a former employee of Popell Co. was told by Leo Popell in early 1960 that he was going to have some shares of Popell stock issued in his name. On February 1, 1960, an account in Kulczynski's name was opened at Strathmore and 1,000 shares of Regulation A stock were sold to that account by Strathmore. Kulczynski had no knowledge of the opening of the account. He denied receiving a confirmation, but affirmed that he received a stock certificate from Strathmore and an offering circular.

Payment for the stock was made by a cashier's check, dated February 5, 1960, drawn on the Hialeah-Miami Springs Bank, a bank where Kulczynski had an account, payable to Strathmore. His name appears on the check.

On February 1, 1960, without his knowledge, an account was opened at Bertner Bros. in Kulczynski's name and 1,000 shares of Popell Regulation A stock were purchased in that account.

On February 26, 1960, the 1,000 shares purchased in the Kulczynski account at Strathmore were sold to it. Kulczynski had nothing to do with arranging the sale. A check for the proceeds was deposited by Kulczynski in his bank account. He testified he received this check from Baldwin and, pursuant to an arrangement with Popell, he drew a check for the amount to Baldwin's order and a few days later cashed it for her at his bank and gave the cash to Philip Kaplan, a Popell employee.

On July 19, 1960, the 1,000 shares purchased in the Kulczynski account at Bertner Bros. were sold through the Kulczynski account at Strathmore. Kulczynski testified he never saw the check for the proceeds of the sale. His name was endorsed on the check and it was cashed at his bank.

It is urged on behalf of the respondents, as in all the other transactions summarized here, that Strathmore dealt directly with Kulczynski and sent confirmations and checks directly to him. Kulczynski was hazy on some details of the Popell transactions and gave inconsistent and contradictory testimony on the question of whether he received any confirmations from Strathmore and the amounts involved in transactions executed in his name. However, the undersigned credits his testimony and finds that he did not open accounts at Strathmore and Bertner Bros., that he placed no orders with those firms, and that at least one check from Strathmore was presented to him by a Popell agent. This procedure was followed in the case of others who testified in this proceeding.

7. 1,500 Shares Sold by Bertner Bros to Account in Name of Dorothy Schmelz; and Subsequent Sale to Strathmore

Dorothy Schmelz is an aunt of Leo Popell and Marjorie Baldwin. She has not dealt in securities since 1929.

On February 1, 1960, an account was opened in the name of Mrs. Schmelz at Bertner Bros. and 1,500 shares of Popell Regulation A stock were sold to that account on that day. Payment was made by use of a personal check of Schmelz and there was deposited in her

bank account a check in a like amount purchased by Baldwin. Mrs. Schmelz testified that she had nothing to do with opening the account at Bertner Bros. nor did she have any recollection of receiving any confirmation or stock certificates from Bertner Bros. She did recall endorsing stock certificates at someone's request.

On June 24, 1960, an account was opened at Strathmore in the name of Mrs. Schmelz and 1,000 of the 1,500 shares purchased in the Bertner Bros. account were sold to Strathmore. The remaining 500 were sold to it on July 14, 1960. Mrs. Schmelz did not arrange to open an account at Strathmore and had no recollection of receiving any confirmation from it.

Strathmore issued checks payable to Schmelz for the Popell stock it bought. The first check in time bears Mrs. Schmelz's name on the back. Mrs. Schmelz denied that she signed it. The check bears a second endorsement by Leo Popell and it was deposited in his personal bank account. As to Strathmore checks issued in connection with the second sale from her account Mrs. Schmelz testified that she did not receive those checks directly but, on request, met someone from the Popell Co. at her bank, endorsed the checks, cashed them, and gave the proceeds to that person.

While Mrs. Schmelz did not have a clear recollection of all the details of these stock transactions her testimony as to her lack of participation in opening accounts at Strathmore and Bertner Bros., her lack of possession of stock certificates in her name, and her activities in connection with Strathmore checks issued in her name, is credited.

8. 1,500 Shares Sold by Bertner Bros. to Account in the Name of Shirley Griffith; Subsequent Sale to Strathmore

Shirley Griffith, a friend of Leo Popell, discussed the Popell stock with him and said she wanted to buy some of the stock, but could not afford it. Popell agreed to lend her the money. Unknown to her, an account was opened in her name at Bertner Bros. and she received a confirmation for 1,500 shares purchased in that account on February 1, 1960. The stock was paid for by the use of a treasurer's check drawn on the Little River Bank and Trust Company and payable to Miss Griffith. The check was purchased by Marjorie Baldwin. Popell delivered the check to Miss Griffith who paid for the stock with her own check or a cashier's check. Sometime after February 18, 1960, she received two certificates totalling 1,500 shares. She retained these certificates in her possession.

After Miss Griffith had held the certificates for several months Popell asked her to let him sell the certificates because, "The company needed the money." She gave the certificates to Mrs. Baldwin after endorsing them.

An account was opened in Miss Griffith's name at Strathmore and 1,000 shares of Popell stock were sold out of this account to Strathmore. The remaining 500 shares in Griffith's name were sold out of that account to Strathmore on July 14, 1960. Miss Griffith could not recall receiving a confirmation of these transactions. Two checks were issued in payment for the securities. Miss Griffith did not endorse the first check in time sequence, that of July 12, 1960. Her name was written on the back of the check and it was deposited

in Popell's bank account. Miss Griffith saw the second check in Popell's office where at his request she endorsed it and returned it to him.

9. 1,000 Shares Sold by Bertner Bros. to Account in the Name of Hilda Scales; Subsequent Sale to Strathmore

Hilda Scales is a Florida real estate broker who had been a bookkeeper for the Popell Co. in 1958-59. She learned of the Regulation A issue from conversations with Popell and Mrs. Baldwin and purchased 300 shares with her own funds. She told either Popell or Baldwin of her desire to make a purchase and received a confirmation from Strathmore, dated February 1, 1960. She did not know Strathmore at that time.

Mrs. Scales also had a conversation with Popell in which the latter told her he was having some stock put in her name. Popell also told her shortly thereafter that she could buy the stock if she could raise the money. Mrs. Scales told him that she did not have the money at that time.

Sometime thereafter Mrs. Scales received in the mail a certificate for 1,000 shares of Popell stock, issued in her name, dated February 18, 1960. These shares were purchased on February 1, 1960 in an account opened at Bertner Bros. in the name of Mrs. Scales. She knew nothing about Bertner Bros. or the opening of the account. Payment for the shares was made by a treasurer's check drawn on the Little River Bank and Trust Company, dated February 8, 1960, payable to Hilda Scales, and purchased by Marjorie Baldwin. Mrs. Scales endorsed this check at the request of Popell or Baldwin

and had nothing to do with its actual forwarding to Bertner Bros.

Mrs. Scales kept the stock certificate for 1,000 Popell shares in her possession for several months. She was then asked by Mrs. Baldwin whether she could "take" the stock. Mrs. Scales replied that she could not, took the certificate to the Popell offices, endorsed it, and gave it to Mrs. Baldwin. On July 28, 1960 the shares were sold to Strathmore out of an account in her name. Mrs. Scales had nothing to do with placing the order. She did not recall receiving a confirmation of this transaction. A copy of a confirmation of the transaction addressed to Mrs. Scales but without any address is in the Strathmore files. Mrs. Scales further testified that she did not receive the check in payment from Strathmore directly but first saw it in the Popell offices where, at the request of Mrs. Baldwin, she endorsed the check and handed it back.

10. 4,000 Shares Sold by Bertner Bros. to Account in the Name of William J. Hartack; Subsequent Sale of 2,000 of These Shares to Strathmore

William J. Hartack, a well-known jockey, was a close personal friend of Leo Popell at the time of the Regulation A offering. On February 1, 1960, 4,000 shares of the Regulation A stock were purchased through an account in Hartack's name at Bertner Bros. Hartack did not open this account or order this purchase. The stock was paid for by use of a treasurer's check of the Little River Bank and Trust Company dated February 10, 1960, purchased by Marjorie Baldwin. Four 1,000-share Popell certificates were issued in Hartack's name. Hartack was uncertain as to whether he received them directly or from whom but did recall he endorsed the certificates at Popell's request.

On September 26, 1960, 2,000 of these shares were sold to Strathmore through an account in Hartack's name at Strathmore. Hartack disclaimed any knowledge of this transaction and denied receiving a confirmation from Strathmore, although admitting he did not open correspondence relating to the Popell Co. The Strathmore check issued in payment for the stock was not endorsed by Hartack, but his name was placed on it and it was deposited in his account. Checks were issued shortly thereafter from Hartack's bank accounts to Popell and the Popell Co. to approximately the amount received from Strathmore.

On February 4, 1960, Hartack decided to buy 500 shares of Popell stock and at Popell's suggestion gave him a check for the amount due made out to Strathmore. During this period, Hartack had a secretary who assisted him in business matters and opened mail.

11. Strathmore's Sale of the Regulation A Stock Purchased from the Foregoing Accounts

Between February 26 and September 30, 1960 Strathmore purchased, as principal, 16,500 shares of Regulation A stock from the ten accounts previously discussed. A. Turner executed the order tickets relating to these transactions. Between February 8, 1960 and October 3, 1960 Strathmore sold these 16,500 shares to other brokers and customers at prices ranging from $3.50 to $6 per share.

During the period of March 3, 1960 to September 20, 1960, Strathmore was inserting bids on Popell stock in the National Daily Quotation Service Sheets on the daily basis. During this period it

made the principal market in Popell's stock and was consistently either the high bidder in the sheets or was high along with other brokers. During the period of February 2, 1960 to September 26, 1960, Strathmore purchased 47,741 shares of Popell stock from other brokers at prices ranging from $2.75 to $5.375 per share.

Contentions of the Parties; Conclusions

The Division contends that Strathmore's activities in sales and purchase transactions with the aforementioned individuals establish that it was participating in a scheme to defraud in violation of the Securities Acts. The respondents contend in substance that Strathmore's activities were normal brokerage activities, that these orders were handled in the usual course of business, and that if any violations of law were committed, Strathmore and A. Turner had no knowledge of them and did not participate therein.

The parties are in agreement that the Regulation A issue was "sticky" and did not sell well. The evidence clearly establishes that Leo Popell engaged in a successful effort to see to it that the Regulation A issue was apparently completely marketed by sale of all the offered shares to the general public. A distribution of securities comprises "the entire process by which in the course of a public offering the block of securities is dispersed and ultimately comes to rest in the hands of the investing public."[8/] In actual effect,

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8/ Oklahoma - Texas Trust, 2 S.E.C. 764, 769 (1939), aff'd 100 F. 2d 888 (C.A. 10, 1939); Lewisohn Copper Corp., 38 S.E.C. 226, 234 (1958); Advanced Research Associates, Inc., Sec. Act Rel. No. 4630, p.21 (Aug. 16, 1963).

Popell's activities resulted in approximately twenty percent of the Regulation A issue remaining under Popell's control. These shares did not reach the public at the original offering price and during the purported Regulation A offering period but much later and at prices above the $3 offering price. Thus, the terms and conditions of Regulation A were not complied with and no exemption from the registration provisions of Section 5 was applicable to the disposition of the shares issued under a claimed exemption under Regulation A. 9/

The record purchasers from Strathmore and Bertner Bros. whose purchases and sales were detailed in the record were actually nominees of Popell, a person in control of the issuer. This is true also in the case of the few record purchasers who assumed that they could pay later for the stock placed in their names. They were not in a financial position to take the shares at the time of the transaction. They were under no firm obligation to take the shares nor was Popell firmly bound to turn over the shares to them. In any.

9/ The Commission has held that the controlling factor in computing the aggregate price at which a purported Regulation A offering was made is the total consideration actually paid by ultimate public purchasers, not the aggregate offering price stated in the notification and offering circular. Homestead Gold Exploration Corporation, Sec. Act Rel. No. 4770, p.2 (Nov. 17, 1965); Advanced Research Associates, Inc., supra; Siltronics, Inc., Sec. Act Rel. No. 4700 (June 4, 1964); Hamilton Oil and Gas Corporation, 40 S.E.C. 796, 801-804 (1961); Sports Arenas (Delaware), Inc., 39 S.E.C. 463, 464-465 (1959); Lewisohn Copper Corp., supra, at p. 234-236.

event these purchasers of record never actually purchased the shares. They were nominees of Popell just as were the other purchasers of record. Popell's activities had the purpose and effort of not only closing out the Regulation A issue, permitting open market trading to develop on the basis that the issue had been sold out, but also gave Popell control of a large block of shares which he could withhold from the market or sell as he saw fit.

The respondents contend that the evidence does not establish that they knew of Popell's activities. There is no dispute over the fact that none of the six record owners who testified in this proceeding communicated directly with Strathmore to place purchase orders.[10/] The evidence further establishes that these orders plus other necessary information must have been supplied by Leo Popell in view of his discussions with the record owners and Mrs. Baldwin's participation in completing the transactions.

There are other factors present which indicate that an ordinary customer-broker relationship between Strathmore and the purchasers of record did not exist.

In the case of Jane Baker, Popell placed the order for stock to be issued in her name, and payment was made by a treasurer's check drawn on the Little River Bank and Trust Company purchased by Mrs. Baldwin. Since Jane Baker's name did not appear on the check

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10/ Baker, Kelly, McCarthy, Judy, Cartier and Kulczynski.

and she knew nothing of it, someone must have remitted it to Strathmore with instructions to credit it to Baker's account. The evidence establishes that this must have been Popell. Baker did not place the order to sell the shares in her name and the check from Strathmore found its way into Popell's personal checking account. Again it is evident that Popell gave the necessary instructions to Strathmore for the sale of the Baker shares. Popell also had Baker sign a stock power and it is clear that he returned it to Strathmore to complete the sale transaction.

Mary Joyce Kelly had agreed to act as nominee or "trustee" for Popell at the urging of her brother-in-law. An account was opened in her name at Strathmore and 2,000 shares were purchased in her name. Payment for the shares were made by treasurer's checks purchased by Marjorie Baldwin at the Little River Bank and Trust Company. Thus Popell not only gave the original purchase instructions to Strathmore but took care of the details of payment and must have advised Strathmore for whom payment was remitted.

Sales of the 2,000 shares purchased in her account and an additional 1,000 shares bought at Bertner Bros. were made from Kelly's account at Strathmore after she had executed an option to purchase in Strathmore's favor. The record is devoid of any evidence that there were any negotiations between Strathmore and Kelly over the option. It was prepared by Kelly at Baldwin's direction. Kelly received Strathmore checks in payment from the Popell Co. and not Strathmore directly.

Dolly McCarthy, a Popell employee, had 2,000 sold to her in an account at Strathmore which she did not own. Payment was made by Baldwin through use of the usual treasurer's check. The stock was sold out of that account later without her knowledge and she turned over to Popell funds received from the transaction which had been wired to her bank. It is evident that Popell arranged the details of her purchase and sale.

Richard Judy had 2,000 shares placed in his name at Strathmore without placing the order or making payment. A sale to Strathmore of these shares was made later, again without direct action by Judy. He signed an option later in favor of Strathmore. Again there is no evidence in the record that Strathmore ever communicated directly with Judy on terms of the agreement. Here, the evidence establishes that Popell controlled all phases of the purchase and sale.

In the case of Roger Cartier, an employee of Popell, 1,000 shares were purchased in his name at Strathmore without his knowledge. His certificate was not sent to him directly but to Popell. When the stock was sold to Strathmore without his knowledge, the check in payment went to Popell, not Cartier.

Edmund Kulczynski did not place buy and sell orders in any account opened in his name at Strathmore. At least one check issued by Strathmore in payment for stock sold through that account was presented to him by a Popell employee. Again, this is an instance where Popell exercised full control of a nominee account.

The transactions with Bertner Bros. which have been detailed in the record followed the same pattern as that used in the Strathmore transactions. Accounts were opened by Popell in the names of the record purchasers without their knowledge and payments were arranged by him. When the shares acquired in this manner were sold, they were sold to Strathmore also by Popell's intervention and direction. Checks in payment went to him.

The evidence proves that Popell succeeded in closing out the Regulation A issue by placing approximately twenty percent of the shares in the names of nominees. To accomplish this purpose he needed the cooperation of a broker or brokers to make it appear that sales were being made to the public instead of to the issuer or a person in control of it. The evidence shows that he obtained this assistance from Strathmore, the underwriter, and Bertner Bros., who also had an underwriting role. Later, when the acquired shares had to be disposed of, Strathmore made the necessary arrangements.

It has been urged that even if Popell did transmit buy and sell orders to Strathmore and perhaps receive checks for record owners this was no indication to Strathmore that there was any wrongdoing. It is significant that despite all the suspicious circumstances including the substantial orders placed with Strathmore mostly on February 1, 1960, and the lack of any direct contact with the customers, Strathmore and A. Turner, who handled all the transactions for Strathmore, made no effort to check with any of the customers to find the true situation.

The undersigned concludes that it has been proved that Strathmore and A. Turner in the offer and sale of Popell stock engaged in a scheme to defraud in violation of the anti-fraud provisions of the Securities Acts. This scheme involved the withholding of substantial blocks of the Regulation A Popell issue from immediate distribution to the public, and the sale of these shares later by Strathmore while also engaging in open-market activities in violation of Section 10(b) and Rule 10b-6 of the Exchange Act. The activities of Strathmore and A. Turner were also violative of Section 5 of the Securities Act since no registration statement was in effect as to these securities and the Regulation A exemption did not apply. The plan of distribution was, of course, never made public and this conduct also was violative of the anti-fraud provisions. It is further concluded that the violations were willful. 11/

* * *

A. Turner did not testify in these proceedings. The Division urges that his failure to do so warrants the application of the rule that:

> "The failure of a party to testify in a non-criminal case, in explanation of suspicious facts and circumstances peculiarly within his knowledge fairly warrants the inference that his testimony, if produced, would have been adverse." 12/

11/ Harry Marks, 25 S.E.C. 208, 220 (1947); George W. Chilian, 37 S.E.C. 384 (1956); E. W. Hughes & Company, 27 S.E.C. 629 (1948); Hughes v. S.E.C., 174 F. 2d 969 (C.A.D.C. 1949); Shuck & Co., 38 S.E.C. 69 (1957); Carl M. Loeb, Rhoades & Co., 38 S.E.C. 843 (1959); Ira Haupt & Company, 23 S.E.C. 589, 606 (1946); Van Alstyne, Noel & Co., 22 S.E.C. 176 (1946); Thompson Ross Securities Co., 6 S.E.C. 1111, 1122 (1940); Churchill Securities Corp., 38 S.E.C. 856 (1959).

12/ N. Sims Organ & Co., Inc., 40 S.E.C. 573 (1961), aff'd 293 F. 2nd 78 (C.A. 2d 961), 2 Wigmore, Evidence (1940 ed.) Sec. 289.

While A. Turner did not testify in his own behalf, he was called as a witness by the Division. He then refused to testify asserting the Fifth Amendment protection. It is urged on his behalf that it would be improper to apply the N. Sims Organ rule in this situation because it would penalize A. Turner for asserting his constitutional rights.

While, in the opinion of the undersigned, the record warrants the findings made herein without application of the N. Sims Organ rule, the contention of the Division is valid and the failure of A. Turner to testify on his own behalf on matters where he clearly played a key role furnishes additional support to the contentions of the Division. If A. Turner had not been called to the stand by the Division, the record would have been the same as in the N. Sims Organ case. If the Division were to be barred from relying on that case simply because it called a party to the stand who asserted constitutional rights against testifying, then a standard similar to that in a criminal proceeding would have been applied in an administrative proceeding. A Division would be faced with a choice of either avoiding calling a material witness or, if it did, waiving the application of the N. Sims Organ rule if there was reliance on constitutional rights by a party called to the stand. There is no requirement that such a choice be made in an administrative proceeding. It must be noted that in the state of this record a party is not being penalized for asserting constitutional rights, but reliance is being placed instead on his failure to present evidence within the scope of the N. Sims Organ rule. 13/

13/ See 8 Wigmore, Evidence (1940 ed.) Sec. 2272, P. 459.

Counsel for A. Turner stated that he advised his client to assert his constitutional rights, partly because he felt that this proceeding might be preliminary to a criminal proceeding and that therefore the N. Sims Organ rule should not be applied here and that there had been a denial of due process. The possibility that a potential witness may be under an apprehension of possible self-incrimination if he testifies furnishes no valid basis for the Commission to fail to carry out its duty under the Securities Acts to determine in the course of an administrative proceeding whether certain alleged violations of the Acts have been committed. It is required to do so in the discharge of its responsibilities. The requirements of due process prescribe that respondents be given due notice of a proceeding before the Commission and opportunity to present witnesses and other evidence. This right has been afforded the registrant and A. Turner. They are not entitled to further grants. A natural consequence of the recognition of the contention urged by the respondents would be that many administrative hearings would be nullified because of the assertion of some type of privilege from testifying on the part of a potential witness. 14/

14/ Security Forecaster Co., Inc., 39 S.E.C. 188, 192 (1959)

D. Acquisition of Perma Cement Products of America, Inc. by L. F. Popell Co., Inc., and Disposition of Stock Issued in Connection with the Acquisition

In August 1959, Charles N. Caputo, William Butterbach, Michael Ortale and George Streiffler formed a Pennsylvania corporation named Perma Cement Products of America, Inc. (Perma Cement). Caputo was the president and Butterbach the vice-president. The corporation was formed for the purpose of manufacturing, selling and applying a wall coating product, known as "perma cement" or "perma glaze." By March 1, 1960, Perma Cement had issued 7,100 shares of stock to nineteen (19) individuals including 1,950 shares to Caputo, and 300 shares to Butterbach. By April 2, 1960, Perma Cement's liabilities exceeded its liquid assets and it was not encountering success in marketing its product.

A. Turner was a neighbor of Butterbach at that time, and during the spring and summer of 1960 he had several conversations with Butterbach concerning Perma Cement and its product. A. Turner told Butterbach that he thought that the Popell Co. might be interested in acquiring Perma Cement. Leo Popell already knew something of the company because the Popell Co. had done some business with Perma Cement and Caputo, an attorney, had discussed the company with him while attempting to collect a Perma Cement account receivable due from the Popell Co. Some time thereafter, A. Turner brought Leo Popell to the Perma Cement plant in Carnegie, Pennsylvania where Leo Popell examined the facilities. During this same visit, a meeting was held between A. Turner, Leo Popell, Caputo and Butterbach

at which there was a discussion of the Perma Cement Co., its product, and the possibility of its sale to the Popell Co. Further discussions took place when Butterbach went to Miami to demonstrate the product. A. Turner was kept advised by Butterbach and Leo Popell as to the progress of these acquisition discussions. In late September 1960, Caputo went to Miami for further negotiations with Leo Popell. It was agreed at this time that the Popell Co. would issue its stock to Perma Cement as payment for the assets of that company. On October 11, 1960, the directors of Perma Cement approved the sale of its assets to the Popell Co. in exchange for 28,600 unregistered shares of the common stock of the Popell Co. The Perma Cement stockholders approved the sale on November 4, 1960. A. Turner had full knowledge of the terms and conditions of the acquisition.

During the period immediately preceding October 20, 1960, Caputo consulted A. Turner concerning the market price of the Popell stock, and A. Turner kept Caputo advised of the market price. Caputo was interested in knowing what the market price was so that he could determine the number of shares to be issued to Perma Cement by the Popell Co. for the proposed acquisition based upon an approximate valuation of Perma Cement of $71,000. To effect the acquisition, 28,600 shares of Popell stock were requested for Perma Cement based upon a ratio of 2.86 Popell shares for each Perma Cement share.

The sales agreement between Perma Cement and the Popell Co. was signed on November 15, 1960. Sometime before November 25, 1960, and pursuant to the agreement, Caputo received 18,600 Popell shares.

The remaining 10,000 shares were held in escrow by the attorneys for the Popell Co. On November 25, 1960, Caputo sent the 18,600 share certificate to the transfer agent for reissuance into the names of the Perma Cement stockholders. The reissued shares were thereafter returned to Caputo by the stock transfer agent. The distribution of these shares has been shown on a chart which is in evidence (Div. Ex. 327). The original distribution was made to 8 individuals with a block of stock in which Caputo had the major interest kept in the name of Perma Cement for one month.

1. Disposition of the 18,600 Unregistered Shares Issued by the Popell Co. in Partial Compensation of the Perma Cement Stockholders

According to Caputo, shortly after November 25, 1960, he was asked by former Perma Cement stockholders if he could arrange for the sale of the Popell stock which had been issued in their names. Caputo, who had had some discussions with counsel for Popell Co., although he had not received any formal opinion, advised these stockholders that if they had to get the money he would assist them in disposing of their stock. He prepared a form letter for the signature of selling stockholders which authorized him to sell their stock at a minimum of $3.50 per share.

Caputo opened a bank account in the name of "Charles M. Caputo, Trustee" on December 9, 1960 for the purpose of receiving and distributing proceeds from the sales of unregistered Popell shares. He discussed with A. Turner the possibility of selling the stock

directly to Strathmore but received no encouragement from A. Turner on this score. A. Turner indicated to Caputo that any distribution of the stock would have to be made to a purchaser who would take for investment and who would sign a letter to that effect. It was agreed that the Strathmore salesmen would offer the shares to their customers at somewhat less than the current "market" price. The salesmen were also to be instructed that customers should send their payments directly to Caputo and each of the customers would be asked to execute an "investment letter," which stated, inter alia, that the purchaser acknowledged that he had been advised that the "stock is 'Investment Stock,' and, as such, cannot be transferred or recorded for at least one year from this date." (Div. Ex. 28-A - H). A. Turner advised the Strathmore salesmen of the arrangement and they proceeded to sell shares out of the 18,600-share block.

Beginning about December 1, 1960 and pursuant to information furnished them by A. Turner, certain Strathmore salesmen, including R. Turner, T. Turner and Henjum, began offering the unregistered stock to their customers at a price below the quoted "market." A salesman making a sale would instruct his customer to make payment directly to Caputo. He also advised the customer that he would receive an "investment letter" at a later date to be executed, and that the letter represented that the shares were "investment shares" which could not be transferred for at least one year.

When a salesman succeeded in making a sale of this Popell stock, that information was relayed to Caputo from the Strathmore

office. Upon receiving the name and address of a customer and the number of shares ordered together with a payment for the shares Caputo would mail a form letter to the customer enclosing the stock certificates and requesting the customer to execute and enclose the "investment letter" in the language previously set forth. In some instances the customer's payment and the executed investment letter were delivered to the salesmen for further delivery to Caputo.

The evidence establishes that Strathmore salesmen used a standard approach to customers in selling the unregistered shares available from Caputo. L. Frank Vogel, a Pittsburgh resident and an optician, had made several purchases of Popell stock from Strathmore between June and December 1960 with T. Turner acting as the salesman. In late November or early December 1960 T. Turner telephoned Vogel and told him that he knew someone who had a block of "Management" stock for sale. T. Turner said that this Popell stock was available at a price below the "market." He also said that Vogel would have to hold the stock for a definite period of time which Vogel could not recall when he testified. Vogel agreed to buy 500 shares at $5.25 per share and upon instructions from T. Turner he drew his check, dated December 2, 1960, to the order of Charles Caputo and mailed it to Caputo's address, which T. Turner had furnished him. Subsequently, Vogel received in the mail a letter dated December 16 from Caputo enclosing 500 shares of Popell stock, evidenced by certificates in the names of Perma Cement stockholders. A form "investment letter" addressed to Caputo was also enclosed and, as instructed, Vogel

executed this letter and returned it to Caputo. He disposed of this stock after he had held it for more than one year.

As a current stockholder of Popell Co. at the time of this purchase Vogel received whatever financial reports which the Popell Co. issued to its stockholders. He had no other association with the Popell Co.

T. Turner followed substantially the same procedure as outlined above in making a sale of 300 shares of stock to Howard M. Bell, a Strathmore customer to whom he had previously sold Popell stock. T. Turner telephoned Bell, a Pittsburgh resident and an official of a land company, shortly before December 1, 1960 and advised him that there was some Popell stock available at a price less than the current market price, but which would have to be held for one year before Bell could sell it. T. Turner recommended the purchase as a good investment and Bell agreed to purchase 300 shares at $5.25 a share. As instructed by T. Turner he made out his check for the amount due to the order of Caputo and mailed his check, as he recalled it, to Strathmore. He received a letter from Caputo enclosing certificates and an investment letter which he signed and returned. He believed that he returned this letter to Strathmore, intending it for T. Turner.

Bell had been a Popell stockholder for at least ten months prior to this particular purchase and had received the regular stockholder reports issued by the Popell Co. He also had read the investment letter which he had signed and was also advised by T. Turner

that he was purchasing investment stock. He did hold the shares he received for approximately a year and then sold them through another broker. Bell did not have a clear recollection of the details of this transaction and was not completely sure as to whether he sent his check directly to Strathmore or Caputo, but his best recollection was that he forwarded it to Strathmore directly.

T. Turner was also successful in selling 500 shares through the Caputo Trust account to another customer of his, George Bogovich, an engineer at Westinghouse Electric Research Corporation. Bogovich had made several purchases of Popell stock beginning early in 1960 from Strathmore with T. Turner acting as salesman.

Shortly before December 1, 1960 T. Turner telephoned Bogovich and suggested he sell 500 of his Popell shares and purchased 500 others which could be bought at a lower price. According to Bogovich, T. Turner told him that someone needed ready cash and was willing to give up the certificates, but that Bogovich would have to hold his stock for a full year before he could do anything with it. Bogovich decided to make the purchase and on instructions from T. Turner sent his check to Caputo for the purchase of the shares at $5.25 per share. He received a certificate from Caputo and also an investment letter which he signed and returned to Caputo.

Bogovich had no connection with the Popell Co. other than a stockholder and received periodic reports from it. Prior to the expiration of the one-year period, T. Turner suggested to Bogovich that he sell the 500 shares of Popell stock aforementioned and

purchase another security. When Bogovich reminded T. Turner that the one-year period had not expired, he was told to proceed anyway and that Strathmore would take care of it from then on. Bogovich mailed the certificate to Strathmore and used the sale proceeds for another purchase.

Stanley E. Guski, a laboratory technician at Westinghouse Electric Research Corporation, had dealt with R. Turner as a representative for Strathmore and had made purchases of Popell stock through him.

Shortly before December 2, 1960, R. Turner telephoned Guski and advised him of the availability of some Popell "management stock" which, he stated, Guski could purchase at a point below the "market" price. R. Turner told Guski that he would have to hold the stock for approximately one year before he could liquidate it. He further stated that the "management" stock was stock owned by insiders who wanted to dispose of it. Guski agreed to purchase 500 shares at $5.25 per share and on instructions from R. Turner sent his check to Caputo from whom he received a letter dated December 16, 1960 enclosing 500 unregistered Popell shares. He executed and returned the standard investment letter.

At the time of his purchase of these 500 shares Guski, as a stockholder of the Popell Co., had received reports from the company, had visited its plant, and had read outside reports about the company.

In October 1961 Guski called R. Turner with reference to disposing of the stock. R. Turner told him that Strathmore would

not handle the transaction but would arrange to have some other broker execute the sale. Shortly thereafter, Guski received a confirmation of sale and a check from another Pittsburgh broker-dealer.

Earl E. Harned, a principal of an elementary school, had done business with R. Turner at Strathmore. In early December 1960 R. Turner telephoned him offering Popell stock stating that he could purchase it at less than the current "market" price. R. Turner further told him that he would have to hold the stock for one year and at the end of that period he could have the stock transferred to his own name and dispose of it. Harned agreed to purchase 100 shares at $5.50 a share. He followed the usual procedure of mailing his check to Caputo at R. Turner's instruction. He received a letter from Caputo dated December 19, 1960 enclosing 100 shares of stock issued by Popell Co. when it acquired Perma Cement. Also enclosed was a form investment letter addressed to Caputo which Harned executed and returned. Harned was a Popell stockholder at the time he acquired the aforementioned shares and he held these shares for approximately two years before disposing of them.

Charles W. Sheftic, a partner in a company which invests in real estate and securities, was a customer of Strathmore. He first heard of the Popell stock from A. Turner and he purchased Popell stock through Strathmore in early 1960.

Shortly before December 1, 1960, A. Turner telephoned him and advised him to buy some Popell "investment stock," which was

available for purchase. He also told Sheftic that this was stock which could not be transferred or sold for one year, and the stock was in someone else's name and had been exchanged for Perma Cement stock. Sheftic agreed to buy 500 shares at $5.25 a share. He remitted his check to Caputo on A. Turner's instructions and received 500 of the unregistered shares from Caputo by letter dated December 19, 1960. Also enclosed was a form investment letter addressed to Caputo which Sheftic signed and returned to either Caputo or Strathmore. Sheftic held these shares for a substantial period of time.

Robert J. Myers, a repairman, had an account at Strathmore where he dealt with A. H. Turner, Sr., father of A. Turner and a salesman at Strathmore at the time. In November or December 1960, Turner Sr. telephoned Myers and advised him that he could purchase some Popell "investment stock" at a price somewhat less than the "market" price but that Myers would have to hold this stock for one year. Myers agreed to buy 100 shares at $5.50. Myers paid Caputo for these shares. They were not transferred into his name until substantially later.

Edmund Adasiak, as a result of communication by one of the Strathmore salesmen, agreed to purchase 600 shares of Popell stock at $5.25 per share. He followed the procedure outlined above of paying Caputo, receiving shares from him on December 16, 1960, and remitting a signed investment letter.

Paul F. Webster bought 500 shares of the Popell stock under arrangements previously outlined. He received 500 of the unregistered shares.

2. Establishment of the Schauffler Trustee Bank Account

In late December 1960, approximately four weeks after Popell stock was distributed to the former Perma Cement stockholders and sales of it began, Caputo, because of the press of other business, decided to have someone else operate the Trustee Bank Account for the purpose of receiving and distributing the proceeds from the sale of the aforementioned Popell shares. He communicated with Harvey E. Schauffler, Jr., a Pittsburgh attorney known to him and A. Turner and requested him to open a trustee bank account in his name to receive and disburse the sales proceeds. He told Schauffler to take instructions from A. Turner or Klein, to receive sales orders from Strathmore salesmen, to pay them commissions, and to follow the procedures that Caputo had instituted in handling orders received previously. Caputo confirmed this arrangement to Schauffler in writing. (Div. Ex. 31).

Pursuant to these instructions Schauffler opened an account in a local bank in the name of "Harvey E. Schauffler, Jr., Trustee" in January 1961. On January 3 an opening deposit of $10,450 was made by Schauffler into this account. This deposit was represented by a check payable to Schauffler from Strathmore. Upon the opening of this account, A. Turner advised Strathmore salesmen to tell customers who purchased the unregistered shares allocated to the former Perma Cement shareholders to make their payment to Schauffler.

3. Participation of the Respondents Weber, Davis, Casper, Moore and Baginski in the Disposition of Part of the 18,600 Unregistered Shares

In December 1960 Louis Moore, a former employee of Strathmore and then working for Claybaugh, told Ethel Weber, Manager of the Claybaugh office, that A. Turner had told him that there was some Popell investment stock available through Caputo and that A. Turner was going to give him some of that stock to sell. Weber spoke with A. Turner who told her that the stock was coming from Caputo, that it was not free trading stock, that it had to be sold by investment letter with an explanation to customers that the stock could not be sold for 13 months and that they would have to sign an investment letter. A. Turner also determined the price at which the stock would be sold by Claybaugh salesmen and also agreed upon the commission with her. A. Turner furnished Weber with form investment letters which the Claybaugh customers were to sign when purchasing the stock and further advised her that purchasing customers were to make payments to Caputo or Schauffler. Weber relayed this information to Davis, Casper and Baginski. Beginning December 2, 1960, Weber, Davis, Casper, Moore and Baginski began advising their customers of the availability of the Popell "investment stock" and selling it to them.

The Claybaugh salesmen used the same procedures in selling the Popell "investment stock" as the Strathmore salesmen were using. Moore sold 1,000 shares of the stock at $5.50 per share to Theodore J. Brauers, a laborer, to whom he had previously sold other Popell stock. He told Brauers that this was "investment stock" for sale at less than

the market price, that he would have to hold the stock for one year and at the end of that period he could sell it or have it reissued in his own name. Brauers, pursuant to Moore's instructions, made his remittance directly to Caputo and received from the latter shortly after December 15 1,000 shares evidenced by certificates in the names of former Perma Cement stockholders.

Baginski sold 150 shares of the aforementioned Popell stock to one customer, Frank Mysliwiec, to whom he described it as "optional stock" which would have to be held for a year; that Caputo was selling this stock and had obtained it as an officer of Perma Cement when the company was acquired by the Popell Co.; and that Mysliwiec would not receive any stock certificates until the holding period had expired. Mysliwiec sold other Popell shares which he had previously purchased, had a check made payable to Schauffler, and remitted it to Baginski who caused it to be delivered to Schauffler. Popell unregistered shares were thereafter delivered to Mysliwiec who did not attempt to sell the shares so purchased until after March 1962.

Additional sales of this Popell "investment stock" were made by Weber, Casper and Davis. They and Baginski sold a total of 2,000 shares. Moore sold 1,000. On or about January 6, 1961, pursuant to arrangements previously made with A. Turner, Weber went to Schauffler's office with Charles Klein, President of Strathmore. Schauffler wrote commission checks at the rate of $1.00 per share to Baginski for $150; to Davis for $900; to Casper for $300; and to

Weber for $650. Weber raised the point that according to her arrangements with A. Turner a larger commission was due and Klein directed Schauffler to write an additional check for $750 payable to Weber's order to cover additional commissions due her and the salesmen.

4. The Disposition of 8,294 Unregistered Popell Shares Issued in the Name of William Butterbach from the 18,600 Share Block

Butterbach, one of the original promoters of Perma Cement, owned 300 shares of the stock of that corporation. Based upon the agreed ratio of exchange between the Popell Co. and Perma Cement, he was entitled to 856 shares of Popell stock upon the completion of the acquisition. In the fall of 1960, Butterbach attended a meeting with Caputo and A. Turner where he was advised that A. Turner and Strathmore would be compensated for their efforts in bringing about the acquisition of Perma Cement by alloting to them 8,294 shares of the 28,600 shares of Popell stock to be issued to Perma Cement. Butterbach was requested at this meeting to act as a nominee for Strathmore and A. Turner. He was told that these shares would be issued in his name but that Strathmore and A. Turner would be the beneficial owners of such shares.

On November 25, 1960, Caputo caused the transfer agent to issue 8,294 shares of Popell stock in Butterbach's name from the 18,600 share block. This was in addition to the 856 shares to which Butterbach was entitled. Thereafter Caputo, on December 6, 1960, gave these certificates to Butterbach instructing him to take the

Klein a commission check dated January 6, 1961, for his activities in this transaction drawn on the Schauffler Trust Account. Ayoob signed an investment letter in connection with his purchase.

Ayoob at the time of the aforementioned purchase had been a stockholder of the Popell Co. and had received information from it, but had no other connection with it.

T. Turner sold 500 shares of the "investment stock" to John Dicoskey, a real estate broker, after telling him that it could be purchased at a price below the "market" but must be held for a period of time. Dicoskey sold 500 shares of Popell stock to acquire this block and received a certificate for 500 shares of the unregistered shares issued in the name of Butterbach.

Dicoskey had been a stockholder of the Popell Co. prior to his purchase and also had received information about the company from his son who had been employed by that company as an applicator for its products.

Henry Fricke Company was a registered broker-dealer in 1961 with offices in New York City. In late January 1961 A. Turner telephoned Henry Fricke and told him to make a sale through his books of 1,000 shares of Popell stock to Strathmore, giving the name and address of William Butterbach as the selling customer. Fricke did not know Butterbach at the time nor did Butterbach have any knowledge of this transaction. Shortly thereafter Fricke received in the mail two certificates for 500 shares each, representing certificates which had been issued in Butterbach's name and which he had turned over previously to Strathmore. Fricke returned these certificates to

certificates to a bank where he was known, have his signature guaranteed and then deliver the shares to Strathmore. Butterbach followed these instructions. Butterbach had no knowledge of the disposition of this block of stock nor did he ever receive any proceeds from its sale.

Beginning in December 1960, A. Turner arranged for Strathmore salesmen and Claybaugh salesmen to sell these unregistered shares to customers, including various amounts totaling 1,300 shares to customers whose transactions have been previously described. Also during December 1960, 400 of these unregistered shares in the name of Butterbach were sold to two other customers. Both purchasers made payment to Schauffler for the shares.

During the period January 1, 1961 to July 3, 1962, Strathmore and Claybaugh salesmen sold 5,594 other of these unregistered shares in the name of Butterbach to various brokers and customers at prices ranging from $5.00 to $17.50 per share. Payment by some of these customers were made to Schauffler.

Henjum contacted two of his customers and told them of this stock. One was Herbert Ayoob who agreed to purchase 100 shares at $5 per share after Henjum told him that he could purchase some Popell "investment stock" at a price less than the current "market" price but that he would have to hold the stock for one year. Ayoob made his payment to Schauffler. Some time later Ayoob complained to Henjum that he had not received any stock certificate for his purchase. Henjum reported that to A. Turner who said he would take care of it and Ayoob later received his certificate. Henjum received from A. Turner or

Strathmore after reflecting receipt of the stock on his books. On March 9, 1961, Fricke drew a check in the amount of $6,115.02 to the order of Butterbach. Butterbach, after receiving the check, endorsed the check and delivered it to Strathmore. Either Klein or A. Turner gave the check to Schauffler with instructions to deposit these checks in his Trustee Bank Account, which he did.

In September 1961, 1,000 more shares in the name of Butterbach evidenced by certificates which he had turned over to Strathmore were sold through an account at Strathmore in the name of Schauffler. Schauffler did not then personally own any Popell stock to sell and had no prior knowledge of this sale. The order tickets reflecting these sales were prepared by A. Turner. As a result of this sale Strathmore issued two checks to the order of Schauffler both in the amount of $4,480.01 which either A. Turner or Klein forwarded to Schauffler with instructions to deposit these checks in his Trustee Bank Account, which he did.

In January 1962 Klein told Schauffler to issue $10,000 in checks to himself and to A. Turner personally as loans. Schauffler issued the checks from his Trustee Bank Account as directed and received back a note executed by A. Turner dated January 25, payable 42 months later or July 1965. A similar note from Klein was due in three years or in January 1965. Both notes remain unpaid. No action has been taken to collect these notes.

On October 21, 1961, 94 shares of Popell stock in the name of Butterbach were sold through an account at Strathmore in the name

of Caputo at a price of $13.25 per share. Caputo denied knowledge of this transaction when he testified. On January 16, 1962, 600 additional Butterbach shares in the possession of Strathmore were sold through an account at Strathmore in the name of Edward P. Neafsey at $17.50 per share. The order ticket covering this sale was written by A. Turner and a check for the proceeds was issued to Neafsey. On July 3, 1962, 500 additional shares were sold through an account at Claybaugh in the name of Neafsey at $13.75 per share. Neafsey refused to testify about these transactions on constitutional grounds and, as previously noted, A. Turner did not take the witness stand in his own behalf.[15/]

5. Disposition by Strathmore of Part of the Remaining Shares from the 18,600 Unregistered Share Block

From the 18,600 Popell shares issued to the Perma Cement stockholders, 4,730 shares were issued to Perma Cement and 1,430 to the name of James Bilotta. Strathmore sold 530 of Bilotta shares for his account in two transactions in August and September 1961. From the 4,730 shares issued to Perma Cement, 3,300 were transferred to the name of Caputo. Sales were made from this block by Strathmore

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15/ The Division offered Neafsey immunity and obtained a Court order directing him to testify, but did not present further testimony from him. Counsel for the respondents alleges that the Division fully examined him privately and then decided not to use him and therefore no adverse inference should be drawn against A. Turner from Neafsey's assertion of his constitutional rights. While no adverse inference can be drawn, the record establishes that Neafsey dealt in shares that were the property of Strathmore. In the absence of counter-evidence it is evident that he acted as nominee for Strathmore and its principals.

in September and October, 1961 in the amount of 1,500 shares for a Pittsburgh bank which had been holding them in safekeeping for Caputo.

From the 18,600 shares 1,430 shares had been issued in the name of Jerome Baker. On March 22, 1961 Strathmore sold 1,000 of these shares.

6. Disposition by Strathmore, A. Turner, R. Turner and T. Turner of Part of 10,000 Unregistered Shares

Under the terms of the agreement between the Popell Co. and Perma Cement, 10,000 shares were held in escrow for Perma Cement stockholders from November 1960 until September 1961. During this period of time, Caputo had several discussions with A. Turner concerning the sale of this stock and arrangements were made for sale of the balance of this stock by Strathmore salesmen who instructed purchasers to send their payments to Schauffler for the Trustee Bank Account. On September 26, 1961 the 10,000 shares were mailed to Caputo by the law firm representing the Popell Co. On November 3, Caputo requested the transfer agent to reissue the 10,000 shares in the name of fifteen individuals, ten of whom were not stockholders of Perma Cement. All the ten transferees except a James R. Molster had purchased the shares through Strathmore salesmen. A chart showing the break-up of the 10,000 shares is in evidence. (Div. Ex. 303).

The five Perma Cement stockholders to whom shares from the 10,000 share block were issued were Butterbach, Guarino, Baker, Caputo and Streiffler. Caputo, who was entitled to 2,270 shares, had these

shares issued in the names of Guarino and Baker. Caputo had these nominees endorse the certificates involved and they remained in his possession until sold by him later. Streiffler received 1,716 shares. He discussed with other Perma Cement stockholders the advisability of selling these shares. At a conference in Caputo's office held shortly before October 13, 1961 he agreed to sell 700 of the shares at $5.25 a share. A. Turner then came to Caputo's office and said he could arrange for the sale of the stock and that Streiffler would receive a check shortly. A. Turner thereafter instructed Schauffler to issue a check to the order of Streiffler. The latter received a check within several days drawn on the Schauffler Trustee Bank Account. Part or all of these shares were sold by Strathmore to one or more of the 10 transferees.

Louis Guarino and some of his relatives were Perma Cement stockholders and entitled to receive Popell stock issued in the course of the acquisition of Perma Cement. Their shares were part of the escrow block. In August 1961 Guarino attended a meeting at which Leo Popell, A. Turner and Caputo were present. At this meeting Guarino agreed to sell the family Popell stock in escrow at $5.25 per share. On or about October 16, 1961 Guarino went to Caputo's office where he met A. Turner. Guarino received three checks totalling $14,264.25, drawn on the Schauffler Trustee Bank Account, representing the proceeds from the sale of 2,717 Popell shares to which Guarino and his family were entitled. Part or all these shares were sold by Strathmore at a higher price to one or more of the 10 transferees.

Peter Mascaro was entitled to 715 of the Popell shares of the 10,000 share block being held in escrow. He sold these shares to the Schauffler Trustee Bank Account at $4 per share and was issued a check on that account on September 11, 1961. Michael Ortale, entitled to 856 of these Popell shares, also sold them to the Schauffler Trustee Bank Account at $6 per share on October 16, 1961. Strathmore sold part of all of the above shares to one or more of the 10 transferees at about $12.00 per share. Rudolph Knoll was entitled to 856 of those shares, disposed of those shares through some facility other than the Schauffler Trustee Bank Account. Evidently these shares were transferred to the name of James R. Molster, an acquaintance of A. Turner.

7. Sale by Strathmore of Part of 5,866 Shares from the 10,000 Unregistered Block

Strathmore salesmen marketed part of the 10,000 share block in a manner similar to their activities in connection with the distribution of the 18,600 share block previously received by former Perma Cement stockholders. Stanley E. Guski had in December 1960 purchased some Popell stock through R. Turner signing an investment letter and making his payment to Caputo. Shortly before December 8, 1961 R. Turner offered him additional stock at one point less than the "market" with the proviso that the stock would have to be held for approximately a year. Guski bought 500 shares at $12.00 a share, made his check payable to Schauffler and mailed it to the latter, and signed a form investment letter. He received a certificate in his

own name. Previously, on November 3, 1961 Caputo had instructed the transfer agent to issue these shares.

Anthony C. Jordan, a wholesale fruit merchant, owned some Popell stock on or about September 29, 1961. T. Turner telephoned him and said that he was "short" 750 shares of Popell stock and requested Jordan to sell Strathmore that amount of shares at $10.00 a share, guaranteeing to replace those shares later at the same price. Jordan did sell 750 shares of Popell stock to Strathmore as requested. On November 3, 1961, Caputo instructed the transfer agent to issue 750 shares in the name of Jordan and on December 4, 1961 a Popell certificate was issued in Jordan's name. On or about September 25, 1962 T. Turner told Jordan that he had shares available for him and instructed him to pay for these shares by issuing his check to Edward P. Neafsey in the agreed amount. Jordan followed these instructions.

John Logan, Herbert Carmichael, Daniel Davis, and Edgar Miller were customers of Strathmore who were sold unregistered Popell shares from the 10,000 share block. They were contacted by Strathmore salesmen and offered these shares at a price supposedly lower than the current "market" price. They agreed to buy at $12.00 per share and were instructed to make their payments to Schauffler. Information was relayed to Caputo by these salesmen of Strathmore of the names of these purchasers and Caputo on November 3, 1961 instructed the transfer agent to issue from the 10,000 share block to the purchasers, the number of shares each had purchased. Three of the

purchasers bought 500 share blocks and one bought 300 shares. All payments were deposited in the Schauffler Trustee Bank Account in January 1962. Investment letters were prepared for these purchasers but were never executed. These purchasers all were shareholders of the Popell Co. at the time of their purchases from the 10,000 share block and had received information issued by Popell to its stockholders but otherwise had no special connection with that company or its management.

James R. Molster, a steel salesman residing in the Washington, D. C. area and a personal friend of A. Turner, had lunch with A. Turner, Charles Klein and Leo Popell in 1960 or 1961. During the luncheon it was suggested to him that Popell stock would be a good investment. Molster said he was not interested. However, pursuant to advice from A. Turner Caputo instructed the transfer agent to issue out of the 10,000 share block 1,316 shares in the name of Molster. This was done on December 4, 1961. At a meeting some time later between A. Turner and Molster, A. Turner showed the certificate to Molster and asked if he would like to buy the stock. Molster disclaimed interest and at A. Turner's request endorsed the certificate and returned it to A. Turner.

On January 2, 1962 Strathmore sent the certificate to the transfer agent and instructed it to issue certificates in varying amounts to five individuals. This was done on January 25, 1962. One of those certificates was in the name of Mildred Fritz who was a customer of A. Turner at Strathmore. She purchased these shares after A. Turner advised her that there was Popell "investment" stock

available which she could purchase from someone other than Strathmore. She made her payment to Schauffler and signed the form investment letter. She also had been a stockholder of the Popell Co.

Contentions of the Parties; Conclusions

The Division alleges that the registrant and the individual respondents violated Section 5 of the Securities Act in the sale of the Popell Co. stock received by the Perma Cement stockholders. Section 5 prohibits the use of the mails or facilities of interstate commerce to sell a security upless a registration statement is in effect as to those securities. A person claiming the benefit of an exemption from this requirement has the burden of proving entitlement to it.[16/] No registration statement was in effect for the Popell stock issued to the Perma Cement stockholders. The respondents urge that transactions in those securities as previously summarized were exempt transactions within the meaning of Section 4 of the Securities Act, specifically the private offering exemption:

> "(2) transactions by an issuer not involving any public offering."

and the general exemption:

> "(1) transactions by any person other than an issuer, underwriter, or dealer."

16/ S.E.C. v. Ralston Purina Co., 346 U.S. 119 (1953); Gilligan, Will & Co. v. S.E.C., 267 F. 2d 461 (C.A.2, 1959); S.E.C. v. Culpepper, 270 F. 2d 241 (C.A.2, 1959); Flanagin, "The Federal Securities Act and the Locked-In Stockholder," 63 Michigan Law Review 1129, 1141.

Respondents contend that the stock of the former Perma Cement stockholders was offered to a limited group who were all Popell stockholders at the time and who signed letters stating they were buying the stock for investment. Therefore, it is argued these transactions fall within the private offering exemption.

The Supreme Court has ruled in the Ralston Purina case, supra, that ". . .there is no warrant for superimposing a quantity limit on private offerings as a matter of statutory interpretation." (P. 125). It further stated, "The natural way to interpret the private offering exemption is in the light of the statutory purpose. Since exempt transactions are those as to which 'there is no practical need for [the bill's] application,' the applicability of 4(1) should turn on whether the particular class of persons affected need the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction 'not involving a public offering'." (P.124).

The persons who took the Popell stock first issued to the former Perma Cement stockholders had only one common link - they had previously bought Popell shares. Otherwise they had diverse backgrounds ranging from laborer to executive positions. None of them had any close association with the Popell Co. In Ralston Purina, the Supreme Court found that ordinary employees would not be in the class that might fall in the private offering exemption but only employees such as "executive personnel who because of their position have access to the same kind of information that the Act would make available in the form of a registration statement." (supra, P. 125). Ordinary stock-

holders do not fall into a class which has independent access to the detailed records of a company to verify information furnished by the company and to obtain further relevant information.[17] This offering was made to unrelated and uninformed persons and the private offering exemption does not apply to the transactions with them.[18]

The use of "investment letters" has no relevancy to the issue here once there has been a determination that the private offering exemption does not apply to the original distribution. It would only warrant consideration if there had been a determination that the exemption applied to an original disposition with an issue remaining whether there had been a later distribution which nullified the exemption.[19]

Respondents also urge that the offering was exempt under Section 4 as being transactions by persons other than an issuer, underwriter, or dealer. Specifically, it is argued that there has

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17/ S.E.C. v. Sunbeam Gold Mines Co., 95 F. 2d 699(1938).

18/ "Non-Public Offering Exemption," Sec. Act Rel. 4552 (Nov. 6, 1962); Gearhart & Otis, Inc., Sec. Act Rel. No. 7328 (June 2, 1964), P. 29-30; Gilligan, Will & Co. v. S.E.C., 267 F. 2d 461, 467 (C.A. 2, 1959), cert. den. 361 U. S. 896 (1960). Note in 72 Harvard Law Review 784 (1959); Advanced Research Associates, Inc., Sec. Act Rel. No. 4630 (August 16, 1963); Dempsey & Company, 38 S.E.C. 371 (1958); Rock Frederick Houle, 39 S.E.C. 821 (1960); D. F. Bernheimer & Co., Inc., Exch. Act Rel. No. 7000 (Jan. 23, 1963); Cohen, "Federal Legislation Affecting Securities," 28 George Washington Law Review 119, 141-42.

19/ "Non-Public Offering Exemption," supra; U.S. v. Custer Channel Wing Corp., 247 F. Supp. 481, 490 (1965).

been full compliance with the requirements of Rule 133 under the Securities Act. This Rule provides, in paragraph (a) thereof, that for the purposes only of Section 5 of the Securities Act no sale shall be deemed to be involved so far as stockholders are concerned where, as here, assets of a company are exchanged for stock of another. With respect to subsequent disposition of the acquired stock it is provided:

> "(c) Any constituent corporation [...any corporation other than the issuer, which is a party to any transaction specified in paragraph (a)] or any person who is an affiliate of a constituent corporation [...a person controlling, controlled by or under common control with a specified person] at the time any transaction specified in paragraph (a) is submitted to a vote of the stockholders of such corporation, who acquires securities of the issuer in connection with such transaction with a view to the distribution thereof shall be deemed to be an underwriter of such securities within the meaning of Section 2(11) of the Act. A transfer by a constituent corporation to its security holders of securities of the issuer upon a complete or partial liquidation shall not be deemed a distribution for the purpose of this paragraph."

Paragraph (d) of Rule 133 provides in pertinent part that a person specified in (e) shall not be deemed to be an underwriter nor to be engaged in a distribution of securities acquired in any transaction specified in paragraph (a) which are sold by him in brokers' transactions and in accordance with specified conditions and limitations. One of the limitations is that the total sales of the same class by such person or on his behalf within the preceding six months, if the security is traded only otherwise than on a securities exchange, will not exceed one percent of the shares of such security outstanding.

The respondents contend that under the provisions of Section 2(11) of the Securities Act and Rule 133 all the Perma Cement stockholders except Caputo were ordinary stockholders free to sell the Popell shares they acquired without limitation. It is conceded that Caputo was a controlling person within the meaning of Rule 133, but as to him, it is argued he complied with the one percent rule. The Division asserts that all the Perma Cement shareholders constitute a single control group and that considered as a unit their distribution exceeded the one percent rule and, as a control group, they engaged in a public distribution of their Popell shares in violation of Section 2(11) of the Securities Act.

"Control" has been defined as "...the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contracts, or otherwise" (Securities Act Rule 405). Control may be exercised by a group acting together, in concert, for a common purpose.[20/] A person with small percentage holdings may be part of a large controlling group. If a control person is a member of a cohesive group, the entire group may be deemed in control if the

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20/ Sommer, "Who's In Control - S.E.C.," 21 The Business Lawyer 559, 581 (April 1966); Flanagin, "The Federal Securities Act and the Locked-In Stockholder," 63 Michigan Law Review 1139, 1145 (May 1965); "Regulation of Nonissuer Transactions Under Federal and State Securities Registration Laws," 78 Harvard Law Review 1635, 1637 (1965).

relationship of the group members to each other and to the issuer is sufficiently close. The fact that a number of people act in concert to effect a distribution has been recognized as a strong indication of a cohesive control group. 21/

Perma Cement had a small group of nineteen stockholders. The evidence establishes that Caputo was the dominant force in the group and his lead was followed in major decisions. Stockholders approved the arrangements he had negotiated for the acquisition of Perma Cement by the Popell Co. and fully participated in the plan he worked out for the disposition of their stock. In all these steps, they acted together for the common purpose of acquiring and distributing their Popell shares. This group control must be deemed to have continued during the disposition period since disposition of the shares began very shortly after the shares were acquired - a matter of days. Considered as a unit, the requirements of Rule 133 were not complied with in the sales by the group since the one percent rule was exceeded. 22/

Even if the contention of the respondents that all the Perma Cement shareholders except Caputo were not controlling shareholders were accepted it does not follow that the plan of disposition

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21/ S.E.C. v. Culpepper, 270 F. 2d 241 (C.A. 2, 1959); Flanagin, supra, P. 1145.

22/ A. Turner and Strathmore were the beneficial owners of a large block of the stock received from the Popell Co. and kept in the name of Butterbach. They clearly acquiesced in the procedures utilized by the control group and, in fact, materially assisted in the ensuing distribution.

used here was in compliance with the requirements of the Securities Act. It is provided in Section 2(11), in pertinent part, that "The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking. . ." Ordinary non-controlling stockholders receiving shares from an issuer in an acquisition such as is involved here who take with an intent to re-sell those shares and who do so are participating in a distribution in a direct chain from an issuer. The Commission has pointed out that such sales may be exempt, but only under certain conditions:

> "The theory of Rule 133 is that no sale to stockholders is involved where the vote of stockholders as a group authorizes a corporate act such as a transfer of assets for stock of another corporation, a merger or a consolidation because there is not present the element of individual consent ordinarily required for a 'sale' in the contractual sense. However, this does not mean that the stock issued under such a plan is 'free' stock which need not be registered insofar as subsequent sales are concerned. Unless the Securities Act provides an exemption for a subsequent sale of such non-registered stock, registration would be required. Of course, subsequent casual sales of such stock by non-controlling stockholders which follow the normal pattern of trading in the stock would be deemed exempt from the provisions of Section 5 of that Act as transactions not involving an issuer, underwriter or dealer under the first clause of Section 4(1) of the Securities Act. However, if the issuer or persons acting on its behalf participate in arrangements for a distribution to the public of any of the stock issued to stockholders or have knowledge of a plan of distribution by, or concerted action on the part of, such stockholders to effect a public distribution in connection with the transaction, a Section 4(1) exemption would not be available since an underwriting within the meaning of the statute would be involved." 23/

23/ Great Sweet Grass Oils Limited, 37 S.E.C. 683, 690 (1957); Cohen, "Rule 133 of the Securities and Exchange Commission," 14 Record of the Assn. of the Bar of the City of New York, 162, 177; Sec. Act Rel. No. 3846 (October 10, 1957).

The distribution of the holdings of the former Perma Cement stockholders was anything but a casual disposition in the normal pattern of trading. There was a single plan of disposition, centrally administered and controlled whereby all shares were sold at a fixed price. Caputo played a key role in the formulation and administration of this plan and, under these circumstances, the one percent rule in Rule 133 is not applicable to transactions in his shares since that rule is applicable to sporadic sales and not to a planned distribution.[24/]

Finally, the respondents rely on the use of "investment letters" in the sales here in question and urge that no distribution of securities took place within the meaning of the Securities Act. The evidence establishes that salesmen told their customers that they would have to hold the acquired stock for a one-year period before they could make a disposition of their stock. The fixing of a holding time limit does not necessarily establish an original investment intent, in fact it might raise a question whether such an intent was in the mind of a purchaser.[25/]

24/ Sec. Act Rel. No. 4669 (Feb. 17, 1964); Voelker, "The Securities Act of 1933 and Stockholders of Acquired Corporations," Vol. 1965 Duke Law Journal 1, 12; Flanagin, supra, P. 1163-1164; Sommer, "Mergers, Consolidations, Sales of Assets - Rule 133, 16 Western Reserve Law Review 11, 33 (1964).

25/ Sec. Act Rel. No. 4552 (Nov. 6, 1962); Voelker, supra, P. 3; "Regulation of Nonissuer Transactions under Federal and State Securities Registration Laws," 78 Harvard Law Review 1635, 1637 (June, 1965).

While some of the purchasers of the Popell stock involved held their stock for substantial periods and evidenced an investment intent, it is clear as to others from the record that they regarded the one-year bar as a quid pro quo for their obtaining their stock at an alleged discount from the market price and felt free to make a disposition as soon as the limitation would be met. Also, the one-year limitation was not met in all cases thus negating the defense asserted here. 26/

It has been established that a distribution of the Popell shares received by the former Perma Cement shareholders commenced as soon as the shares were received. Shares from the escrow block were sold even before they were received. Sales were made to persons who had no close connection to the Popell Co. and who were in the class of persons for whose protection the registration provisions of the Securities Act were adopted. Distribution was made in accordance with a fixed plan under circumstances where no exemptions from registration were available.

The registrant, Strathmore, and A. Turner, one of its principals, played a key role in the distribution. The direction of the distribution was under their control. A. Turner instructed Strathmore salesmen in procedure, made arrangements with Claybaugh and its salesmen, negotiated commission compensation, issued instructions for disbursements from the Schauffler Trustee Account, and participated

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26/ Cameron Industries, Inc., 39 S.E.C. 540, 545-46 (1959); Advanced Research Associates, Inc., supra, P. 12.

in sales to customers. It is concluded that registrant and A. Turner violated and aided, abetted and caused violations of Section 5 of the Securities Act and that such violations were willful.[27/]

The salesmen at Strathmore and Claybaugh named in the order for these proceedings, and Ethel I. Weber, Pittsburgh office manager of Claybaugh, played key roles in the distribution to the public. It has been urged on behalf of the salesmen that they relied on arrangements worked out by their superiors and also relied on the fact that well-known attorneys were participating in the distribution. However, it is significant that they made no effort to check on the validity of the transactions they were about to negotiate despite their knowledge that these transactions were not being treated as ordinary brokerage transactions. A securities salesman has a personal responsibility to take independent action to avoid violations of the securities laws.[28/] None of the salesmen made any such efforts nor did they attempt to find out whether any legal determination had been made of the legality of the proposed offering.[29/]

27/ See authorities cited in footnote 11, P. 30.

28/ Mac Robbins & Co., Inc., Sec. Exch. Act Rel. No. 6846 (July 11, 1962).

29/ While a legal opinion, as such, would not have furnished a full defense (Sec. Act Rel. No. 4445, February 2, 1962), it would have been some evidence that these respondents were attempting to fulfill their obligations.

It is concluded that the respondents, R. Turner, T. Turner, Henjum, Moore, Davis, Casper, Baginski, and Weber, singly and in concert, aided, abetted and caused violations of Section 5 of the Securities Act in the sales of Popell Co. stock on behalf of the former Perma Cement stockholders.

E. Acquisition of Manor Lake Development Corporation by L. F. Popell Co., Inc., and Issuance of 50,139 Popell Shares Therefor

About September 1959 Schauffler was approached by A. Turner, Sr., who asked his advice concerning certain real property located near Cresson, Pa. Thereafter, Schauffler became personally interested in this property and purchased options on it for approximately $3,000. Subsequently, Schauffler was approached by A. Turner and Klein, who discussed with him the idea of selling the options to Manor Lake Development Corporation, a land development company. Schauffler agreed to the proposal and assigned the options to Manor Lake in return for 30,000 shares of Manor Lake stock. Manor Lake itself in 1960 made a public offering of stock, intrastate, with Strathmore as the underwriter. A. Turner and Klein were listed as directors of the company.

In September or October 1961 A. Turner and Klein advised Schauffler that the Popell Co. might acquire the assets of Manor Lake in a stock exchange. A Turner and Klein, then Manor Lake president, and the other directors were conducting the negotiations on behalf of Manor Lake with the Popell Co. and from time to time they advised

Schauffler of the course of the negotiations. In early October Popell and his counsel met with Charles Klein, A. Turner and others to discuss the acquisition and how it would be accomplished. A stumbling block was an outstanding mortgage on certain property of Manor Lake. After some negotiations Klein proposed a plan whereby Manor Lake would issue a certain amount of its stock in the name of Walter Criste, an attorney and a personal friend of Klein, and such shares would be sold and the proceeds used to satisfy the mortgage. Under these circumstances Popell agreed to the acquisition of Manor Lake by the Popell Co.

On December 27, 1961, 50,139 shares of unregistered Popell stock were issued to the stockholders of Manor Lake in exchange for their shares. Klein received 3,065 shares; A. Turner received 2,440; Criste, who had not disposed of the Manor Lake shares he held to satisfy the mortgage, was issued 10,000 shares; and Schauffler received 9,500 shares. These four holders received a total of 25,005 shares and 199 other Manor Lake stockholders received the balance of 25,134 shares.

1. Sale by Strathmore of 2,000 of the 3,065 Popell Shares Issued to Klein

Soon after the Popell shares were issued to the Manor Lake stockholders sales were made from these holdings. A chart showing the breakup of the key blocks is in evidence (Div. Ex. 374). On January 22, 1962, Klein sold 1,000 of these shares to Strathmore at $17.00 a share. Strathmore had previously sold these shares to cus-

tomers and the certificates that were received from Klein were used to fill these obligations. On March 15, 1962 Klein sold an additional 1,000 of these shares to Strathmore at $18.50 per share. Strathmore delivered into its trading account the two certificates received from Klein, and thereafter sent them to the Transfer Agent for use in filling orders of various Strathmore customers who had been sold stock during the period January 9, 1962 to February 28, 1962 at prices ranging from $17.00 to $20.25 per share. None of these purchasers had any special relationship to the Popell Co. other than as possible stockholders.

2. Sale by Strathmore of the 2,440 Unregistered Popell Shares Issued in the Name of A. Turner

A. Turner, on January 22, 1962, sold 1,000 of his unregistered shares to Strathmore at $17.00 per share. He sold an additional 1,000 of these shares to Strathmore on March 15, 1962. These shares were used by Strathmore to fill orders to customers and brokers.

3. Disposition by Strathmore of Part of the 10,000 Unregistered Shares in the Name of Criste through the Criste Trustee Bank Account

Walter A. Criste was the Secretary of Manor Lake and according to arrangements previously discussed 10,000 shares of Popell stock were issued in his name on December 27, 1961, so that these shares could be sold and the proceeds used to satisfy a mortgage on a Manor Lake property. Pursuant to instructions, Criste opened a Trustee Bank Account on or about January 9, 1962, to receive and

disburse the sale proceeds. The records of the Transfer Agent of the Popell stock reflect Criste's address as at the same building where the office of Strathmore is located.

On January 2, 1962, Strathmore purchased from an account in the name of Criste 570 shares of this unregistered stock at $15.75 per share and sold them to various customers. Criste, as instructed by Klein, deposited the check in payment in a bank account other than the Criste Trustee Bank Account and disbursed these proceeds in payment for Manor Lake obligations. The same procedure was followed on January 11, 1962, when Strathmore purchased an additional 1,000 shares from an account in the name of Criste.

From December, 1961 to July, 1962, 5,300 shares of unregistered Popell stock were sold to various customers. In general, Strathmore salesmen used the same procedure which has previously been described of approaching their customers, offering this stock as so-called "investment stock" and directing the customer to make payment to Criste and to sign an "investment letter."

Stanley E. Guski, who had previously been sold Popell "investment stock" by R. Turner, was again approached by him in February, 1962 and agreed to purchase an additional 100 shares of "investment stock" at $16.25 per share. As instructed by R. Turner, he mailed his check in payment to Criste at an address which Turner furnished him. The check was deposited in the Criste Trustee Bank Account and subsequently Strathmore delivered to Guski a certificate for the 100 shares in the name of Criste.

Nicholas Marie maintained an account at Claybaugh in 1962 where Moore was his saiesman. On or about February 5, 1962, Moore suggested that Marie purchase certain shares of Popell "investment stock" which he would have to hold for a period of time. Moore further stated that he could get 1,000 shares at a price somewhat less than the quoted "market" price. Pursuant to Marie's request for 1,500 shares, Moore called A. Turner who told Moore that he could obtain that amount of shares. A. Turner also told Moore to have Marie make his check payable to Edward Neafsey. The sale took place at the approximate price of $15.50 a share. Marie delivered his check to Moore and it was subsequently deposited in the Criste Trustee Bank Account. Marie also executed an "investment letter" which Moore gave him. Sometime thereafter Moore delivered 1,500 unregistered shares to Marie, evidenced by Popell certificates in the name of Criste.

A. Turner, in January or February of 1962, sold 200 unregistered shares in the name of Criste at $16.50 per share to Mildred E. Fritz. He told her she could buy at a price below the "market" price. As instructed, Mrs. Fritz mailed her payment to Criste and signed an "investment letter." Mrs. Fritz, a widow, had previously bought Popell stock through A. Turner and was a Popell stockholder at the time of this additional purchase.

L. Frank Vogel, who had previously been sold Popell "Management Stock" by T. Turner was again contacted by T. Turner in February, 1962 and agreed to buy an additional 500 shares at $15.50 per

share. He mailed his payment directly to Criste, the check was deposited in the Criste Trustee Bank Account, and thereafter Strathmore delivered to him a certificate in the name of Criste for his 500 shares. He signed an "investment letter."

Ernest Feitl maintained an account at Strathmore and A. Turner was his salesman. In December, 1961, A. Turner offered Feitl some Popell "investment stock" at a price less than the "market" price. Feitl purchased 500 shares at $10.75 per share and, pursuant to A. Turner's instructions, issued his check payable to Schauffler and mailed it as directed. Feitl also executed an "investment letter." In January, 1962 A. Turner again advised Feitl that he could purchase 500 more shares of "investment stock" at a price below the "market" price. Feitl purchased an additional 500 shares at $15.50 per share and, as instructed by A. Turner, issued his check to the order of Richard F. Whelan, Agent (Whelan was President of the Mortgagee of Manor Lake). Feitl again executed an "investment letter" and received Popell certificates in the name of Criste.

Michael Slish, a customer of Strathmore, purchased 500 of the unregistered Popell shares on February 19, 1962, at $15.50 per share, made his check payable to Criste as directed, and received a certificate for 500 unregistered shares in the name of Criste.

George E. Lekas, another Strathmore customer, purchased 500 of these Popell shares on February 16, 1962, at $15.75 per share, made his payment directly to Criste, who deposited it in the Criste

Trustee bank account, and thereafter received a Popell certificate in the name of Criste.

William de Marsh, another customer of Strathmore, purchased 1,000 unregistered shares on July 13, 1962. He made his check payable to Schauffler and the check was deposited in the Schauffler Trustee bank account. He received Popell certificates in the name of Criste.

4. Sale of Part of the 9,500 Popell Shares in the Name of Schauffler

On December 27, 1961, as a result of the acquisition of Manor Lake by the Popell Co. 9,500 unregistered shares of Popell stock were issued in the name of Schauffler. Schauffler received the 9,500 shares and delivered part of them to Strathmore, which began to sell these shares beginning about April, 1962.

On or about April 18, 1962, 1,000 of these Popell shares were sold to Strathmore at $17.00 per share through an account in the name of Edward Neafsey. To consummate this sale a certificate for 1,000 shares was received by Strathmore and was subsequently used by it to fill orders of its customers. On or about July 10, 1962, Schauffler, after discussions with either A. Turner or with Klein, sold to Strathmore 1,000 of these unregistered shares at $15.00 a share through an account in his own name. Strathmore received a certificate in its trading account and thereafter used the certificate to fill orders from customers and brokers.

On or about August 21 Schauffler sold an additional 1,000 of these unregistered shares to Strathmore at $17.50 through an account in his own name. Strathmore used the certificate to fill various orders.

F. Operation and Control of the Caputo, Schauffler and Criste Trustee Bank Accounts

The evidence establishes that Strathmore and its principals had a close association with Caputo, Schauffler and Criste in their operation of the trustee bank accounts used in the disposition of Popell stock. Caputo and A. Turner had discussions concerning the sale of Popell shares of former Perma Cement stockholders at the time the Popell Co. issued shares to them. When the procedure was adopted of selling stock as "investment stock" Strathmore salesmen after receiving information from A. Turner took the lead in arranging sale of this stock. Certain purchasers forwarded their checks to Strathmore and these were forwarded by it to Caputo.

Upon the opening of the Schauffler Trustee Bank Account Caputo told Schauffler that he would be receiving checks from purchasers of the unregistered Popell stock which would be forwarded to him by Strathmore, A. Turner and others. He also instructed Schauffler that he was to take instructions as to the operation of the trustee bank account from A. Turner and Klein.

By at least February 23, 1961 Schauffler had begun to

receive checks of customers who had purchased the unregistered stock by mail or by delivery from A. Turner or Klein. He also received instructions from them to deposit such checks in the trustee bank account. On other occasions Schauffler received Strathmore checks payable to him and was instructed by A. Turner or Klein to deposit these checks in his trustee bank account.

Throughout the active existence of the Schauffler Trustee Bank Account Schauffler made disbursements at the instruction of A. Turner and Klein. He wrote commission checks for sales of Popell stock to all the individual respondents named in this proceeding.

On January 24, 1961 A. Turner instructed Schauffler to draw a check on the trustee bank account to an individual who had performed certain advertising services for the Popell Co. and Manor Lake under the direction of A. Turner and Klein. This check in the sum of $300 was supplemented on February 2, 1961 by an additional check of $2,700. A. Turner caused these checks to be delivered.

On January 25, 1961 Schauffler drew a check on the trustee bank account at the instructions of either A. Turner or Klein, payable to a David Phillips for $5,000. Schauffler mailed this check to Phillips along with a letter which had been dictated to his secretary over the phone by either A. Turner or Klein at Strathmore. These funds were forwarded for the purchase of Craft Glass Pools stock by Strathmore.

On July 26, Schauffler drew a check on this trustee bank account to Gerson Publications for $750. This check was in payment for advertising by Strathmore concerning Popell stock.

On February 19, 1961 Schauffler drew a check on the trustee bank account at the instructions of A. Turner payable to Robert Bruce in the amount of $400. This check was mailed to Bruce at the Popell Co. office.

On January 25, 1962 Schauffler drew two checks on his trustee bank account, each in the sum of $10,000: one payable to A. Turner and one to A. Klein. Schauffler received his instructions to issue these checks from either Klein or A. Turner. As previously noted, Klein and A. Turner furnished long-term promissory notes for these sums which have become due and which remained uncollected at the time of the hearing.

On February 28, 1962 either A. Turner or Klein instructed Schauffler to write a check on the trustee bank account to P. G. Acceptance Corporation, a corporation owned or controlled by Popell in the amount of $14,250. Schauffler issued and mailed this check to the Popell Co. office along with a covering letter as instructed.

On March 29, 1962 Schauffler, at the instructions of Klein, drew a check on his trustee bank account payable to the president of a company which held the mortgage on the Manor Lake property. The check in the amount of $25,000 was to be applied to that mortgage.

On June 19, 1962 A. Turner instructed Schauffler to draw a check for $6,000 on the Schauffler Trustee Bank Account payable to Langley-Howard, Inc., and to reflect it as a loan by A. Turner. This check was actually in payment of a personal obligation of A. Turner to John Howard, President of Langley-Howard.

On August 28, 1962 at the instructions of A. Turner, Schauffler drew a check on his trustee bank account for $2,000 to the Cresson Lake Club. Schauffler mailed this check to the Cresson Lake Club stating he was acting on instructions of A. Turner.

Criste made two disbursements from the Criste Trustee Bank Account at the direction of Klein and Popell with A. Turner being present when Criste received instructions on the second payment. A first disbursement, on February 21, 1962, was a payment of $23,000 payable to the mortgagee on the Manor Lake property. A second check dated February 28, 1962, for $29,425 was issued by Criste to a corporation owned or controlled by Popell.

Contentions of the Parties; Conclusions

The Division contends that Klein, A. Turner, Criste, and Schauffler constituted a control group of Manor Lake, that they engaged in a distribution of the Popell shares they received and since no registration statement was in effect as to those shares and no exemption applied, registrant, A. Turner, and the salesmen who participated in the sales made in the course of that distribution, willfully violated Section 5 of the Securities Act.

It is argued in opposition that there was no control group here. As to Schauffler, it is contended that he was not an officer or director of Manor Lake, had little influence in its affairs. The same position is taken with respect to A. Turner. In addition it is pointed out that he received 2,440 shares out of a total of 50,139. Klein received a higher amount, 3,065, and while it is conceded he at one time was a controlling person in the Manor Lake organization and participated in the negotiations with the Popell Co., it is asserted he became ill and was not a controlling influence at the time of the stock transfer and could have disposed of his stock as an ordinary shareholder or as a control person selling under a change of circumstances. Criste, it is further urged, disposed of shares in his name in a private offering for the purpose of paying off a mortgage.

The disposition of the Popell shares received by the Manor Lake stockholders can be evaluated only in its context. Commencing in December, 1959 successive distributions of Popell stock were made to the public. First, 300,000 were marketed under an asserted exemption from registration, pursuant to Regulation A. In November 1960, distribution of 18,600 shares received by Perma Cement stockholders began. This continued during 1961 to be supplemented later that year by 10,000 additional shares of Popell stock held in escrow for those shareholders. When this distribution was well under way arrangements for the Manor Lake acquisition were completed. This

involved the issuance of another large block of Popell shares, 50,139, which could be used in a further public distribution.

Klein, A. Turner, Criste, and Schauffler, considered as a unit, clearly had control of Manor Lake prior to the acquisition by Popell Co. in view of their holdings. The evidence shows that Strathmore at the time was engaged in substantial trading activities in Popell shares and needed stock to cover trades already made and future needs. The acquisition stock proved a ready source of supply. A. Turner and Klein each furnished 2,000 shares to Strathmore. The block of Criste trustee stock of 10,000 shares was also used for sales. Later, the Schauffler holdings were used.

What is significant in determining the issue here is not the extent of the individual holdings of Klein, A. Turner, Criste and Schauffler (although each of the latter two controlled a 20% block of Popell shares) or the connections of each to Manor Lake (Klein was a controlling officer and negotiated the arrangements with Popell Co.), but that all four acted together to see to it that Strathmore was supplied with as much stock as it could market. The four individuals were not strangers to each other but were acting as a unit in the disposition of Popell stock and distribution of the proceeds. For these reasons and the legal authorities referred to in a prior section of this decision, the undersigned concludes that Klein, A. Turner, Criste, and Schauffler were a controlling group of Manor Lake acting in concert, that the Popell shares they received

in the acquisition were not exempt from registration, and that by their activities in sales transactions of those shares, the registrant, A. Turner and registrant's salesmen, R. Turner and T. Turner willfully violated Section 5 of the Securities Act.

G. Violations of Record-Keeping Requirements and Anti-Fraud Provisions of the Securities Acts

The Division contends that the bank trustee accounts were used as a device to avoid reflecting transactions on the books of Strathmore and the failure to do so was violative of record-keeping requirements applicable to brokers and dealers (Section 17(a) of the Exchange Act and Rule 17a-3 thereunder). It is argued, in opposition, that the sales were not made by Strathmore as principal or agent, no compensation was payable to Strathmore, and that it had no responsibility for normal brokerage functions such as receiving payment and delivering stock certificates.

The record establishes that Strathmore and its principals, Klein and A. Turner, played key roles in the disposition of Popell stock from the trustee bank accounts. Most of the sales were negotiated by Strathmore salesmen who acted after receiving detailed instructions from A. Turner. A. Turner personally made some of the trades. The Strathmore salesmen used the office facilities of Strathmore just as they did in other sales. A. Turner set the prices for sales, established commission rates, and he and Klein controlled disbursements from the trust accounts. In summary, the substance of the transactions was under the control of Strathmore and its

principals; the clerical operations were left to trustees who maintained the records and received money from and delivered stock to persons whom they did not know and who were mere names to them. This is not a case of an isolated transaction by a broker, but a consistent course of conduct extending for almost a two-year period. These transactions were Strathmore transactions in that Strathmore exercised control over the fundamentals. It is concluded that the registrant and A. Turner willfully violated the record-keeping requirements applicable to brokers and dealers by their failure to record on the books and records of Strathmore transactions in Popell stock as recorded in the trustee bank accounts.

In the above respect and in the failure to reveal to customers that the sale of Popell stock in which they participated was made in violation of Section 5 of the Securities Act with contingent liabilities arising therefrom, registrant and A. Turner willfully violated the anti-fraud provisions of the Securities Acts.

H. Activities of Michael R. Ventura in the Distribution of Popell Stock

It is alleged in the order for the proceedings that Michael R. Ventura violated the registration provisions of the Securities Act (Sections 5(a) and (c)) in assisting in the distribution of certain Popell shares owned by former Perma Cement stockholders. Ventura has been employed as a registered representative in the Pittsburgh office of Merrill Lynch, Pierce, Fenner & Smith,

Inc. since January 1956. He has been a personal acquaintance of Caputo since the early 1930's and has seen him socially from time to time. In 1958 as a result of a suggestion from Ventura, Caputo opened an account at Merrill Lynch but this account was dormant except for one trade until April 1961 when Caputo sold some Popell stock through this account.

According to Caputo, prior to this sale he had been in touch with Ventura about the Popell stock. Before the acquisition of Perma Cement by the Popell Co. Caputo was interested in getting quotations on the current price of Popell stock and, according to his testimony, he contacted brokers several times a week commencing in October 1960 to get quotations. Among those he called for this information was Ventura of Merrill Lynch. Continuing his testimony, Caputo stated that after the acquisition of Perma Cement by the Popell Co. he was interested in disposing of shares which had been given to the stockholders of Perma Cement and that he sought to arrange so-called private sales through brokers. He named Ventura as one of those he contacted although he further stated that Ventura never was able to find a buyer for them. Ventura denied that any such discussions had taken place. Caputo's testimony is credited.

In April 1961 Caputo called Ventura and after receiving a market quotation from him on the Popell stock instructed him to sell 900 shares. Ventura arranged for the sale of these shares at prices ranging from $7.375 to $7.75 per share and the sale was handled in the usual manner. At the time of the sale Ventura made no inquiry

as to the source of these shares. Caputo delivered stock certificates for 900 shares to complete the sale which he had received out of the 18,600 share block given by the Popell Co. to the Perma Cement shareholders and which were unregistered. Ventura testified that he did not know of Caputo's association with Perma Cement nor had he heard of its acquisition by the Popell Co. in 1960. He denied knowing of any connection between Caputo and Popell and asserted that he only knew that Caputo was an attorney in active practice in Pittsburgh who had held official positions.

Approximately sixteen months later, on or about August 13, 1962, Caputo telephoned Ventura and asked him to sell two additional Popell shares for him. He also stated that he had certain clients who wished to sell their Popell stock. After receiving a quotation from Ventura, Caputo, according to his testimony, directed Ventura to sell a stated number of shares for two persons, Louis Guarino and James Bilotta, at a price of approximately $16.00 per share. Accounts were opened in the names of Guarino and Bilotta at Merrill Lynch and on August 13, 1962, 207 shares of Popell stock were sold through Guarino's account. Actually Guarino was the nominee for these shares which were issued out of the 10,000 share block in Guarino's name and which actually belonged to Caputo. The Merrill Lynch opening account card for Guarino, prepared by Ventura, reflects Caputo's business phone number as the phone number for Guarino, but includes Guarino's then home address. Guarino received a confirmation for this sale from Merrill Lynch and subsequently a check which he endorsed and delivered to Caputo.

On August 13 Ventura also opened an account at Merrill Lynch in the name of James Bilotta and sold 39 shares of unregistered Popell shares through this account at $16.50 per share. Bilotta's account card lists Caputo's office number and the check in payment was sent to Caputo's office.

Ventura denied that Caputo gave him orders to sell for Bilotta and Guarino and asserted that Caputo did no more than refer him to these persons as clients who had Popell stock they might be interested in selling at the quoted price. He testified that he communicated with them by telephone, received orders to sell from them and additional information which he needed to complete their account cards. Guarino testified and recalled speaking with Ventura about the transaction but had no distinct recollection of what was said. Bilotta did not testify.

Ventura made additional sales of Popell stock. On or about September 7, 1962 Caputo telephoned him and directed him to sell 45 more shares of his stock at a quoted price of $19.625 per share for which he received a check for $867.59. Also, on September 7, 1962 Ventura sold 63 shares of Popell stock for a Rose Prinzo at the price set forth above for which she received payment of $1,218.54. On the same day Ventura sold 821 additional shares of Popell stock for the account of Jerome Baker at prices of $19.50 a share and $19.625 per share. An additional 422 more Popell shares were sold for Baker on September 10, 1962 by Ventura at prices ranging from $19.625 to $19.75 per share.

Caputo delivered unregistered Popell stock to cover the sales by Prinzo and Baker. Of the stock sold in the name of Baker, Caputo was a true owner of 1,185 of those shares. Checks were issued to Baker in payment for the shares sold totalling $22,801.99.

Again, there is a conflict in the testimony between Caputo and Ventura as to whether Caputo actually directed the sale of the shares for Prinzo and Baker, as Caputo testified, or whether he merely directed Ventura to communicate with them as persons who had Popell stock to sell, which is Ventura's. Mrs. Prinzo testified that Caputo told her that someone would call her to get her social security number and that she received such a call but she could not recall any further details of the conversation. Baker denied talking with anyone who identified himself as Ventura. Ventura testified that as in previous cases when Caputo had referred him to prospective sellers of Popell stock he telephoned both Mrs. Prinzo and Baker and obtained from them information which he placed on their new account cards. As to the four sellers whose sales have been set forth here, he testified that where Caputo's address or phone number was listed on the new account forms for these sellers it was done at their specific direction and that he understood they were clients of Caputo. Ventura knew Guarino but not Mrs. Prinzo or Baker.

The undersigned credits Caputo's version of his dealings with Ventura. It is clear he initiated the disposition of each of the blocks of stock sold by Ventura. While Ventura obtained information for record purposes from the record owners, negotiations for the sales

were conducted primarily by Caputo. Caputo was the beneficial owner of the Guarino block and most of the shares in the name of Baker. Caputo would hardly have left it to Guarino and Baker to negotiate the price he was to receive nor would they be interested in negotiating the sales price for those shares.

A tabulation of the Popell transactions in which Ventura participated as salesman is as follows:

Date	Customer	Number of Shares Sold	Amount Paid to Customers
April 1961	Caputo	900	$6,653.63
August 13, 1962	Caputo	2	30.92
"	Bilotta	39	630.65
"	Guarino	207	3,404.39
Sept. 7, 1962	Caputo	45	867.59
"	Prinzo	63	1,218.54
"	Baker	821)	
Sept. 10, 1962	"	)	22,801.99
	"	422)	

Contentions of the Parties; Conclusions

It is argued in Ventura's behalf that the sales through Ventura by Bilotta, Mrs. Prinzo, and Baker were exempt under Section 4(1) of the Securities Act as transactions by persons other than an issuer, underwriter or dealer and that the transactions with Caputo were exempt under the 1% rule as set forth in Rule 133. These arguments have been previously considered and rejected.

It is contended that in any event these were exempt transactions within the meaning of Section 4(4) of the Securities Act as:[30/]

> "(4) brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solication of such orders."

30/ Formerly Section 4(2) of the Act prior to the Securities Acts Amendments of 1964.

The Commission, in Rule 154 under the Securities Act, has defined the term "brokers transactions" as used in Section 4(4) of the Securities Act and has set forth four conditions which must be satisfied for the exemption to attach. Of these the applicability of the following condition is in dispute:

> "(4) The broker is not aware of circumstances indicating that his principal is an underwriter in respect of the securities or that the transactions are part of a distribution of securities on behalf of his principal."

Ventura, it is urged, was not aware that the transactions set forth above were part of distribution nor did he have any reason to suspect that any distribution was taking place. It has been found that Caputo spoke to Ventura in late 1960 and obtained Popell Co. quotes from him and offered him Popell stock for private sale. It is contended that even if these conversations occurred Ventura's testimony establishes that nothing came of these early talks with Caputo and that he did not retain these in his memory when he executed the single sale for Caputo in 1961 and the sales in 1962. Even if this explanation were accepted and the 1961 sale not considered further, the sales in 1962 are on a different footing. There, in the course of two conversations with Caputo within a period of less than a month arrangements were made for the sale of 1599 shares of Popell stock at prices of approximately $16 to $19 per share for a total of $28,954.08 in seven transactions.

Ventura did not know Bilotta, Baker or Prinzo and had never done business with them or Guarino before. The only transactions he

had with them were in Popell stock. Despite these factors and his admitted lack of knowledge about the Popell Co., its finances, authorized shares, and other relevant matters, Ventura made no inquiry as to the source of the shares he was being offered. This omission is particularly glaring in the case of Baker for whom 1243 shares of Popell stock were sold at a price of $22,801.99. On Baker's New Account Information slip Ventura had written as his occupation, "Steward (Club) W_____ Musical Society." This was a social organization. Ventura had no information as to Baker's financial resources and made no inquiry as to how he obtained the substantial amount of Popell stock he was selling. The Commission has pointed out that under Rule 154, "The broker is at least obligated to obtain facts reasonably sufficient under the particular circumstances to indicate whether his customer is engaged in a distribution or is an underwriter."[31/]

Under all the circumstances the undersigned concludes that Ventura aided and abetted a distribution of Popell Co. stock in violation of Section 5 of the Securities Act and that his failure to make any inquiry as to the source of the stock offered for sale through him was violative of his obligations as a registered representative and was an act of gross negligence amounting to a willful violation of Section 5 of the Securities Act.

31/ Sec. Act Rel. No. 4818 (Jan. 21, 1966); Sec. Act Rel. No. 4669 (Feb. 17, 1964). See also, Sec. Act Rel. No. 4445 (Feb. 2, 1962)

III. CONCLUDING FINDINGS, PUBLIC INTEREST

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

It has been found that the registrant and A. Turner, its president, in connection with distributions of the stock of L. F. Popell Co., Inc., willfully violated the registration provisions of the Securities Act, the anti-fraud provisions of the Securities Acts, and record-keeping requirements applicable to brokers and dealers. The evidence establishes that four successive distributions of blocks of Popell stock were made over an approximately two-year period. No registration statement was ever filed for these distributions. Claims asserted for exemption from registration

were invalid. Thus, investors were deprived of the protection to which they were entitled under the Securities Act.

Strathmore and its principals played a key role in the distributions. They controlled the channels by which unregistered stock was sold to the public. Three distributions were made through the use of trust accounts. Strathmore and its principals established the procedures which would be used in effecting sales, fixed sales prices and commission rates, exercised control over disbursements from the trust accounts, and through its salesmen made the bulk of the sales found in violation of the Securities Acts.

In addition to what income accrued to Strathmore through commission and trading activities in Popell stock, these respondents had a direct stake in the distributions. When the Popell Co. acquired the Perma Cement Company, approximately thirty percent of the shares issued went to Strathmore and its principals, ostensibly as a finders fee. The record shows that Perma Cement had discussed acquisition possibilities with Popell Co. before the above respondents became involved and that they played very little part in the acquisition, certainly nothing to warrant the substantial percentage of stock they took and marketed. When trust accounts were used in later stock distributions, moneys in those accounts were used for the benefit of Strathmore principals. The evidence leads to the conclusion that Strathmore and its principals participated in a stock-selling arrangement whereby companies that were dormant and of doubtful or unproved value were used as vehicles for the distribution of stock to

the public in violation of applicable statutory provisions. The violations found go to the heart of the regulatory pattern established for the protection of investors. Accordingly, it is concluded that it is in the public interest to revoke the registration of Strathmore as a broker and dealer and, pursuant to Section 15A of the Exchange Act, to expel Strathmore from membership in the National Association of Securities Dealers, Inc. A. Turner played a key part in the violations found, as heretofore detailed. It is further concluded that it is in the public interest to bar him from association with any broker or dealer.

It has been found that the salesmen respondents willfully violated and aided and abetted violations of the registration provisions of the Securities Act by their activities in the sale of Popell Co. stock. It has been urged in their behalf that no sanction against them is warranted since they acted under instructions and guidance of their employer and that to place on salesmen the obligation of determining the validity of a marketing arrangement such as existed here would be an undue burden. Securities salesmen impliedly represent to their customers that they have the training and expertise to advise them in securities matters. At a minimum, they should not accept and pass on blindly information given them by others, but must recognize a personal responsibility to protect investors. The record evidences that none of the salesmen made any effort to check on the validity of procedures they were told to use, even

though they knew normal brokerage procedures were not being followed. In this they were derelict in their duties. It is concluded that it is in the public interest to suspend these respondents from association with other brokers and dealers for periods varying according to their participation in the sales activity. Ronald D. Turner and T. Theodore Turner each handled a substantial number of trades over a long period. Their period of suspension should be twelve months. Theodore B. Henjum offered stock to two customers and actually negotiated one trade. His period of suspension should be thirty days. Louis A. Moore made substantial trades during the distributions and served as the link between Strathmore and the Claybaugh selling group. His period of suspension should be twelve months.

John J. Baginski made one sale while employed at Claybaugh. He was new to the securities field. In view of these factors, it is concluded that it is not necessary to impose a sanction in his case.

Alan J. Davis, Hugh M. Casper, and Ethel I. Weber defaulted. The evidence has clarified their roles in the distributions and the undersigned therefore has determined that the following periods of suspension should be imposed as to them:

Ethel Weber, had managerial responsibility over Claybaugh operations, but participated in the distributions and encouraged her staff to do so. A twelve month suspension is warranted in her case.

Davis and Casper, each made several trades, according to their commission records and a six-month suspension period is imposed in their cases.

Ventura did not play any part in the so-called "investment stock" sales organized and directed by Strathmore and A. Turner. Yet he facilitated the distribution of some of the Caputo stock in violation of Section 5 of the Securities Act. A thirty-day suspension is imposed in his case.

Accordingly, IT IS ORDERED that the registration as a broker and dealer of Strathmore Securities, Inc., is revoked and it is expelled from membership in the National Association of Securities Dealers, Inc.

FURTHER ORDERED, that Auldus H. Turner, Jr., is barred from being associated with a broker and dealer.

ORDERED that the following respondents are suspended from being associated with a broker or dealer for the periods indicated: Ronald D. Turner (twelve months), T. Theodore Turner (twelve months), Theodore B. Henjum (thirty days), Michael R. Ventura (thirty days), Louis A. Moore (twelve months), Alan J. Davis (six months), Hugh M. Casper (six months), Ethel I. Weber (twelve months).

Pursuant to Rule 17(b) of the Commission's Rules of Practice a party may file a petition for Commission review of this initial decision within fifteen days after service thereof on him. This

initial decision, pursuant to Rule 17(f) shall become the final decision of the Commission as to each party unless he files a petition for review pursuant to Rule 17(b) or the Commission, pursuant to Rule 17(e), determines on its own initiative to review this initial decision as to him. If a party timely files a petition to review or the Commission takes action to review as to a party, this initial decision shall not become final as to that party. 32/

Sidney L. Feiler
Hearing Examiner

Washington, D.C.
June 27, 1966

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